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**Justifying Limitations on the Freedom to Manifest Religion or
Belief and the Freedom of Expression under the ICCPR**

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Abstract

The freedom to manifest religion or belief, and the freedom of expression ('the Two Freedoms') are of paramount importance to the inner realm of the human person; yet they may be limited on certain grounds. Articles 18(3) and 19(3) of the International Covenant on Civil and Political Rights (ICCPR) accordingly set out the legal basis on which states may limit the Two Freedoms. This thesis seeks to answer the following question: to what extent can a conceptually coherent, normatively compelling, and politically appealing justificatory burden be placed on states when they limit the Two Freedoms under the ICCPR? The thesis contains seven chapters. The first evaluates the common approaches to justifying limitations on the Two Freedoms – both of which are recognised as basic liberties and claim rights in the liberal tradition. The second chapter presents a conceptual, normative and political case for an alternative approach to justifying limitations on the Two Freedoms. This alternative approach requires the state to demonstrate that the competing interests at play are sufficient reason to impose on the individual concerned a *duty of justice* to refrain from engaging in the impugned conduct. Chapters three, four and five deal with the historical discourse surrounding the drafting of articles 18(3) and 19(3), the orthodox interpretation of these two limitation clauses, and the jurisprudence of the United Nations Human Rights Committee respectively. These three chapters reveal that the two limitation clauses are particularly vulnerable to abuse. The final two chapters explain that a simple good faith approach to interpreting the ICCPR can offer a more conceptually coherent, normatively compelling, and politically appealing approach to justifying limitations on the Two Freedoms, i.e. a 'duty-based' approach. The thesis concludes that this approach can actually be accommodated within the object and purpose of the ICCPR, and can provide the Committee with a doctrinal framework to advance a justificatory approach based on duties of justice. Such an approach could add further impetus to our perennial struggle to defend two of our most cherished freedoms: the freedom to manifest religion or belief, and the freedom of expression.

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Table of Abbreviations

AAICJ	– American Association for the International Commission of Jurists
CCPR	– Human Rights Committee
ECHR	– European Convention on Human Rights
ECtHR	– European Court of Human Rights
GC	– General Comments
ICCPR	– International Covenant on Civil and Political Rights
ICJ	– International Court of Justice
ILC	– International Law Commission
PCIJ	– Permanent Court of International Justice
UN	– United Nations
UNTS	– United Nations Treaty Series
U.S.	– United States
VCLT	– Vienna Convention on the Law of Treaties

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Introduction

The freedom of religion or belief, and the freedom of opinion and expression are two of our most cherished and contested values. They are of paramount importance to an inviolable inner realm of the human person; yet they are not without their limits. Under international human rights law, states may impose limitations on certain aspects of these values. They may specifically limit the freedom to manifest religion or belief and the freedom of expression – what I call, for the purpose of convenience, the ‘Two Freedoms’. The grounds on which the Two Freedoms may be limited may vary across international legal regimes. This thesis focuses on one such legal regime: the International Covenant on Civil and Political Rights (ICCPR).¹ I choose to focus on this particular treaty simply because it is the foremost international instrument that recognises and deals with the Two Freedoms. Articles 18(3) and 19(3) of the ICCPR authorise states to limit the Two Freedoms on the basis of interests such as protecting public order, health or morals, and the rights of others. States are then expected to justify limitations on the Two Freedoms on the basis that the limitations serve one of those interests.²

This thesis sets out to answer the following question: to what extent can a conceptually coherent, normatively compelling, and politically appealing justificatory burden be placed on

¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (‘ICCPR’).

² This thesis does not deal with the question of derogations under article 4 of the ICCPR. Article 4 authorises states to ‘take measures derogating from their obligations’ under the ICCPR, but only ‘in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed’ and ‘to the extent strictly required by the exigencies of the situation’. Moreover, such measures may not be inconsistent with states’ other obligations under international law and must not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. In any event, no derogation may be made with respect to the freedom to manifest religion or belief; it is possible, however, for a state to temporarily derogate from obligations with respect to the freedom of expression.

states when they limit the Two Freedoms under the ICCPR? I intend to present the basic parameters and structure of the thesis in this introductory chapter. The chapter is presented in four sections. The first section explores certain questions and intuitions that underlie this thesis. The second section explains some of the basic conceptions that recur throughout the discussions undertaken in this thesis. In the third section of this introductory chapter, I discuss the Two Freedoms, and offer a brief explanation of why I have chosen to examine them together. The final section presents the structure of this thesis, and outlines the numerous inquiries I will undertake in my attempt to answer the central research question.

I. QUESTIONS AND INTUITIONS

More will be said about why this thesis focuses on the Two Freedoms in particular. For now, it may suffice to say that the Two Freedoms are important because they are valuable in and of themselves, and because they are part of a broader family of fundamental freedoms. It is hoped that the conclusions drawn about the justifications for limiting the Two Freedoms are intrinsically valuable, and to some degree, applicable to other fundamental freedoms.

This thesis is not merely a quest for more *precision* in framing the specific grounds for limiting the Two Freedoms. As observed by Jeremy Waldron in his exploration of dignity as the foundation for human rights, '[s]ometimes the quest for precision blinds us to certain insights that we can as yet only formulate haltingly; sometimes it blinds us to the importance of pursuing certain questions (and linking them to other questions) even when there is not yet an answer in sight.'³ This thesis is focused on exploring questions of justification, and what a conceptually, normatively, and politically sound justification for limiting the Two Freedoms

³ Jeremy Waldron, 'Is Dignity the Foundation of Human Rights?' in Rowan Cruft, S Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015) 137.

might look like. The main questions that preoccupy this thesis flow from an intuition about the ICCPR's *vulnerability* in terms of how it sets out the state's burden to justify limitations on the Two Freedoms. I choose to frame this challenge as a type of 'vulnerability' principally because I will argue that the ICCPR is vulnerable to being interpreted in a manner that imposes a deficient justificatory burden on states. However, I will also make the case for an interpretation of the ICCPR that tackles this vulnerability. My intuition about this vulnerability pivots on two observations, which will be further substantiated in the chapters to follow. First, some of the interests that the ICCPR prescribes as grounds for limiting the Two Freedoms are poorly or vaguely defined. For instance, there is a great deal of disagreement on what interests such as 'public order' or 'public morals' actually mean. Second, (and closely related to the first concern) genuine threats to many of these interests are often difficult to establish. This difficulty, of course, may vary from interest to interest. A 'public health' risk that emerges from an individual's refusal to accept a vaccination based on a religious conviction may be assessed and verified by relevant public health experts. A 'public order' risk that emerges from an individual's expression of a particular opinion may be comparatively more difficult to demonstrate, but may be assessed and verified to some extent by law enforcement and security experts. A risk that a person's expression may pose to 'public morals' may be even more difficult to demonstrate. What type of expertise can we sincerely rely on to substantiate such a threat? As evident in the concrete cases I explore in this thesis, the 'ambiguous and obscure'⁴ nature of these limitation grounds makes them particularly prone to abuse. This potential for abuse is precisely what early international human rights scholars including Erica-Irene Daes

⁴ A phrase I borrow from article 32 of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

and John Humphrey point to when critiquing the limitation regimes found in international human rights treaties.⁵

A potential deficiency in the state's justificatory burden under the ICCPR is also worth investigating because of the manner in which international human rights treaty law is made – by the *agreement of states*. Compare this manner of treaty-making with the more robust dialogic model of law-making observable at the domestic level. Lawmakers – at least the ones in liberal democratic countries – are subjected to myriad democratic forces, and are required to engage in a great deal of negotiation with individuals who directly stand to benefit or lose from laws that are enacted. By contrast, international human rights treaties – particularly the ones that were framed during an era that predated the proliferation of international civil society organisations – were negotiated exclusively *between states*. Since states are setting out to frame their own obligations to respect and observe human rights and freedoms, we are faced with an inescapable paradox⁶ when it comes to treaties such as the ICCPR: the treaty essentially comprises rules drawn up by potential violators of the rights and freedoms that are supposed to be protected. To put it somewhat crudely, it is not very different to thieves coming together to draw up the rules that protect persons from theft.

It is of course true that elements of domestic law at the time influenced the crafting of limitation clauses in the ICCPR, including articles 18(3) and 19(3). It is equally true that the

⁵ Erica-Irene A Daes, 'Restrictions and Limitations on Human Rights' in René Cassin (ed), *Amicorum Discipulorumque Liber III* (Pedone 1971) 175; John Humphrey, 'The Just Requirements of Morality, Public Order and the General Welfare in a Democratic Society' in R MacDonald and John Humphrey (eds), *The Practice of Freedom: Canadian Essays on Human Rights and Fundamental Freedoms* (Butterworth 1979).

⁶ This paradox is akin to what Abdullahi An-Na'im calls the 'paradox of self-regulation', which reflects a difficulty inherent within international human rights law: it expects states to regulate themselves. See Abdullahi An-Na'im, 'Universality of Human Rights: Mediating Paradox to Enhance Practice' in Miodrag A Jovanovic and Ivana Kristic (eds), *Human Rights Today – 60 Years of the Universal Declaration* (Eleven International Publishing 2010).

ICCPR has influenced subsequent domestic law-making. Therefore, there is a symbiosis between law-making processes at the international and domestic levels, and it could be said that international and domestic norms influence the conduct of states at both levels. This symbiosis is not a matter that this thesis will delve into in great detail. However, the overarching structure of international treaty-making should at least arouse suspicion about the potential vulnerability of the ICCPR to conceptually, normatively, and politically problematic interpretations. States will naturally seek to place on themselves a lighter justificatory burden when they limit the Two Freedoms. Therefore, it makes sense to pay closer attention to how that burden can be strengthened.

My intuition about the potential vulnerability of articles 18(3) and 19(3) of the ICCPR directly relates to how limitation grounds found in these clauses have become the basis for problematic limitations in practice. Some of these examples will be discussed in greater depth in the chapters to follow, and will exemplify the political case for the alternative justificatory approach I have in mind. Three classes of cases may be briefly cited to illustrate the vulnerability I am referring to. First, states may rely on broad conceptions of ‘public order’ to restrict certain religious practices that are deemed incompatible with values associated with public order. Bans on certain types of Islamic attire that are deemed to be incompatible with ‘European’ values such as ‘secularism’⁷ and ‘living together’⁸ fall into this class of cases. Second, states may rely on broad conceptions of morality to restrict certain political expressions deemed contrary to those conceptions. The restriction of speech advocating same-sex equality

⁷ See for example, *Leyla Şahin v Turkey*, Application No 44774/98 (European Court of Human Rights (‘ECtHR’) Grand Chamber [‘GC’] judgment of 10 November 2005).

⁸ See for example, *S.A.S v France*, Application No 43835/11 (ECtHR judgment [GC] of 1 July 2014).

in Russia falls into this class of cases.⁹ Finally, states may rely on risks associated with majority outrage – sometimes couched in terms of threats to ‘public safety’ or ‘public order’ – to restrict manifestations of religion or belief that ostensibly ‘provoke’ such outrage. Restricting the religious practices of Ahmadis in Pakistan on the grounds of avoiding backlash from the Sunni majority falls into this class of cases.¹⁰ It is therefore apparent that the various limitation grounds commonly found in limitation clauses such as articles 18(3) and 19(3) of the ICCPR are vulnerable to abuse. If a sound justificatory burden is not imposed on states, these clauses can be deployed to impose deeply problematic limitations on the Two Freedoms of individuals. Individuals belonging to minority groups, and those who entertain unpopular or dissenting views, are often the most vulnerable to such abuse.

II. GENERAL CONCEPTIONS

Throughout this thesis, I rely on certain conceptions of interests, duties, rights, and liberties, when presenting my arguments. I do not attempt to present any case for adopting one theoretical conception over another. I merely select the conceptions that I find most compelling, and employ them within my arguments. For instance, there are many theories of rights, but I mainly employ the interest theory of rights, as I find this theory generally convincing. Prior to proceeding further, it may be useful to briefly clarify the conceptions on which I rely.

⁹ See for example, *Fedotova v The Russian Federation*, Communication No 1932/2010 (CCPR views adopted on 31 October 2012).

¹⁰ *Zaheeruddin v State* (1993) SCMR 1718. Also see Amjad Mahmood Khan ‘Pakistan’s Anti-Blasphemy Laws and the Illegitimate use of the “Law, Public Order, and Morality” Limitation on Constitutional Rights’ (2015) 13(1) *The Review of Faith & International Affairs* 13, 19.

The term ‘interest’ refers to something of value to human beings – to things they have some stake in.¹¹ This term is sometimes used interchangeably with ‘well-being’.¹² Interests can be individual or collective in nature. Individual interests can be categorised further. For instance, Ronald Dworkin discusses ‘volitional’ interests and ‘critical’ interests. A person’s volitional interests are served whenever the person’s wants are gratified, whereas a person’s critical interests are served only by ‘having or achieving those things [the person] should want’.¹³ The latter category refers to things that life would be genuinely impoverished without. Dworkin provides examples to clarify this distinction: wanting good food can be a volitional interest, whereas wanting a close relationship with one’s family can be characterised as a critical interest. Joel Feinberg meanwhile proposes two categories of interests: welfare interests, which are minimal interests connected to a person’s basic well-being, and ulterior interests, which relate to a person’s ultimate goals and aspirations.¹⁴ It is meanwhile also possible to conceptualise collective interests, which are either an aggregation of individual interests, or exist as non-aggregative interests of a particular collective body of persons. For instance, the interest in a clean environment may be an aggregation of individual interests in such an environment. The interest in the territorial integrity of a country, by contrast, may be better described in a non-aggregative manner, i.e. the interest lies directly in the collective, and is not the sum of individual interests.

¹¹ Joel Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (Oxford University Press 1987) 33.

¹² Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 166.

¹³ Ronald Dworkin, ‘Liberal Community’ (1989) 77 *California Law Review* 479, 484.

¹⁴ Feinberg 37.

A ‘duty’, according to John Stuart Mill, is something that ‘may be exacted from a person, as one exacts a debt’.¹⁵ A necessary feature of a duty, therefore, is that ‘a person may rightfully be compelled to fulfil it’.¹⁶ Charlie Web meanwhile cites Wesley Hohfeld’s general conception of a duty when he observes that ‘the significance of the duty is to make a certain choice nonoptional: if I am under a duty to Φ , I have no option not to Φ ’.¹⁷ The type of action required of duties may point to one way of classifying duties. ‘Negative duties’ in this regard would be duties to *refrain* from action, whereas ‘positive duties’ involve action of some kind. Negative duties tend to apply to everyone in a universal sense, whereas positive duties tend to be directed more specifically at certain parties.¹⁸ For instance, everyone has a duty in the negative sense to *not* incite violence, whereas only the state may have a positive duty to enforce the law against those who incite violence.¹⁹ I shall return to the question of duties once I explain what I take to mean by a ‘right’.

Rights relate to things of value. Joseph Raz makes two important observations in this regard: that the objects of rights are things of value, and that *having* the rights is itself a thing of value to the rights-holder.²⁰ Yet the concept of a right does not merely equate to things of

¹⁵ John Stuart Mill, *The Collected Works, Volume 10* (University of Toronto Press, 1974 [*Utilitarianism* 1861]) 246.

¹⁶ *ibid.* Also see Charlie Webb, ‘Three Concepts of Rights, Two of Property’ (2018). 38(2) *Oxford Journal of Legal Studies* 246, 247.

¹⁷ Wesley N Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (WW Cook ed Yale University Press 1919) 36-39.

¹⁸ Marinella Capriati, ‘The Universal Scope of Positive Duties Correlative to Human Rights’ (2018) 30(3) *Utilitas* 355, 359.

¹⁹ For a useful discussion on the structure of negative and positive duties, see Sandra Fredman, *Human Rights Transformed: Positive Rights and Duties* (Oxford University Press 2008), chapter 3. Also see Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011), chapter 14.

²⁰ Joseph Raz, ‘Human Rights in the Emerging World Order’ in Rowan Cruft, S Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015) 220.

value. Raz explains that rights ‘apply to cases where the value of something to a person is of a kind that warrants holding others duty-bound to respect it or otherwise secure its enjoyment in some ways’.²¹ He accordingly observes that ‘rights are grounds of duties in others’;²² a person has a right ‘if and only if...an aspect of [the person’s] well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty’.²³ I find this account of rights compelling, and rely on it throughout this thesis.²⁴

A right therefore denotes a specific type of relationship between persons. This basic relationship entails an entitlement of an individual (the ‘rights-holder’) that grounds duties in others (‘duty-bearers’). The normative significance of rights is also that they are in some way claimable,²⁵ i.e. that the rights-holder has some moral entitlement to claim (from duty-bearers)

²¹ *ibid* 221-222.

²² Raz, *The Morality of Freedom*, 167.

²³ *ibid* 166. Also see Matthew H Kramer, ‘In Defense of the Interest Theory of Right-Holding: Rejoinders to Leif Wenar on Rights’ in Mark McBride (ed), *New Essays on the Nature of Rights* (Hart Publishing 2017) 49-84. Also see Visa A J Kurki, ‘Rights, Harming and Wronging: A Restatement of the Interest Theory’ (2018) 38(3) *Oxford Journal of Legal Studies* 430.

²⁴ This theory of rights is generally classified as an ‘interest theory’ of rights. There are of course other rights theories, the most significant of which may be the ‘will theory’ of rights, advanced by scholars such as HLA Hart. I do not reject these theories, as they offer important insights, some of which are quite relevant to this thesis. For instance, under the will theory, rights-holders possess the moral power to control the duties owed to them, i.e. to enforce or waive the performance of those duties. I think this feature is often important to explaining the ‘claimability’ of rights. See HLA Hart, ‘Are There Any Natural Rights?’ (1955) 64(2) *The Philosophical Review* 175. Also see Siegfried Van Duffel, ‘The Nature of Rights Debate Rests on a Mistake’ (2012) 93(1) *Pacific Philosophical Quarterly* 104. Meanwhile, some theorists offer differing accounts of rights. For instance, Ronald Dworkin conceptualises rights as ‘trumps’ over other interests; Robert Nozick describes them as ‘side constraints’ on other background considerations; Frederick Schauer calls them ‘shields’ that serve to protect individuals from interference. It should be borne in mind that these differing accounts of rights often underpin the approach that these scholars prescribe when it comes to justifying limitations on rights and freedoms. See Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977); Robert Nozick, *Anarchy, State and Utopia* (Blackwell 1974); Frederick Schauer, ‘A Comment on the Structure of Rights’ (1993) 27 *Georgia Law Review* 415.

²⁵ Onora O’Neill, *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* (Cambridge University Press, 1996) 131.

the performance of duties.²⁶ Hohfeld accordingly explains that a ‘claim right’ simply corresponds to another’s duty to do or refrain from doing something.²⁷ A right is therefore distinct from an interest, which is a more general reference to a person’s well-being or to what the person considers valuable. Only *some* interests offer sufficient reason to ground duties in others, and can form the basis of rights.²⁸ If a Razian conception of a right is accepted, rights and duties are not always correlative. Whenever there is a right, there is certainly a duty. But not all duties involve rights.²⁹ The relationship between rights and duties are essentially ‘justificatory’: rights *justify* the imposition of duties, but not *vice versa*.³⁰ We must remain cognizant of this important distinction, but not necessarily be mired by it. It is possible to adopt a basic Razian conception of a right (and acknowledge the existence of some duties that do not necessarily correspond to rights), while still relying on Hohfeldian terminology to explain the way rights and *certain types* of duties operate.

This thesis is principally concerned with the idea of legal rights, which are essentially grounds for legal duties, i.e. rights and duties enforceable through law. While it acknowledges the existence of moral rights, it is mainly concerned with moral rights that are recognised and

²⁶ See Joel Feinberg, ‘The Nature and Value of Rights’ (1970) 4(4) *The Journal of Value Inquiry* 243; John Skorupski, *The Domain of Reasons* (Oxford: Oxford University Press 2010).

²⁷ Hohfeld, *Fundamental Legal Conceptions*, 39. For a fruitful discussion on the Hohfeldian conceptions, see Robert P George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford University Press 1995) 119-122.

²⁸ Raz, *The Morality of Freedom*, 180-183. Raz concludes: ‘Only where one’s interest is a reason for another to behave in a way which protects or promotes it, and only when this reason has the peremptory character of a duty, and, finally, only when the duty is for conduct which makes a significant difference for the promotion or protection of that interest does the interest give rise to a right.’

²⁹ Andrei Marmor, ‘On the Limits of Rights’ (1997) 16 *Law and Philosophy* 1, 3. Raz rejects the idea that all duties correspond to rights. He insists that some duties can arise out of considerations that are not rights-based. For example, the simple duty to water a plant on behalf of a neighbour, or not to destroy a van Gogh painting one owns, arises out of interests that are not sufficient reasons by themselves to impose duties on others. See Raz, *The Morality of Freedom*, 77 and 212.

³⁰ *ibid.*

upheld by law.³¹ For example, a person's moral right to the freedom of expression may be recognised by an international legal instrument such as the ICCPR, thereby becoming an international legal right.³² This thesis does not set out to explain the philosophical foundations of rights. Instead, it relies on a reasonably descriptive conception of rights, based on an observable relationship between rights-holders and duty-bearers. This relationship may exist either due to some pre-existing philosophical foundation, or due to its creation through positive law. Rights can therefore be 'recognised by law' and 'created by law'.³³ What concerns this thesis is the actual existence of legal relationships between rights-holders and duty-bearers, and what that means for the limitation of certain specific freedoms – in this case, the freedom to manifest religion or belief, and the freedom of expression. The focus on the Two Freedoms and their limitation under international human rights law means that this thesis is concerned with a particular class of legal rights we have come to identify as 'human rights'. As Waldron notes, 'the characterization of a set of rights as human rights may mean no more than that they are rights which are properly attributed on a universal basis to all human beings'.³⁴ Accordingly, a 'human right' refers to a certain type of right that, by definition, is held by virtue of the person's humanity.³⁵ Raz correctly observes that when human rights are incorporated into law, 'the relevant legal rights are, rightly, considered not to be rights created by law, but ones recognized

³¹ As noted by Raz, legal rights may be distinguished from moral rights; the latter category is founded on moral validity, but is not necessarily recognised and enforceable by law. However, moral rights can be recognised by law, and thereby become legal rights. In certain cases, moral rights can also be created by law, i.e. new legal rights with moral validity. See Raz, 'Human Rights in the Emerging World Order', 219.

³² For a useful discussion on this matter, see Jeremy Waldron, 'Is Dignity the Foundation of Human Rights?', 127.

³³ Raz, 'Human Rights in the Emerging World Order', 219.

³⁴ Waldron, 'Is Dignity the Foundation of Human Rights?', 120.

³⁵ According to Mark Lattimer, however, 'human rights' are not only rights that 'all human beings possess simply by virtue of being human', but are also rights 'that constitute the human'. See Mark Lattimer, 'Two Concepts of Human Rights' (2018) 40(2) *Human Rights Quarterly* 406.

by law'.³⁶ As we shall see in the next section of this chapter, the Two Freedoms are undoubtedly 'rights', as the interests that generally underlie them are important enough to ground duties in others.

Among the classes of duties that may be identified, this thesis is interested in what some scholars call 'duties of justice'. This class of duties may be contrasted with 'duties of charity', and contain only such duties where others 'have a legitimate right to claim the performance that is owed to them'.³⁷ Duties of justice then appear to be the kind of duties that are grounded in (and correspond to) legal claim rights. These are duties that 'the state can justifiably compel people to perform',³⁸ yet not all duties that the state compels people to perform are 'duties of justice'.³⁹ The second chapter of this thesis delves deeper into this particular conception of duties.

The underlying normative case for individual liberty often relies on appeals to values such as personal autonomy or human dignity.⁴⁰ Yet conceptually speaking, a 'liberty' usually signals the *absence* of any competing claim right, and therefore the absence of duties of justice owed to others.⁴¹ Such duties may also be described as 'horizontal' duties, as they are duties

³⁶ Raz, 'Human Rights in the Emerging World Order', 224.

³⁷ Robert E Goodin, 'Duties of Charity, Duties of Justice' (2017) 65(2) *Political Studies* 268, 271; Allen Buchanan, 'Justice and Charity' (1987) 97(3) *Ethics* 558. Also see Webb, 'Three Concepts of Rights, Two of Property', 247. Duties of justice are analogous to what Mill called perfect moral obligations. See Mill, *The Collected Works, Volume 10*, 247; Alan E Fuchs, 'Mill's Theory of Morally Correct Action' in Henry R West (ed), *The Blackwell Guide to Mill's 'Utilitarianism'* (Blackwell 2006) 147-51. Also see Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Mary J Gregor tr Cambridge University Press 1998).

³⁸ Goodin 268; Pablo Gilabert, 'Basic Positive Duties of Justice and Narveson's Libertarian Challenge' (2006) 44(2) *The Southern Journal of Philosophy* 193, 195.

³⁹ For example, the state may justifiably impose on individuals a duty to pay taxes. Yet such duties are not necessarily 'duties of justice', as they are not necessarily grounded in the claim rights of others.

⁴⁰ I explore these underlying values in the next chapter of this thesis.

⁴¹ See Hohfeld, *Fundamental Legal Conceptions*, 36-39. Hohfeld's reference to liberty (what he called

that an individual owes other individuals.⁴² To have a liberty to do something is to say no one has a claim right *against* the doing of that thing. Liberties then appear to correspond to the absence of constraints on an individual's conduct. The duties of justice that constrain the scope of a liberty are usually *negative* duties, as they involve refraining from action. However, the converse may also be true: if the liberty that is claimed is one of refraining from action, a duty of justice that constrains such liberty could be a positive duty, i.e. a duty to engage in some action. John Rawls accordingly suggests that the general description of a liberty has the following form: '[a] person (or persons) is free...from this or that constraint (or set of constraints) to do (or not to do) so and so'.⁴³

The scope of an individual's liberty is, by definition, constrained by the duties of justice they owe others. The relationship between liberties and duties of justice may be explained further using Hohfeldian terminology. Let us say *A* has the liberty to say *x*, as *A* has no duty of justice to refrain from saying *x*, i.e. no other person has a claim right that he refrains from saying *x*. Meanwhile, if *A* owes *B* a duty to refrain from saying *y*, *A*'s liberty, which no doubt includes the liberty to say *x*, does not extend to saying *y*. Only the sphere of conduct that is not duty-

'privilege') appears to be analogous to Isaiah Berlin's conception of 'negative liberty', which he describes as the area within which a person 'is or should be left to do or be what he is able to do or be, without interference'. See Isaiah Berlin, 'Two Concepts of Liberty' in Isaiah Berlin, *Four Essays on Liberty* (Oxford University Press 1969) 2. Charles Taylor describes this conception as founded in the idea of 'opportunity', as it entails having options available to a person, regardless of whether that person actually chooses to exercise such options. See Charles Taylor 'What's Wrong with Negative Liberty' in Alan Ryan (ed), *The Idea of Freedom: Essays in Honour of Isaiah Berlin* (Oxford University Press 1979) 175–93.

⁴² John H Knox, 'Horizontal Human Rights Law' (2008) 102(1) *The American Journal of International Law* 1, 2; Fernando Berdion Del Valle and Kathryn Sikkink, '(Re)discovering Duties: Individual Responsibilities in the Age of Rights' (2017) 26(1) *Minnesota Journal of International Law* 189, 205; Jeremy Waldron, 'Dignity, Rights, and Responsibilities' (2011) 43 *Arizona State Law Journal* 1107, 1111.

⁴³ John Rawls, *A Theory of Justice: Revised Edition* (Harvard University Press 1999) 177.

bound corresponds to *A*'s liberty. Therefore, an individual's liberty is inherently limited⁴⁴ by the competing duties that the individual owes others.

III. THE TWO FREEDOMS

We now turn to the content of the Two Freedoms, their relationship to each other, and their distinctiveness compared to other rights and freedoms. These features hopefully explain why this thesis is particularly interested in these Two Freedoms.

The Two Freedoms should be understood both as 'liberties' and as 'claim rights'. First, they are liberties, as they may entail a person's liberty to manifest or express something where there is *no duty* owed to others to refrain from manifesting or expressing that thing. For instance, a person has the liberty to refrain from consuming meat based on a religious conviction, as no duty is usually owed to others to consume meat. Similarly, a person has the liberty to endorse the ratification of the ICCPR, as there is no duty usually owed to others to refrain from endorsing the ratification of an international human rights instrument. Admittedly, these illustrations are fairly straightforward. They are only meant to help us understand, in broad terms, how the Two Freedoms might fall into the general conceptual category of 'liberties'.

Second, the Two Freedoms may be conceptualised as 'claim rights', as they concern interests that are sufficiently important to ground specific duties in others to do or refrain from doing something. A society's general commitment to protecting individual liberties may be one reason to ground certain duties in others to act in ways that respect liberties such as the Two Freedoms. Moreover, the interest that the individual may have in personal autonomy, i.e. in

⁴⁴ Andrei Marmor makes a similar observation with respect to rights in general. See Marmor, 'On the Limits of Rights', 1.

having a choice in what to believe, practice or say, may be another reason to ground certain duties in others. A similar reason may be an individual's interest in seeing their dignity respected. There may also be a host of consequentialist and epistemic reasons for recognising the Two Freedoms as claim rights. I shall delve into some of these reasons in the next chapter of this thesis.

The duties that the Two Freedoms contemplate include duties of non-interference (i.e. the obligation to refrain from interfering with the individual's conduct), and duties of protection (i.e. the positive obligation to protect individuals from interference by others).⁴⁵ On the one hand, the Two Freedoms may ground duties in others – including the state – to refrain from interfering with certain conduct associated with the Two Freedoms. For example, an individual may have a claim right that others refrain from interfering with the individual's decision to not consume meat. The individual may also have a claim right that no legislation compelling the consumption of meat is enacted. Similarly, an individual might have a claim right that others refrain from interfering with the advocacy of the ICCPR's ratification. This individual may also have a claim right that no legislation banning such advocacy is enacted. In both cases, the duties owed to the individual includes the duty to refrain from interference, including through coercive legal means. On the other hand, the Two Freedoms may ground positive duties specifically in the state to protect individuals from interference by others.⁴⁶ Heiner Bielefeldt, Nazila Ghanea, and Michael Wiener point to some of the positive obligations borne by the state with regard to

⁴⁵ Fredman 66-67. Fredman notes: 'duties of restraint are attached to freedom-protecting civil and political rights... [which] are generally thought to refer to rights which protect individuals against intrusion by the State'. However, she also correctly observes: 'civil and political rights are only regarded as limited to duties of restraint because they are viewed through the lens of freedom as non-intervention. The richer conception of freedom as the ability to exercise one's rights immediately reveals that these rights also entail positive duties'.

⁴⁶ *ibid*-67.

the freedom of religion or belief.⁴⁷ They explain that the state's duty is not merely to refrain from interfering with the exercise of the freedom; it also has a positive obligation to proactively protect the freedom from being violated by non-state actors. For example, the state – apart from the duty of non-interference – may have an additional duty to prevent non-state actors from interfering with an individual's decision not to consume meat. This protection may include the institution of legal remedies where an individual is coerced into consuming meat. Similarly, the state may be dutybound to prevent non-state actors from coercively interfering with an individual's advocacy of the ratification of the ICCPR. Therefore, the Two Freedoms can simultaneously ground multiple duties.

Conceptualising the Two Freedoms both as liberties and claim rights is important to understanding their content, including the nature of the duties required for their meaningful exercise. Yet this thesis does not claim that the Two Freedoms can be collapsed into one another: that the freedom to manifest religion or belief is a special subset of the freedom of expression, or of a general right to 'ethical independence'.⁴⁸ I avoid this claim for two reasons.

First, there may be an actual normative distinction between the Two Freedoms. It is likely that this distinction has prompted the Two Freedoms to be traditionally distinguished from each other in international human rights law. Such distinction is occasionally defended through the claim that expressions of religion or belief require 'special status and special

⁴⁷ Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief: An International Law Commentary* (Oxford University Press 2016) 320.

⁴⁸ Ronald Dworkin, *Religion without God* (Harvard University Press 2013) 132; also see James W Nickel, 'Who Needs Freedom of Religion?' (2005) 76 *University of Colorado Law Review* 941; Mark Tushnet, 'The Redundant Free Exercise Clause?' (2002) 33(1) *Loyola University of Chicago Law Review* 71.

protection, different from the protection guaranteed to ordinary expression'.⁴⁹ In the case of the manifestation of religion or belief, 'a common set of values and precepts' guide the manifestation;⁵⁰ there must be an 'intimate connection' between the manifested practice and the belief.⁵¹ The freedom of expression appears to occupy a broader normative terrain. It does not necessarily have to be connected to an underlying value, precept or belief. It does, however, have an important normative function. Michael O'Flaherty observes that the freedom of expression is 'essential to the good working of the entire human rights system', and is 'described as a multiplier or meta right because of its role in enabling enjoyment of so many other rights'.⁵² For example, to be meaningful, the freedoms of peaceful assembly and association require an entitlement to the freedom of expression.

Second, there appears to be an actual linguistic distinction between the terms 'manifestation' and 'expression'. Under article 18(1) of the ICCPR, the freedom to manifest religion or belief entails 'worship, observance, practice and teaching', and may be exercised 'either individually or in community with others and in public or private'.⁵³ The freedom of

⁴⁹ Paul M Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge University Press 2005) 207; Malcolm D Evans, *Religious Liberty and International Law in Europe* (Cambridge University Press 1997) 285.

⁵⁰ Cornelis De Jong, *The Freedom of Thought, Conscience and Religion or Belief in the United Nations (1946-1992)* (Intersentia, 2000) 79. Also see Bielefeldt, Ghanea and Wiener 92-95.

⁵¹ Kevin Boyle and Sangeeta Shah, 'Thought, Expression, Association and Assembly' in Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran, and David Harris (eds), *International Human Rights Law* (Oxford University Press 2014) 221. Also see *Eweida and others v UK* (2013) 57 EHRR 8. The European Court of Human Rights opined: 'In order to count as a 'manifestation'...the act in question must be intimately linked to the religion or belief' (para 82).

⁵² Michael O'Flaherty, 'Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34' (2012) 12(4) *Human Rights Law Review* 627, 630-631.

⁵³ The UN Human Rights Committee offers a non-exhaustive list of what the freedom captures: 'The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life,

expression involves the communication of ideas, opinions, and information. Article 19(2) of the ICCPR provides that this freedom can be exercised ‘either orally, in writing or in print, in the form of art, or through any other media of [the individual’s] choice’. Even if there are obvious descriptive similarities between the two freedoms, not all manifestations are definitively expressive or communicative in nature. Bielefeldt in fact observes that the freedom to manifest religion or belief ‘cannot be summed up under the heading of communicative freedom’, as it could also include ‘aspects of leading one’s life in conformity with one’s religion or belief’, which do not necessarily involve contact with others’.⁵⁴ For example, when an individual refuses vaccination owing to a religious conviction or belief, there is a manifestation (i.e. some form of externalisation) of the underlying religious conviction; but it is unclear as to whether the act involves expression or communication as well. Therefore, it makes sense to acknowledge some distinction between the Two Freedoms.

If the Two Freedoms are indeed distinct, then why study the Two Freedoms together? Despite the possible normative and linguistic distinctions between the Two Freedoms, certain conceptual and descriptive similarities between the two make them uniquely interesting to evaluate together.

and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.’ See Human Rights Committee, ‘General Comment No 22 – Article 18 (Freedom of Thought, Conscience or Religion)’ (30 July 1993), CCPR/C/21/Rev.1/Add.4, para 4.

⁵⁴ Human Rights Council, *Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt*, 23 December 2015, A/HRC/28/66/Add.1 (Bielefeldt Report) para 7.

The Two Freedoms share unique conceptual characteristics in the way they are connected to an individual's *forum internum*.⁵⁵ Both these freedoms envisage conduct that involves the externalisation (*forum externum*) of a person's 'inner realm of thinking and believing' (*forum internum*).⁵⁶ This inner realm is arguably inviolable, and is not subjected to limitations under international human rights law. For example, persons cannot be compelled to reveal their thoughts or beliefs, for example, by being required to swear a religious oath or express a religious affiliation.⁵⁷ Moreover, persons may hold opinions without interference; they may 'think what they like'.⁵⁸ By contrast, the manifestation and expression of those inner thoughts, beliefs, and opinions, may be subjected to limitations under international human rights law. The Two Freedoms are distinct from other fundamental freedoms that are subject to limitations (i.e. freedoms that are not absolute), such as the freedom of movement, the freedom of association, and the freedom of peaceful assembly; the Two Freedoms are unique among this class of fundamental freedoms, as they are the only non-absolute freedoms intrinsically connected to the unconditional realm of the human person (*forum internum*) – a realm that is not subject to any limitations.⁵⁹ This structure is clearly reflected in articles 18 and 19 of the ICCPR. These articles do not permit limitations on the inner realm of a person, i.e. aspects of the freedom of thought, conscience and religion, and the freedom of opinion. Yet they authorise states to limit the freedom to manifest religion or belief and the freedom of expression. As noted

⁵⁵ See Peter Petkoff, 'Forum Internum and Forum Externum in Canon Law and Public International Law with a Particular Reference to the Jurisprudence of the European Court of Human Rights' (2012) 7 *Religion and Human Rights* 183; Mari Stenlund and Pamela Slotte, 'Forum Internum Revisited: Considering the Absolute Core of Freedom of Belief and Opinion in Terms of Negative Liberty, Authenticity, and Capability' (2018) 19 *Human Rights Review* 425.

⁵⁶ Bielefeldt Report, para 7.

⁵⁷ Boyle and Shah 223.

⁵⁸ *ibid* 226.

⁵⁹ Bielefeldt Report, para 7.

by Bielefeldt, '[t]his conceptual distinction appears nowhere else in the text of the Covenant'.⁶⁰ Therefore, the Two Freedoms occupy a unique space in international human rights law.

The Two Freedoms are also intrinsically connected to each other, and appear to enjoy a special relationship to one another. According to scholars such as Manfred Nowak, the 'media' for manifesting a religion or belief often includes forms of communication already contemplated by the freedom of expression.⁶¹ Nowak describes the freedom to manifest religion or belief as often involving 'the communication of spiritual subject matter to the world at large and the defence of a conviction in public'.⁶² Despite their distinctiveness, the Two Freedoms are acknowledged for their 'positive interrelatedness'.⁶³ As observed by Bielefeldt, 'the Two Freedoms mutually reinforce each other in facilitating free and democratic societies'.⁶⁴ Ahmed Shaheed meanwhile observes that the Two Freedoms are 'not only interdependent, but also exist in a legal continuum with myriad other rights', such as the right to privacy, and the freedoms of association and peaceful assembly.⁶⁵ This special relationship between the Two Freedoms is precisely why, in the preamble to Resolution 16/18, the United Nations (UN) Human Rights Council emphasises: 'the positive role that the exercise of the right to freedom

⁶⁰ *ibid*, para 17.

⁶¹ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: Committee Commentary* (NP Engel 2005) 418-19.

⁶² Nowak 411.

⁶³ Bielefeldt Report, paras 30 and 6. Also see Boyle and Shah 217.

⁶⁴ *ibid*, para 17.

⁶⁵ Human Rights Council, *Freedom of religion or belief: Report of the Special Rapporteur on freedom of religion or belief*, 5 March 2019, A/HRC/40/58, para 14. Shaheed cites Malcolm D Evans, 'The Freedom of Religion or Belief and the Freedom of Expression' (2009) 4(2-3) *Religion and Human Rights* 206.

of opinion and expression and the full respect for the freedom to seek, receive and impart information can play in strengthening democracy and combating religious intolerance'.⁶⁶

The fact that the Two Freedoms share certain unique conceptual characteristics, and remain positively interrelated make them interesting to study together. Therefore, this thesis features both these freedoms in each of its theoretical and doctrinal discussions. As we shall discover in the course of the chapters to follow, discussing these Two Freedoms together is not untidy; each theoretical and doctrinal observation I make in the thesis will essentially be applicable to both these Freedoms. On the one hand, the omission of either of the Two Freedoms from the scope of this thesis would have impoverished it in some way, given the rich scholarship and case law that are relevant to each of the Freedoms. On the other hand, including other fundamental freedoms within the scope of the thesis would have added little value, as none of them share with the Two Freedoms their unique conceptual characteristics concerning an individual's *forum internum*. Therefore, it is hoped that the reasons for pairing these Two Freedoms in this thesis are understood and accepted as analytically compelling.

IV. STRUCTURE OF THE THESIS

I end this introductory chapter by presenting the basic structure of this thesis. This thesis entails two parts, which together contain seven substantive chapters. Each substantive chapter undertakes a specific inquiry relating to the main research question. The first part, which

⁶⁶ Human Rights Council, *Resolution 16/18: Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief*, 12 April 2011, A/HRC/RES/16/18. This same notion guides the observations made in the Rabat Plan of Action: 'The freedom to exercise or not exercise one's religion or belief cannot exist if the freedom of expression is not respected, as free public discourse depends on respect for the diversity of convictions which people may have. Likewise, freedom of expression is essential to creating an environment in which constructive discussion about religious matters could be held'. See Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred (Rabat Plan of Action)*, 11 January 2013, A/HRC/22/17/Add.4, para 10.

engages in theoretical exploration, contains two chapters. The second part, which engages in doctrinal analysis, contains the remaining five chapters. I will additionally offer some final observations in a concluding chapter.

The first chapter of this thesis illustrates a spectrum of liberal thought on the justifications for limiting the Two Freedoms. In this chapter, I examine the work of certain prominent theorists and discuss two approaches to justifying limitations on the Two Freedoms: an unconstrained interest-based approach, and a constrained interest-based approach. Under the first approach, the state is required to justify the limitation on the basis of compelling interests that outweigh the interests in favour of the conduct that is being restricted. Under the second approach, the state is required to justify the limitation *only* on the basis of specific types of interests, such as interests in basic liberties. I explain that each of these approaches contain certain merits and weaknesses that shape the justificatory burden that a state must meet when it limits the Two Freedoms.

The second chapter presents a case for adopting an alternative approach to the two common justificatory approaches discussed in the first chapter. This alternative approach places ‘duties of justice’ at the centre of the state’s justificatory burden. Under this approach, a limitation on the Two Freedoms may be justified only when competing interests are sufficient reason to impose on the individual concerned a duty of justice (towards others) to refrain from engaging in the conduct that the state seeks to restrict. I argue that such a duty-based approach builds on the merits of the two common approaches, and addresses some of their weaknesses. I argue that it is a more conceptually coherent, normatively compelling, and politically appealing approach to justifying limitations on the Two Freedoms.

The second part of this thesis contains chapters three to seven. These chapters essentially engage in doctrinal analysis and focus on articles 18(3) and 19(3) of the ICCPR – the two limitation clauses that authorise states to limit the Two Freedoms under the ICCPR.

The third chapter of this thesis commences the doctrinal analysis by exploring the historical origins of articles 18(3) and 19(3). It does not offer an interpretation of these limitation clauses. Instead, it briefly captures the historical context in which these two clauses were framed. I explain that the drafters of the ICCPR initially diverged on many aspects of articles 18(3) and 19(3) – both in terms of their substance and form, and then eventually converged for the sake of expediency. Such expediency left us with two limitation clauses that even the drafters themselves were dissatisfied with – mainly owing to the ambiguity and obscurity of the limitation grounds found in the two clauses.

The fourth chapter examines how articles 18(3) and 19(3) of the ICCPR are commonly interpreted. It deals with a literal reading of these clauses, and then turns to a ‘guided’ reading based on certain sources of interpretative guidance. The chapter focuses on the general comments of the UN Human Rights Committee, the statements of UN special rapporteurs, and the Siracusa Principles, to illustrate what a guided reading of the two limitation clauses might look like. I then map these interpretative approaches on to the justificatory approaches discussed in the first part of this thesis. I argue that the trajectory that could be advanced through a guided reading of the two limitation clauses is promising.

The fifth chapter presents an analytical account of the UN Human Rights Committee’s jurisprudence with respect to limitations on the Two Freedoms. The Committee is the treaty body mandated under the ICCPR to supervise the Covenant’s implementation. Under this

mandate, it receives communications from individuals alleging the violation of their rights and freedoms recognised by the Covenant. In this chapter, I explore how the Committee has relied on a guided reading of articles 18(3) and 19(3) in actual cases involving alleged violations of the Two Freedoms. I conclude that the Committee's jurisprudence reflects a positive development wherein a fairly robust justificatory burden is imposed on states when they seek to limit the Two Freedoms.

The sixth chapter builds on the historical, explanatory and analytical work undertaken in the preceding three chapters. In this chapter, I explore the parameters of international legal rules of interpretation pertaining to human rights treaties. I discuss an approach to treaty interpretation that may aid the Committee in advancing a more conceptually coherent, normatively compelling, and politically appealing approach to justifying limitations on the Two Freedoms. I ask what it means to interpret human rights treaties in 'good faith'. I then re-examine the work of the Human Rights Committee in an attempt to explain how it has in fact advanced a good faith interpretation of articles 18(3) and 19(3) of the ICCPR. While the Committee's interpretation of the ICCPR may not be legally binding on states, it no doubt plays a vital role in advancing a good faith interpretation of the Covenant. I accordingly conclude that jurisprudential advances in this area of law suggest that the Committee is well-placed to promote a duty-based approach to justifying limitations on the Two Freedoms.

The seventh and final chapter of this thesis returns to the duty-based approach to justifying limitations. I set out to demonstrate that such an approach can be accommodated under a good faith interpretation of the ICCPR. I then reiterate the conceptual, normative and political value of an approach that places duties of justice at the centre of the state's burden to

justify limitations on the Two Freedoms. I conclude that in light of such value, it makes sense for the Human Rights Committee to advance such a justificatory approach.

PART I: The Theory

Chapter 1

Justifying Limitations

The justification of limitations on basic liberties such as the freedom to manifest religion or belief and the freedom of expression ('the Two Freedoms') remains an important – and vexing – philosophical endeavour. A number of legal theorists offer valuable insights in this regard. This chapter grapples with what theorists within the 'liberal' tradition have to say about placing limitations on the Two Freedoms.

I look to the liberal tradition as a normative source for exploring the question of limitations on the Two Freedoms because this tradition is fundamentally concerned with how political authority and law must be justified when employed to limit the freedom of individuals. As suggested by Gerald Gaus, this concern relates to the 'fundamental liberal principle'¹ – that freedom is the default position, so 'the onus of justification is on those who would use coercion to limit freedom'.² The liberal tradition is also concerned with a particular type of political order, which includes religious toleration and freedom of discussion.³ In this context, liberalism is associated with certain core norms and values such as personal security (i.e. the monopolisation of legitimate violence by the state), impartiality (i.e. a system of law that is applied equally to all), individual liberty, and democracy.⁴ As suggested by Anthony Langlois,

¹ Gerald F Gaus, *Justificatory Liberalism: An Essay on Epistemology and Political Theory* (Oxford University Press 1996) 162-166.

² Gerald F Gaus, 'Liberalism', *Stanford Encyclopaedia of Philosophy* (1996), (revised version as of 22 January 2018). Isaiah Berlin offers a useful definition for the term 'coercion': 'Coercion implies the deliberate interference of other human beings within the area in which I could otherwise act.' See Isaiah Berlin, 'Two Concepts of Liberty' in Isaiah Berlin, *Four Essays on Liberty* (Oxford University Press 1969) 122.

³ Stephen Holmes, *The Anatomy of Antiliberalism* (Harvard University Press 1993) 3-4.

⁴ *ibid.* Also see Jethro K Lieberman, *Liberalism Undressed* (Oxford University Press 2012) 4. According to John Gray, liberalism appeals to individualism, egalitarianism, universalism, and meliorism. By 'meliorism', Gray

it takes little imagination to appreciate how liberalism and liberal democracy make the case for human rights.⁵

This chapter does not aspire to portray uniformity among liberal theorists. Using the term ‘liberal’ to describe a general family of theories is by no means a reflection of uniformity. Instead, the chapter sets out to broadly illustrate a spectrum of liberal thought on the justifications for limiting the Two Freedoms. It is presented in two sections. In the first section, I deal with the idea of justification. I discuss the special value afforded to the Two Freedoms, and how such value places a justificatory burden on those who seek to limit the Two Freedoms. In the second section, I explain two common theoretical approaches to justifying limitations on the Two Freedoms. The first justifies limitations on the Two Freedoms based on an individual or collective interest of some kind. I call this an ‘unconstrained interest-based approach’. The second justifies the limitation *only* if it is based on certain types of interests, such as individual interests in ‘basic liberties’. I call this a ‘constrained interest-based approach’. I explore the merits and weaknesses of these two common theoretical approaches with the aim of establishing the need for an alternative justificatory approach that can both build on such merits and address such weaknesses. The present chapter accordingly sets out the groundwork for the discussion undertaken in the next chapter of this thesis, which makes a case for an alternative justificatory approach based on ‘duties of justice’.

refers to social institutions that are capable of improvement and advancement. Gray suggests that it is this conception of individuals and society that gives liberalism ‘a definite identity which transcends its vast internal variety and complexity.’ See John Gray, *Liberalism* (University of Minnesota Press 1986) 90.

⁵ Anthony Langlois, ‘Human Rights without Democracy? A Critique of the Separationist Thesis’ (2003) 25 *Human Rights Quarterly* 990, 1011.

I. JUSTIFYING LIMITATIONS IN THE LIBERAL TRADITION

A. Justification

Liberal theorists do not always agree on the precise justification required for limiting the Two Freedoms. The liberal tradition is, however, generally interested in ensuring that states bear some kind of justificatory burden when they limit the freedom of individuals. Gaus observes in his work on ‘justificatory liberalism’ that ‘public justification is the “moral lodestar” of liberalism’.⁶ ‘Justification’ refers to the process of providing good ‘reasons’ for an action, omission, or even a belief.

For our purposes, i.e. exploring justifications for limiting the Two Freedoms, it may be useful to draw from the work of Joseph Raz and John Rawls when explaining the idea of good reasons. According to Raz, ‘reasons’ ‘are referred to in explaining, in evaluating, and in guiding people’s behaviour’.⁷ He also observes a ‘reason’ is identified with ‘statements, beliefs and facts’, and further notes that ‘[r]easons must...be subject to logical analysis since they figure in practical reasoning...both beliefs and facts are capable of logical analysis’.⁸ I take *good* reasons – in the specific context of justifying limitations on the Two Freedoms – to roughly mean reasons that fall under the rubric of what Rawls calls ‘public reason’.⁹ According to Rawls, ‘public reason’ essentially requires citizens to justify their political decisions to each other using

⁶ Gaus, *Justificatory Liberalism*, 160.

⁷ Joseph Raz, *Practical Reason and Norms* (Oxford University Press 1999) 16.

⁸ *ibid.* 16-17. Raz describes a reason as consideration in favour of doing, believing, or feeling something. Also see Thomas Scanlon, *What We Owe to Each Other* (Belknap Press 1998) 17.

⁹ John Rawls, *Political Liberalism: Expanded Edition* (Columbia University Press 2005) 212-254.

values and standards that are publicly available, and acceptable.¹⁰ Reasons can be classified within the rubric of ‘public reason’ when they are the reasons of citizens who share the status of ‘equal citizenship’; their subject is accordingly the ‘good of the public and matters of fundamental justice’, and their nature and content are ‘public’ in that they are based on an entire society’s conception of ‘political justice’.¹¹

When the conduct in question relates to the Two Freedoms, the burden of justifying limitations (on the basis of public reason), falls on those who wish to restrict the conduct, i.e. the state. This proposition is in no way peculiar within the liberal tradition. John Stuart Mill in fact states ‘in practical matters, the burthen [*sic*] of proof is supposed to be with those who are against liberty; who contend for any restriction or prohibition’.¹² Joel Feinberg summarises what he calls the ‘presumption in favour of liberty’ in the following terms: ‘whenever a legislator is faced with a choice between imposing a legal duty on citizens or leaving them at liberty, other things being equal, he should leave individuals free to make their own choices. Liberty should be the norm; coercion always requires some *special justification*’ (emphasis added).¹³ Therefore, in the case of the Two Freedoms, it would be up to those denying liberty to justify the denial by presenting good, publicly justifiable reasons. The starting point in the reasoning process is fairly clear: an individual is entitled to the Two Freedoms unless proven otherwise. It is therefore the *limitation* (and

¹⁰ *ibid* 275-317.

¹¹ *ibid* 213. It is worth noting that scholars have debated the precise parameters of ‘public reason’. One particularly insightful contribution is offered by Kevin Vallier, who explains that public reason can be understood in relation to features of shareability, accessibility, and intelligibility. See Kevin Vallier, ‘Against Public Reason Liberalism’s Accessibility Requirement’ (2011) 8(3) *Journal of Moral Philosophy* 366.

¹² John Stuart Mill, ‘The Subjection of Women’ in John Stuart Mill, *On Liberty and Other Essays* (John Gray ed Oxford University Press 1991) 472.

¹³ Joel Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (Oxford University Press 1987) 9.

not the liberty) that needs to be justified. Prior to delving into the two common justificatory approaches found in the liberal tradition, it is perhaps useful to recall why the Two Freedoms are of particular importance to this tradition.

B. The Value of the Two Freedoms

Thomas Nagel observes that ‘liberalism’ – broadly speaking – ‘takes various forms, but they all include a system of individual rights against interference of certain kinds’.¹⁴ Gaus correctly notes that the Two Freedoms have a special place within the liberal tradition. He observes that ‘although the precise contours of the basic rights endorsed by liberals differ, we cannot go far astray by taking John Stuart Mill’s analysis of liberty as canonical: Any liberal theory must provide a strong defence of freedom of speech...Additionally, basic to the liberal tradition in politics has been a special commitment to religious toleration.’¹⁵ There is accordingly a sentiment within this tradition that a substantial justificatory burden must be placed on the state when it seeks to limit the Two Freedoms. Such a justificatory burden arises due to the special value of the Two Freedoms.¹⁶

On the one hand, the Two Freedoms are of inherent value to the individual. In the introductory chapter of this thesis, I discussed the close relationship the Two Freedoms have to an individual’s *forum internum*. The Two Freedoms involve the *external* manifestation or

¹⁴ Thomas Nagel, *Equality and Partiality* (Oxford University Press 1991) 57.

¹⁵ Gaus, *Justificatory Liberalism*, 160.

¹⁶ Eric Barendt, for instance, presents four arguments in favour of ‘free speech’: (1) its importance to discovering truth; (2) it is an aspect of self-fulfilment; (3) it enables citizen participation in a democracy; and (4) it is needed because we ought to be suspicious of government. See Eric Barendt, *Freedom of Speech* (2nd edn, Oxford University Press 2007) 1-38. Also see Martin H Redish, ‘The Value of Free Speech’ (1982) 130 *University of Pennsylvania Law Review* 591.

expression of an individual's inner realm of thoughts, beliefs, and convictions – a realm that many would argue is inviolable.¹⁷ This relationship to the *forum internum* points to why the Two Freedoms are of inherent value to human beings as moral agents.¹⁸ Andrei Marmor notes: 'The ability to communicate our thoughts and feelings to other human beings is an essential aspect of what makes us humans, and it is an aspect of our humanity that we care about deeply, morally and otherwise.'¹⁹ Moreover, the Two Freedoms derive from certain foundational values such as autonomy and dignity, which no doubt underlie their normative appeal. I explore these foundational values later in this chapter.

On the other hand, the Two Freedoms have consequentialist and epistemic value. Mill's defence of free speech and religious liberty points to such value. His defence rests on two corresponding claims. The first claim is based on human fallibility.²⁰ He contends that there is no inherent justification for suppressing the beliefs and opinions of others through coercive means, even if one believes that those beliefs and opinions are untrue, as they may in fact be true, and the alternative beliefs and opinions untrue. Mill argues that this uncertainty justifies greater tolerance of diverse views. He extends this claim to religious freedom by citing the motivations of Emperor Marcus Aurelius in authorising the persecution of Christianity.²¹ Mill explains that a Christian's justification for suppressing atheism (as being untrue) is no different to Marcus Aurelius's justification for suppressing Christianity, which he thought to be untrue.

¹⁷ Kevin Boyle and Sangeeta Shah, 'Thought, Expression, Association and Assembly' in Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran, and David Harris (eds), *International Human Rights Law* (Oxford University Press 2014) 226.

¹⁸ Joseph Raz, 'Free Expression and Personal Identification' (1991) 11 *Oxford Journal of Legal Studies* 303.

¹⁹ Andrei Marmor, 'Two Rights of Free Speech' (2018) 31 *Ratio Juris* 139, 140-141.

²⁰ John Stuart Mill, *On Liberty* (1859) 19-21. For a useful discussion on the contemporary relevance of Mill, see John Skorupski, *Why Read Mill Today?* (Routledge 2006).

²¹ Mill, *On Liberty*, 26-27.

For instance, denying the right of atheists to be witnesses in a court of law because they refuse to swear a Christian oath cannot be justified merely on the assertion that only Christianity is true, and any person who refuses to swear a Christian oath is unlikely to speak the truth. Since there is always uncertainty regarding which religion or belief is true, it makes sense to tolerate a diverse range of religions or beliefs, and permit a person who is an atheist to swear a secular oath and be a witness in a court of law.

Mill's second claim is based on the idea that truth can only be ascertained in a 'clearer' and 'livelier' form when it is permitted to collide with error.²² He argues that there is a greater truth being served by permitting unrestricted expression of opinions, despite the possibility that they are erroneous. A rational being, he argues, ought not to hold a truth as a belief independent of argument.²³ Mill extends this same idea to religious freedom, and the notion of heresy. He contends that 'it is not the minds of heretics that are deteriorated most by the ban placed on all inquiry which does not end in the orthodox conclusions. The greatest harm done is to those who are not heretics, and whose whole mental development is cramped, and their reason cowed, by the fear of heresy.'²⁴ Mill makes a separate complementary claim to justify what he calls the liberty of thought and discussion. He argues that such liberty is important when 'conflicting doctrines, instead of being one true and the other false, share the truth between them; and the nonconforming opinion is needed to supply the remainder of the truth, of which the received doctrine embodies only a part'.²⁵ For example, certain 'heretical' claims, such as the idea of heliocentrism (i.e. that the earth revolved around the sun) proposed by Nicolaus Copernicus

²² *ibid* 19.

²³ *ibid* 34.

²⁴ *ibid* 32.

²⁵ *ibid* 44.

and advanced by others such as Galileo Galilei, were later proved to be true.²⁶ Non-interference with the expression of diverse opinions, including heretical opinions, is therefore important because, sometimes, elements of truth lie embedded in non-conforming opinions.

Limitations on the Two Freedoms ought to take into account their inherent, consequentialist and epistemic value. Such value points to why the Two Freedoms should not be limited without sufficient justification. It makes sense not to limit the Two Freedoms except for good reason, and to require the state to satisfy a substantial justificatory burden when it seeks to limit the Two Freedoms. I next turn to some of the common theoretical approaches that may be adopted to frame such a justificatory burden.

II. JUSTIFICATORY APPROACHES

In this section, I interrogate the work of several prominent liberal theorists. I do not intend to survey the entire spectrum of liberal thought on the various justificatory approaches to limiting rights and freedoms. My aim in this section is instead to illustrate two common approaches to justifying limitations on the Two Freedoms: an unconstrained interest-based approach, and a constrained interest-based approach. Each of these theoretical approaches contemplates a justificatory burden that a state must satisfy when it limits the Two Freedoms.

²⁶ For an incisive discussion on the case concerning the Papal Inquisition on Galileo Galilei, see Kristina Terkun Castro, 'Religion as a Credence Good and the Case Against Galileo' (2012) 8 *Interdisciplinary Journal of Research on Religion* 1.

A. Unconstrained interest-based approach

We may recall that an ‘interest’ is simply something of value to human beings, and is often conceptualised as ‘well-being’.²⁷ We could imagine an approach wherein limitations on the Two Freedoms need to be justified on the basis that they serve certain important interests. This approach can be called an unconstrained interest-based approach to justifying limitations. I call this approach ‘unconstrained’, as it does not, at the outset, exclude any particular type of important interest. This approach would not treat rights as automatic ‘trumps’ over other interests. As suggested by Raz, ‘[g]iven that rights are based on people’s interests it cannot be claimed that they are trumps in the sense of overriding other considerations based on individual interests’.²⁸ Under an unconstrained interest-based approach, any conflicting interest of greater weight may be sufficient to justify limiting the Two Freedoms. For instance, an interest in ‘collective goods’,²⁹ such as a tolerant society, would in some cases be considered a sufficient justification for limiting the Two Freedoms. In contrast to the view that individual rights always trump interests in collective goods, an unconstrained interest-based justificatory approach would require ‘no general rule giving either rights or collective goods priority in cases of conflict’.³⁰

²⁷ Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 167.

²⁸ *ibid* 187.

²⁹ Raz explains that a ‘good’ is a ‘public good’ ‘if the distribution of its benefits... is not subject to voluntary control by anyone other than each potential beneficiary controlling his share of the benefits’. He then describes some public goods, such as a society that is tolerant, educated, and respectful, as ‘inherently’ public goods, as the benefit to all persons within that society are not contingent on any other factor. He calls these public goods ‘collective goods’. See *ibid* 198-199.

³⁰ *ibid* 255.

An unconstrained interest-based approach can resemble what Kai Möller and others endorse as a general method to adjudicating limitations on rights – an approach sometimes described as ‘unconstrained moral reasoning’.³¹ This approach accordingly relies on ‘practical reasoning’³² (wherein the underlying value of a competing interest in favour of the limitation is weighed against the underlying value of the interests in favour of the impugned conduct³³) to determine whether or not a limitation is permissible.

Another way of articulating this justificatory approach is to say that the ‘harm’ caused (by the impugned conduct) to the competing interests needs to be established as weightier than the harm caused to the individual whose Two Freedoms are being limited. The state would need to justify the limitation primarily on the basis of the harm that the impugned conduct causes to others. This articulation draws from Mill’s ‘harm principle’:³⁴ ‘the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.’³⁵ Feinberg meanwhile suggests that ‘harm’ can involve a type of

³¹ Francisco J Urbina, ‘Is it Really That Easy? A Critique of Proportionality and ‘Balancing as Reasoning’ (2014) 27(1) *Canadian Journal of Law & Jurisprudence* 167, 178. See Kai Möller, ‘Proportionality: Challenging the Critics’ (2012) 10(3) *International Journal of Constitutional Law* 709, 715-721; Moshe Cohen-Eliya and Iddo Porat, ‘Proportionality and the Culture of Justification’ (2011) 59 *American Journal of Comparative Law* 463, 479.

³² Möller, ‘Proportionality: Challenging the Critics’, 721; Mattias Kumm, ‘The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review’ (2010) 4 *Law & Ethics of Human Rights* 142, 147.

³³ By ‘impugned conduct’ I simply mean the individual conduct that is ostensibly related to the Two Freedoms, and that is being restricted.

³⁴ It is worth noting that the overarching justification for his views, in Mill’s mind, is utility: that individuals have liberty because in the long run, permitting such liberty ‘redounds to the net benefit of the community’. Impermissible limitations on liberty are outweighed by the greater benefits that would accrue as a result of unrestricted liberty. See Robert P George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford University Press 1995) 83.

³⁵ Mill, *On Liberty*, 13. Piers Norris Turner argues that Mill uses ‘harm’ simply as a general term for ‘bad consequences, requiring no further specification’. See Piers Norris Turner, ‘‘Harm’ and Mill’s Harm Principle’ (2014) 124 (2) *Ethics* 299, 300. Also see Jonathan Riley, ‘Racism, Blasphemy, and Free Speech’ in C L Ten (ed), *Mill’s ‘On Liberty’: A Critical Guide* (Cambridge University Press 2008) 67. An alternative school of thought attributes to Mill a restrictive conception of ‘harm’. For example, David Brink claims that Millian ‘harm’ is a reference to the violation or threatened imminent violation of ‘important interests of others in which

non-normative setback to interests,³⁶ as well as a normative notion of a wrong.³⁷ According to this articulation of an unconstrained interest-based approach, a limitation on the Two Freedoms may be justified when the conduct in question harms others, or ‘affects *prejudicially* the interests of others’ (emphasis added).³⁸ Such harm involves a discernible setback to another’s interest, such as for example the harm that an individual’s speech might cause to another’s reputation.

Ronald Dworkin expresses scepticism over the use of ‘harm’ as the necessary measurement for determining the permissibility of interference with individual conduct. He observes that ‘everything turns on what “harm” is taken to be’.³⁹ If it only includes direct physical damage, then the condition is ‘much too strong’.⁴⁰ If it includes mental distress or annoyance, it is ‘much too weak to be of any use in political theory, since any kind of conduct likely to be made criminal in a democracy, is conduct that causes annoyance or distress to someone’.⁴¹ A third conception of harm could exclude mental distress but include damage to the general social and cultural environment. Dworkin argues that this conception would be of no help either, as opponents of a particular activity could always argue that the activity damages

they have a right’ (emphasis added). David O Brink, ‘Mill’s Liberal Principles and Freedom of Expression’ in C L Ten (ed), *Mill’s ‘On Liberty’: A Critical Guide* (Cambridge University Press 2008) 42.

³⁶ Feinberg, *The Moral Limits of the Criminal Law*, 33.

³⁷ *ibid* 34.

³⁸ Mill, *On Liberty*, 69. According to Mill, limitations on liberty could only be justified when harm is caused to others. Purely self-regarding acts are beyond the realm of limitations. He argues: ‘The only part of the conduct of any one, for which he is amenable to society, is that which *concerns others*. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign’ (emphasis added) (p.13).

³⁹ Ronald Dworkin, ‘Do We Have a Right to Pornography?’ (1980) 1 *Oxford Journal of Legal Studies* 177, 178.

⁴⁰ *ibid*.

⁴¹ *ibid*.

the general cultural environment.⁴² The imprecise nature of ‘harm’ could therefore detract from the aim of imposing a sufficiently heavy justificatory burden on the state when it limits the Two Freedoms. However, Gaus correctly notes that although ‘[t]he notion of a harm to another can be articulated through a number of competing conceptions...it does not follow from this that the concept of a harm to another is altogether empty.’⁴³

A ‘harm-based’ approach is not distinct from an unconstrained interest-based approach, particularly if we accept Raz’s re-articulation of the harm principle. He first adopts a fairly broad conception of harm: ‘one harms another when one’s action makes the other person worse off than he was, or is entitled to be, in a way which affects his future well-being.’⁴⁴ He then insists: ‘[o]ne harms another by failing in one’s duty to him, even though this is a duty to improve his situation and the failure does not leave him worse off than he was before.’⁴⁵ Accordingly, an unconstrained interest-based approach could be understood as an approach that asks the state to balance competing harms, i.e. the harm caused to others as a result of the individual’s impugned conduct, and the harm caused to the individual as a result of the proposed limitation. It is ‘unconstrained’, as a *broader* range of setbacks to the interests of others (harm) may be considered at the outset of the balancing or reasoning process.

What would the state’s justificatory burden under an unconstrained interest-based approach look like? It could involve demonstrating how serious the harm is, or how ‘compelling’ the interest is, and justifying the particular limitation on the Two Freedoms as the

⁴² *ibid.*

⁴³ Gaus, *Justificatory Liberalism*, 174.

⁴⁴ Raz, *The Morality of Freedom*, 414.

⁴⁵ *ibid* 416.

best way to *prevent* that harm or *serve* that interest. Since harm basically involves setbacks to interests, I will proceed on the basis that there is no material difference between preventing a setback to an interest, and serving that interest.

Even under an unconstrained-interest based approach, interests that serve to override the Two Freedoms must be sufficiently weighty; they must be ‘compelling’. As pointed out by Mattias Kumm, it is possible to frame a particular interest as ‘compelling’ enough to justify a limitation on individual rights, such as the claim rights to the Two Freedoms.⁴⁶ For example, interests in public order, health or morals are typically framed as ‘compelling’, and are often presented as justification for limiting the Two Freedoms. By contrast, some subjective preferences may not be considered aims that are ‘compelling’. For instance, a state may wish to limit an individual’s practice of religion because the state believes the particular religion to be untrue. An aim arising out of such a belief may be manifestly unreasonable and may merely amount to the subjective preference of the leadership within the state. The reasons presented by the state on the basis of such a belief would not be part of what Rawls calls public reason. Although the commonly conceived unconstrained interest-based approach considers a wide range of interests within the justificatory process, it would not include reasons that are outside the bounds of public reason. An unconstrained interest-based approach is therefore still subject to the requirements of public reason. This sort of justificatory approach is reflected in modern adjudicative settings where the state is required to demonstrate the ‘proportionality’ of the limitation.

The idea of ‘proportionality’ concerns justification, and as pointed out by Möller, has

⁴⁶ Mattias Kumm, ‘Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice’ (2004) 2(3) *International Journal of Constitutional Law* 574, 593.

gained a prominent role in rights adjudication.⁴⁷ As noted by Francisco Urbina, what is distinctive about proportionality is that it reflects the idea that ‘limitations on human rights must be *justified by reference* to gains on some other interest or value’ (emphasis in original).⁴⁸ The typical analysis associated with ‘proportionality’ tends to be a four-part test. First, when limiting a right, the state must be pursuing an aim that is connected to some interest that is compelling or ‘legitimate’.⁴⁹ This limb of the analysis may be called the ‘legitimacy’ subtest. Only publicly justifiable reasons are relevant to this limb of the test. Second, there must be a rational connection between the measure used to limit the right and the legitimate aim. The measure must actually contribute towards the advancement of the aim. Urbina and others call this the ‘suitability’ or ‘rationality’ subtest.⁵⁰ Third, the specific measure must be necessary to achieve the legitimate aim.⁵¹ This limb of the analysis is called the ‘necessity’ subtest. Finally, the measure must be proportionate in the ‘strict sense’. This limb of the analysis is referred to as the proportionality *stricto sensu* subtest. As suggested by Julian Rivers, this subtest asks: ‘does the act represent a net gain, when the reduction in enjoyment of rights is weighed against the level of realization of the aim?’.⁵² According to Grégoire Webber: ‘there must be a proportionality between the effects of the measures which are responsible for limiting the right...and the objective which has been identified as of “sufficient importance”.’⁵³

⁴⁷ Kai Möller, ‘Constructing the Proportionality Test: An Emerging Global Conversation’ in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) 32.

⁴⁸ Urbina, ‘Is it Really That Easy?’, 173.

⁴⁹ *ibid* 167; Luc B Tremblay, ‘An Egalitarian Defense of Proportionality-based Balancing’ (2014) 12(4) *International Journal of Constitutional Law* 864, 865. Also see Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press 2012).

⁵⁰ Urbina, ‘Is it Really That Easy?’, 167; Tremblay 865.

⁵¹ *ibid*.

⁵² Julian Rivers, ‘Proportionality and Variable Intensity of Review’ (2006) 65 *Cambridge Law Journal* 174, 181.

⁵³ Grégoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press

We are bound to encounter some confusion when the term ‘proportionality’ is used to describe the entirety of the four-part test associated with the term. This terminological challenge is mainly due to the fact that different versions of the proportionality test have been applied in different jurisdictions. For instance, the German Federal Constitutional Court applies a test that only considers the question of ‘balancing’ in the final limb of the test. Under this version of the test, the question of ‘proportionality’ – strictly speaking – only actually arises at the final stage of the test.⁵⁴ It is sensible, therefore, to call such a four-part test something more precise. For example, it could more accurately be called a ‘permissibility test’, as it is simply a test that determines the permissibility of a limitation. The Canadian Supreme Court, by contrast, prefers to engage in some form of ‘balancing’ under the legitimacy and necessity subtests as well. In Canada, under the legitimacy subtest, the interest being pursued through the limitation must be of *sufficient importance* to warrant *overriding* the right or freedom in question.⁵⁵ Moreover, under the necessity subtest, the measure must be the option that impairs the right or freedom *the least*.⁵⁶ As correctly pointed out by Dieter Grimm, the Canadian version of the four-part test appears to contain elements of ‘balancing’ not only in the final subtest, but also in the legitimacy and necessity subtests.⁵⁷ In this context, the use of the term ‘proportionality’ to describe the entire four-part test is not necessarily an error or oversight.

2009) 71-72.

⁵⁴ Möller, ‘Constructing the Proportionality Test’, 34.

⁵⁵ *R v Oakes* [1986] 1 SCR 103, paras 69-70 (Canada).

⁵⁶ *ibid.* Also see Sujit Choudhry, ‘So What Is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter’s Section 1’ (2006) 34 *Supreme Court Law Review* 501.

⁵⁷ Dieter Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’ (2007) 57 *University of Toronto Law Journal* 383.

Meanwhile, some jurisdictions, such as the United States (U.S.), have developed very specific legal tests to determine the permissibility of a limitation. For instance, ‘content-based’ limitations on the freedom of expression attract what has come to be known as ‘strict scrutiny’, i.e. the highest level of judicial scrutiny of the restrictive measure. This approach is essentially founded on an American common law idea that the right to ‘freedom of speech’ – protected under the First Amendment to the U.S. Constitution⁵⁸ – is a highly valued individual right.⁵⁹ The state must accordingly meet the heaviest justificatory burden when restricting certain types of speech, such as political speech. By contrast, ‘content-neutral’ limitations on the freedom of expression (for example, restrictions on the form, extent, timing or medium of an expression) are reviewed under an ‘intermediate scrutiny’ test. The U.S. Supreme Court has formulated a four-part test to determine whether a content-neutral limitation is constitutional:⁶⁰ (1) the limitation must be within the constitutional power of government; (2) the limitation must further an important or substantial governmental interest; (3) the governmental interest must be unrelated to the suppression of the freedom of expression; and (4) the limitation must be narrowly tailored – no greater than necessary. In subsequent cases, the Supreme Court devised a fifth limb: the limitation must leave open ample opportunity for communication.⁶¹ Although this justificatory approach prevalent in the U.S. is rarely termed a ‘proportionality test’, it appears to contain elements of ‘balancing’. Ultimately, whichever version of the test is employed, the idea of proportionality involves a justificatory burden of a particular form. The

⁵⁸ Constitution of the United States, 17 September 1787.

⁵⁹ David A Strauss, ‘Freedom of Speech and the Common-Law Constitution’ in Lee C Bollinger and Geoffrey R Stone (eds), *Eternally Vigilant: Free Speech in the Modern Era* (University of Chicago Law Press 2002). Also see Arthur D Hellman, William D Araiza and Thomas E Baker, *First Amendment Law: Freedom of Expression and Freedom of Religion* (LexisNexis 2010).

⁶⁰ *United States v O'Brien* (1968) 391 U.S. 367; Geoffrey R Stone, ‘Content-Neutral Restrictions’(1987) 54 *University of Chicago Law Review* 46; Elisabeth Zoller, ‘The United States Supreme Court and the Freedom of Expression’ (2009) 84 *Indiana Law Journal* 885, 906.

⁶¹ *Ladue v Gilleo* (1994) 512 U.S. 43.

limitation would be justified only if it is apparent that countervailing interests have greater importance than the individual's interests in question.

Under a 'proportionality test', the justificatory burden imposed on the state can take two forms. First, the state can be required to rigorously apply the four-part test, which involves sequentially meeting the subtests of legitimacy, rationality, necessity, and proportionality *stricto sensu*. This form reflects a usage of the term 'proportionality' that is specific to the final subtest. Using the term 'proportionality' to describe the entire test in this context can be misleading, as the term only reflects a conclusion (i.e. that the limitation is 'proportionate') when all four subtests are considered. The question of 'proportionality' would not be relevant if one of the first three subtests were not satisfied. The four-part test is, after all, sequential. For example, if the measure in question sought to achieve an aim that was patently illegitimate, such as the destruction of a population, the measure would fail the legitimacy test, and the 'proportionality' of the measure would not be considered. Calling the four-part test a 'proportionality test' in this context is a misnomer.

Some scholars have pointed out the need for a more robust version of the necessity subtest to ensure further rigour in the application of a 'proportionality test'. For instance, David Bilchitz argues that this subtest must first identify the range of measures that can be employed by the state to meet the legitimate aim concerned. It must carefully assess whether there is an alternative (to the proposed measure), which meets that aim in a real and substantial manner.⁶² If there are no such alternatives, the measure meets the necessity subtest. Therefore, under Bilchitz's proposal, some form of 'balancing' does take place at the necessity stage. Yet, despite

⁶² David Bilchitz, 'Necessity and Proportionality: Towards A Balanced Approach?' in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) 55.

meeting the necessity subtest, the measure in question could still be assessed as ‘disproportionate’ under the final subtest if it causes an unacceptable impairment to the right or freedom concerned.⁶³ In such an event, the limitation would still be impermissible.

Second, a more flexible justificatory path may be taken. To justify the limitation, the state can be asked to do nothing more than to demonstrate that the pursued compelling interest outweighs the interests in favour of the conduct in question. When this type of ‘balancing’ is resorted to, calling the test a ‘proportionality test’ may actually be appropriate. This form of the ‘proportionality test’ glosses over the second and third subtests, and focuses on the fourth subtest. It is possible that we call the entire four-part test a ‘proportionality test’ precisely due to the fact that courts and tribunals often adopt this flexible version of the test. In this context, it is the fourth subtest, i.e. proportionality *stricto sensu*, that has come to define the four-part test.⁶⁴ However, since both forms of the test is evident in practice, it makes sense to simply call the four-part test a ‘permissibility test’.

The state’s justificatory burden under an unconstrained interest-based approach can therefore feature either a *rigorous* or *flexible* permissibility test. I shall be returning to the flexible and rigorous versions of this test in the fifth chapter of this thesis, where I analyse the United Nations Human Rights Committee’s jurisprudence on the Two Freedoms. A rigorous permissibility test requires states to systematically meet the legitimacy, rationality, necessity, and proportionality *stricto sensu* subtests. A flexible permissible test, by contrast, would only

⁶³ Möller, ‘Constructing the Proportionality Test, 36-38.

⁶⁴ *ibid* 34. Möller notes: ‘At the legitimate goal stage, any goal that is legitimate will be accepted. At the suitability stage, even a marginal contribution to the achievement of the goal will suffice. At the necessity stage, it is very rare for a policy to fail because less restrictive alternatives normally come with some disadvantage and cannot therefore be considered equally effective. *Thus, the balancing stage dominates the legal analysis and is usually determinative of the outcome*’ (emphasis added).

require the state to show that the interests being pursued through the limitation is weightier than the interests in favour of the conduct in question. The magnitude of the state's justificatory burden would ultimately depend on how the question of 'balancing' is approached – a matter I will return to later in this chapter.

B. Constrained interest-based approach

A second theoretical approach to justifying limitations on the Two Freedoms involves justifying the limitations *only* on the basis of specific types of interests. In this sense, it is a 'constrained' interest-based approach. Under this approach, certain types of interests may be excluded from the outset, despite being within the bounds of public reason. For instance, Dworkin suggests that we should rule out all collective interests when justifying a limitation on individual rights.⁶⁵ He argues that rights exist, and ought to be protected, even when the community is genuinely worse off.⁶⁶ Understood this way, individual rights, such as the claim rights to the Two Freedoms, constrain the state's pursuit of collective interests, and set out a protected realm that a state cannot interfere with even when collective interests could be served through such interference.⁶⁷ In Dworkin's view, individual rights *trump* collective interests.⁶⁸ If an individual has a right, say, to the Two Freedoms, 'it is for some reason wrong for officials to act in violation

⁶⁵ Ronald Dworkin, 'Rights as Trumps' in Jeremy Waldron (ed), *Theories of Rights: Oxford Readings in Philosophy* (Oxford University Press 1984) 153; Jeremy Waldron, *Liberal Rights* (Cambridge University Press 1993) 210.

⁶⁶ Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 350.

⁶⁷ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) 198, 205-206, 266-278. Dworkin argues that individual rights trump collective interests because every individual has the right to be treated by the state with 'equal concern and respect'. Permitting collective interests to outweigh individual rights would deny persons equal concern and respect. This principle of equality requires that the state refrain from restricting individual conduct on any basis that the individuals concerned could not accept without abandoning their sense of equal worth.

⁶⁸ *ibid.* xi.

of that right, even if they (correctly) believe that the community as a whole would be better off if they did'.⁶⁹ We could therefore conceive of an approach wherein certain types of interests, such as collective interests, cannot be considered when justifying a limitation on the Two Freedoms. The Two Freedoms could be limited under this approach, except that such limitations would only be permissible when imposed for the purpose of protecting other rights. This type of approach could also be framed as a 'rights-based' approach⁷⁰ of sorts, as the Two Freedoms may be limited only for the purpose of protecting interests in respect of which persons have rights. Scholars including Marmor and Alan Gewirth⁷¹ also argue that rights, including rights to the Two Freedoms, may not be limited except for the protection of individual rights. Marmor suggests that the prevention of harm – which he takes to merely mean the prevention of setbacks to interests – is 'only a necessary but not a sufficient justification for the legal prohibition of conduct'.⁷² For instance, he argues that 'justified restrictions' on the freedom of expression 'derive from prevailing rights of others, not merely prevention of harm'.⁷³ John Locke meanwhile argues that 'equals' (i.e. equal persons) have reason to submit to political power only when such power is aimed at protecting what he calls 'civil interests'.⁷⁴ These civil

⁶⁹ Dworkin, 'Do We Have a Right to Pornography?', 200.

⁷⁰ I choose not to use the terminology of a 'rights-based approach' for reasons that are mostly methodological and 'ethical'. Such reasons are explored in greater detail in the final chapter of this thesis. In any event, the phrase 'rights-based approach' is used in a variety of contexts and can mean different things. For instance, Jacco Bomhoff uses this phrase in his critique of the approach through which the European Court of Human Rights deals with conflicts between certain fundamental rights, including the Two Freedoms. His contribution is important, as it points to the incoherence in treating *all* conflicts between rights and interests as conflicts between rights. See Jacco Bomhoff, 'The Rights and Freedoms of Others: The ECHR and its Peculiar Category of Conflicts between Individual Fundamental Rights' in Eva Brems (ed), *Conflicts Between Fundamental Rights* (Intersentia 2008).

⁷¹ Alan Gewirth, *Human Rights: Essays on Justification and Applications* (University of Chicago Press 1982) 6 and 57. Also see Michael Freeman, 'The Philosophical Foundations of Human Rights' (1994) 16 *Human Rights Quarterly* 491, 508.

⁷² Marmor, 'Two Rights of Free Speech', 151.

⁷³ *ibid* 152.

⁷⁴ See John Locke, *A Letter Concerning Toleration* (M Montuori ed Martinus Nijhoff 1963) 15. Also see Albert Weale, 'Needs and Interests' (1998) *Routledge Encyclopaedia of Philosophy*.

interests appear to be the type of interests commonly associated with individual rights; they include ‘life, liberty, health, and indolency of body; and the possession of outward things, such as money, lands, houses...’⁷⁵ The corollary of this prescription is that power may be legitimately exercised *only* in the service of those specific interests.

Rawls’s approach to limiting the Two Freedoms may also be framed as a constrained interest-based approach. He focuses on the terminology of ‘basic liberties’. His list of basic liberties include political liberty (the right to vote and to hold public office) and freedom of speech and assembly, the liberty of conscience and freedom of thought, freedom of the person, which includes freedom from psychological oppression and physical assault and dismemberment, the right to hold personal property, and freedom from arbitrary arrest and seizure.⁷⁶ Rawls argues that basic liberties, such as the Two Freedoms, can only be limited for the sake of basic liberties.⁷⁷ These basic liberties have ‘lexical priority’, i.e. they are to be prioritised over all other types of interests. In his view, ‘equal basic liberties’, and their priority, ensure fair terms of cooperation. He theorises that rational agents in ‘the original position’⁷⁸ and ‘behind a ‘veil of ignorance’⁷⁹ would select a principle that guarantees and prioritises the equal basic liberties of the citizens they represent. Accordingly, basic liberties such as the Two

⁷⁵ Locke 15.

⁷⁶ See John Rawls, *Justice as Fairness: A Restatement* (Erin Kelly ed Harvard University Press 2001) 28, 169.

⁷⁷ John Rawls, *A Theory of Justice: Revised Edition* (Harvard University Press 1999) 177-178, 220.

⁷⁸ Rawls explains: ‘In justice as fairness the original position of equality corresponds to the state of nature in the traditional theory of the social contract...It is understood as a purely hypothetical situation characterized so as to lead to a certain conception of justice.’ See Rawls, *A Theory of Justice*, 11.

⁷⁹ Rawls explains that agents in the original position are ignorant of what status those they represent will enjoy, what natural assets they will possess, and what religious beliefs and conceptions of moral and non-moral good they will hold in society. The purpose of the veil is to ‘eliminate bias from the selection of principles of justice by persons whose selection is directed by self-interested prudential deliberation’. See George 134.

Freedoms would have ‘absolute weight’ with respect to interests unrelated to basic liberties.⁸⁰ For example, the freedom of expression cannot be denied to an individual on the grounds that their speech enables them to block a certain collective interest, such as ‘economic efficiency and growth’.⁸¹ Therefore, all reasons that are not related to basic liberties of similar importance to the Two Freedoms will be excluded (at the outset) from the justificatory process. According to Rawls, the Two Freedoms can, however, be limited for its own sake or for the sake of other basic liberties of similar importance. A state that seeks to limit the Two Freedoms would then need to frame its justification on the basis that the limitation serves the protection or promotion of one of the Two Freedoms, or some other basic liberty. In this sense, the justification for limiting the Two Freedoms would need to be connected to advancing a competing interest in a basic liberty.

A constrained interest-based approach differs from an unconstrained interest-based approach because it only considers a certain type of interest as relevant to justifying limitations on the Two Freedoms. Under a constrained interest-based approach, the state would need to demonstrate that an interest of a particular type – such as an interest in basic liberties – is served by the limitation. This approach would treat basic liberties and claim rights as having preemptory value over other interests. Therefore, certain types of interests are from the outset excluded from consideration. The approach no doubt places a heavy justificatory burden on the state when it seeks to limit the Two Freedoms.

⁸⁰ Rawls, *Political Liberalism*, 294.

⁸¹ *ibid* 294-295.

C. Illustrating the two approaches

An illustration might help explain the two justificatory approaches I have just described. Imagine that *A*, *B*, and *C* wish to speak at the town square on the role of religion in the public sphere. The three speakers rely on their constitutionally guaranteed basic liberty to freedom of expression, which has ordinarily included the claim right to speak at the town square. Each of them has a position on the subject, and wishes to convince others to join them in advancing their respective positions. *A* believes that the state ought to adopt the ‘one true religion’ of the country, and that all public life should be governed by religious values. *B* believes that religion should be confined to the private sphere. *C* believes that religious adherents ought to have the right to practice in public, but that religious beliefs should not be immune to criticism. However, all three speakers happen to select the same date and time to speak – from twelve noon to one o’clock, which is usually the time people gather at the town square during their lunch break. Upon discovering the problem, the three speakers appeal to the Town Council. *A* proclaims that only he should be permitted to speak for one hour – because he is quite certain he is right, and that the others are totally mistaken. *B* and *C*, dismayed by this suggestion, demand that *A* be given no more than 20 minutes to speak. The council deliberates on the two positions and decides that *A*, *B*, and *C* should each be allotted 20 minutes to speak. It is clear that some form of limitation on *A*’s freedom of expression is contemplated in this decision, as it places a fetter on *A*’s wish to speak for longer. How then might the council justify this limitation on *A*’s freedom of expression?

Under an unconstrained interest-based justificatory approach, the council may present a range of competing interests that may be weighed against *A*’s interest in speaking for as long as he wishes. For example, *B*’s and *C*’s interests in freedom of expression may be relevant to

the justification. The audience's interests in hearing diverse views in some equal measure may also be relevant. Moreover, the council may consider collective interests in an equal and tolerant society when determining the time allocations for speakers. What is clear is that an unconstrained interest-based approach is not averse to the consideration of any relevant individual or collective interest – within the realm of public reason – when determining the permissibility of a limitation.

Under a constrained interest-based justificatory approach, the council would need to justify the limitation on the basis of only a limited set of interests – such as competing interests in basic liberties. Other interests, such as the collective interest in a tolerant society, may not be considered at all. This justificatory burden could still be met by pointing to the important interests in basic liberties that can be protected through the limitation. As suggested by Rawls, on occasion, certain rules are deemed necessary to regulate discussion, without which the freedom of expression loses its value.⁸² The council may accordingly justify limiting *A*'s right to speak on the basis that the limitation serves the freedom of expression in general, and specifically, *B* and *C*'s interests in expressing themselves.

This illustration signals the types of interests that the state could consider when it sets out to meet its justificatory burden. An unconstrained interest-based approach contemplates a much broader array of interests, whereas a constrained interest-based approach considers a narrower range. The illustration also depicts how the justificatory burden of the state can vary according to the approach adopted. Under an unconstrained interest-based approach, the state's burden would be to demonstrate that the competing interests in favour of the limitation

⁸² Rawls, *A Theory of Justice* 178; Rawls, *Political Liberalism* 341.

outweigh the interests in favour of the impugned conduct. Under a constrained interest-based approach, the state's burden would be compounded by the requirement to demonstrate that the limitation serves a very specific type of interest; once it is clear that the limitation serves a competing interest of that specific type, the state would need to demonstrate that this competing interest outweighs the interests in favour of the impugned conduct.

D. Balancing and incommensurability

Whichever of the two common approaches are adopted to justify a limitation on the Two Freedoms, the task of 'balancing' competing interests cannot be avoided. This requirement is certainly evident in an unconstrained interest-based approach. Such an approach requires the state to show that the compelling interest being pursued through the limitation is weightier than the interests in favour of the conduct ostensibly related to the Two Freedoms. This process of determining which of the two is weightier invariably involves an exercise in 'balancing'. A constrained interest-based approach would also involve the task of 'balancing'. A state that seeks to limit the Two Freedoms under this approach would need to justify the limitation on the basis that it serves a specific type of interest of similar importance (such as an interest in a basic liberty). In this regard, Rawls concedes that we cannot 'avoid some reliance on our sense of balance and judgment' to decide whether or not a particular limitation is warranted.⁸³

Robert Alexy offers a useful insight on how to think about 'balancing'. He observes that 'balancing' can be broken down into three stages. The first stage focuses on the 'concrete intensity' of the harm caused by the limitation.⁸⁴ This stage would identify the harm

⁸³ Rawls, *A Theory of Justice*, 180.

⁸⁴ Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr Oxford University Press 2002) 401.

experienced by the individual and others who benefit from the individual's conduct. For example, we would ask: what is the intensity of the harm encountered by *A*, an artist, and others who wish to enjoy her art, when the display of her art is restricted? The second stage focuses on the 'concrete importance' of the benefit gained (as a result of the limitation) in terms of a competing compelling interest. Consider, for example, a case where *A*'s art demeans members of a particular minority group. We would then ask: what is the concrete benefit gained (through restricting *A*'s art) in terms of the minority group's interests? Alexy offers a 'triadic model'⁸⁵ to classify the harm endured and benefit gained by the limitation.⁸⁶ The harm or benefit can be classified as (1) 'low/minor/weak/light', (2) 'moderate', or (3) 'high/serious/strong/heavy'. He approximates these terms to the idea of 'weight', by which he simply means the 'weight of the reasons' associated with a particular harm or benefit.⁸⁷ The third stage of 'balancing' involves comparing the concrete intensity of the harm with the concrete importance of the benefit. As noted by Luc Tremblay, this type of 'balancing' does not necessarily involve comparing the harm and benefit according to a common scale, standard or metric.⁸⁸ It is important that we avoid the objection of incommensurability, i.e. that harms and benefits are often too dissimilar to compare along a common scale, standard or metric.⁸⁹ Instead, 'intensity' and 'importance'

⁸⁵ Tremblay 885.

⁸⁶ Alexy 402-405.

⁸⁷ *ibid* 402. Also see Tremblay 885-886 for a useful discussion on Alexy's triadic model. Tremblay observes: 'The degrees of probability that a harm (or benefits) occurs may or may not have an incidence on the "weight" of the relevant value: if the probability that a harm (or benefits) occurs is low, the weight of the value might be light; but if the alleged harm (or benefits) is very great, the weight of the value may be heavy even if the probability of its occurrence is low. In general, the probability of occurrence is accepted as sufficiently high to concentrate the measurements on the intensity of harm and the importance of the benefits.'

⁸⁸ Tremblay 886.

⁸⁹ See Bruce Chapman, 'Law, Incommensurability, and Conceptually Sequenced Argument' (1998) 146 *University of Pennsylvania Law Review* 1487, 1492 n 10; Francisco J Urbina, 'Incommensurability and Balancing' (2015) 35(3) *Oxford Journal of Legal Studies* 575. Also see Möller, 'Proportionality: Challenging the Critics' (2012) 10(3) *International Journal of Constitutional Law* 709, and Francisco J Urbina, "'Balancing as Reasoning" and the Problems of Legally unaided Adjudication: A Reply to Kai Möller' (2014) 12(1) *International Journal of Constitutional Law* 214 for an interesting exchange on the contrasting approaches to

can be weighed through a process of practical reasoning. If the intensity of the harm caused by the limitation were greater than the importance of the benefit accruing as a result of the limitation, the limitation would be unjustified. The limitation would be justified only if the competing interests in favour of the limitation outweighed the interests in favour of the impugned conduct.

Even under Alexy's triadic model, sensibly 'balancing' incommensurable things may not be easy. There are two methods by which the question of 'balancing' could be approached. On the one hand, it may be possible to simply weigh the reasons given, and as suggested by Kumm, engage in a type of practical reasoning exercise.⁹⁰ This method would not require a common value to underlie the competing interests under consideration. Different underlying values could supply the reasons that are then balanced against each other. This method is for instance suggested by Tremblay, who proposes an 'optimisation of values' approach to limiting rights.⁹¹ Under this approach, all norms, interests and values have equal status, and none have priority as such. Tremblay argues that 'a right can always be limited by a competing value in context, provided that both values are realised as much as possible, given the relevant facts and law'.⁹²

On the other hand, a number of scholars including Jochen von Bernstorff and Urbina have pointed out that 'ad hoc balancing', or 'balancing as reasoning', can undermine the rule

balancing, and the consequent questions of commensurability that arise.

⁹⁰ See Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 *Law & Ethics of Human Rights* 142, 150.

⁹¹ See Tremblay 868.

⁹² *ibid.*

of law, and legal predictability.⁹³ In this context, it may be necessary to place more importance on certain values when engaging in the process of ‘balancing’.⁹⁴ This method may be preferable when dealing with limitations on the Two Freedoms. The starting point adopted in this thesis is different to Tremblay’s assumption that all values have equal status. I begin with the liberal presumption that individual freedom (and therefore the Two Freedoms) is the default position, and any limitation on such freedom must be specifically justified. Therefore, it may be necessary to reconcile conflicts between competing interests by taking cognisance of certain foundational values, which we may in fact treat as more important than other values. Such foundational values would not quite solve the incommensurability problem, but it may provide guidance against unconstrained moral reasoning.⁹⁵ The purpose of foundational values is not to introduce a distinct ‘conception of the good’ into the equation. These values would, on the contrary, merely function as a defence against arbitrariness, or a descent into a purely utilitarian calculus. Two candidates for such foundational values could be considered: autonomy and dignity.⁹⁶

⁹³ Jochen von Bernstorff, ‘Proportionality Without Balancing: Why Judicial Ad Hoc Balancing is Unnecessary and Potentially Detrimental to the Realisation of Individual and Collective Self determination’ in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) 66; Urbina, ‘Is it Really That Easy?’ 180.

⁹⁴ Dworkinian critiques of proportionality tend to emphasise that proportionality fails to give due weight to the normative importance of rights. See George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007); Stavros Tsakyrakis, ‘Proportionality: An Assault on Human Rights?’ (2009) 7 *International Journal of Constitutional Law* 468. Meanwhile, Paul Yowell and Kai Möller have argued that Dworkin’s theory of rights as ‘trumps’ can actually accommodate proportionality. See Paul Yowell, ‘A Critical Examination of Dworkin’s Theory of Rights’ (2007) 52 *American Journal of Jurisprudence* 93, 96-97; Kai Möller, ‘Dworkin’s Theory of Rights in the Age of Proportionality’ (2018) 12(2) *Law & Ethics of Human Rights* 281.

⁹⁵ See Urbina, ‘Is it Really That Easy?’, 181-184 for a critique on proportionality as unconstrained moral reasoning. Urbina argues: ‘Legally directed adjudication is better than unconstrained moral reasoning both for the rule of law [and] for justice and other substantive values involved in the case.’

⁹⁶ This is not to say autonomy and dignity are the only ‘foundational values’ that may be relevant to ‘balancing’ and reasoning. Other foundational values such as equality would function in much the same way. See Gaus, *Justificatory Liberalism*, 163; Isaiah Berlin, ‘Equality as an Ideal’ in Frederick A Olafson (ed), *Justice and Social Policy* (Prentice-Hall 1961) 128-50.

The work of Immanuel Kant is quite central to our understanding of the value of autonomy, or ‘freedom’ in one sense of the term. His moral philosophy on freedom is thought to illuminate the values underlying the modern constitutional protection of the Two Freedoms.⁹⁷ He observes: ‘freedom (independence from the constraint of another’s will), insofar as it is compatible with the freedom of everyone else in accordance with a universal law, is the one sole and original right that belongs to every human being by virtue of his humanity.’⁹⁸ In Kant’s view, freedom of the individual is ‘innate’, and can only be limited for the purpose of guaranteeing an equal measure of freedom to others.⁹⁹ This underlying idea of autonomy points to the inherent value of the Two Freedoms. The importance of autonomy is perhaps one reason to say that an individual’s interests in the Two Freedoms are generally sufficient to ground in others a duty to refrain from interfering with the exercise of the Two Freedoms. It is one of the reasons for conceptually classifying the Two Freedoms as claim rights.

Raz’s conception of ‘personal autonomy’ reflects both the achievement of a life made up of choices, and the capacity to make such choices.¹⁰⁰ It is of ultimate value, and is not reducible to concrete rights, such as the right against coercion. It thus entails a much broader concept than rights, and may in fact depend on the provision of many collective goods.¹⁰¹ For instance, a tolerant society, which is a collective good, and which is not reducible to rights, may be constitutive of personal autonomy.

⁹⁷ David A J Richards, ‘Kantian Ethics and the Harm Principle: A Reply to John Finnis’ (1987) 87 *Columbia Law Review* 457, 471.

⁹⁸ Immanuel Kant, *The Metaphysical Elements of Justice* (John Ladd tr Bobs-Merrill 1965) 230.

⁹⁹ Immanuel Kant, *The Metaphysics of Morals* (Mary J Gregor tr Cambridge University Press 1991) 63-64.

¹⁰⁰ Raz, *The Morality of Freedom*, 204.

¹⁰¹ *ibid* 207 and 247. Raz explains that there is no specific *right* to personal autonomy: ‘Assuming that the interest of one person cannot justify holding so many to be subject to potentially burdensome duties...it follows that there is no right to personal autonomy.’

It is possible to think of autonomy as an underlying foundational value that guides the process of ‘balancing’, particularly if Raz’s explanation of its significance to rights is accepted. He maintains that the justification for some types of fundamental rights is not only grounded in the individual interest in personal autonomy, but also in certain collective goods necessary for personal autonomy. Interestingly, he refers to both the freedom of religion and the freedom of expression in this regard. He explains that, while religious freedom is ‘usually conceived of in terms of the interest of individuals’, such interest rests on the public good relating to ‘the existence of religious communities’ within which people pursue freedom.¹⁰² Similarly, he argues: ‘some aspects of freedom of speech cannot be explained at all except as protecting collective goods, e.g. preserving the character of the community as an open society’.¹⁰³ The view that both individual interests and collective goods underlie the justification for certain types of rights exemplifies why Raz does not view rights as trumping collective goods. For Raz, these two things can be, and often are, mutually reinforcing. The ultimate value that binds this interaction is personal autonomy.

The process of ‘balancing’ may be guided by the degree to which personal autonomy is served overall through the limitation. For instance, Möller suggests that the proportionality principle can be a doctrinal tool that guides judges through the process of resolving those conflicts with respect to interests in *autonomy*.¹⁰⁴ By implication, the underlying commitment to autonomy, and ‘each agent’s status as an equal’, govern the process of ‘balancing’.¹⁰⁵ For

¹⁰² *ibid* 251.

¹⁰³ *ibid* 253.

¹⁰⁴ Kai Möller, ‘Constructing the Proportionality Test’, 32.

¹⁰⁵ Raz, *The Morality of Freedom*, 253.

example, the *loss* sustained by *A* in terms of her personal autonomy when the display of her art is restricted may be ‘balanced’ with the personal autonomy *gain* achieved by the religious group that is demeaned by her art. Personal autonomy does not necessarily provide a commensurable scale, standard or metric in this case. It does, however, provide some normative guidance on what underlying value should be focused on when comparing seemingly incommensurable things.

We next turn to the value of dignity. Dignity has come to mean a variety of associated values. It can be a reference to values such as ‘worth’, ‘respect’ and ‘self-esteem’. This foundational value is cited in international legal instruments including the International Covenant on Civil and Political Rights, which states in its preamble that ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’.¹⁰⁶ It also proclaims that human rights ‘derive from the inherent dignity of the human person’.

The precise definition of dignity is contested. Oscar Schachter observes that there is no explicit definition for the concept of dignity in any of the international instruments that typically invoke it. He argues that the intrinsic meaning of the value is often left to ‘intuitive understanding’.¹⁰⁷ Despite its definitional imprecision, multiple strands of philosophical thought have attempted to claim dignity as part of their foundation.¹⁰⁸ Some have claimed

¹⁰⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (‘ICCPR’), preamble.

¹⁰⁷ Oscar Schachter, ‘Human Dignity as a Normative Concept’ (1983) 77 *American Journal of International Law* 848, 849.

¹⁰⁸ Jeremy Waldron, ‘Is Dignity the Foundation of Human Rights?’ in Rowan Cruft, S Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015) 136. Also see Tarunabh Khaitan, ‘Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea’ (2012) 3 *Oxford Journal of Legal Studies* 1.

dignity to be a reflection of ‘God’s claim upon us, or our being created in His image’.¹⁰⁹ Others, alongside Kant, argue that dignity is based on ‘the metaphysical significance of our possession of moral capacity, the ability to act on principle even when every empirical impulse or inclination, every sentiment, and every element of self-interest pressures us to the contrary’.¹¹⁰ Others, such as Dworkin, argue that dignity is based on the ordinary capacity to take responsibility for our actions and lives, and the ability to recognise that same capacity in others.¹¹¹ Feinberg meanwhile suggests that dignity ‘may simply be the recognisable capacity to assert claims. To...think of [a person] as possessed of human dignity simply is to think of [them] as a potential maker of claims.’¹¹²

Dignity can be understood not only as a ‘value-concept’ but also as a ‘status-concept’.¹¹³ Jeremy Waldron argues that conceptualising dignity as a status – the same way ‘infancy’ or ‘bankruptcy’ is conceptualised – could help explain how it functions as an abbreviation for a package of rights, powers, disabilities, duties, privileges, immunities, and liabilities that accrues to the person who has ‘dignity’.¹¹⁴ Yet this package is not arbitrary, but comprises a list of things that ‘make sense relative to some underlying idea that informs the status in question’.¹¹⁵

¹⁰⁹ See John Paul II, *Evangelium Vitae* (25 March 1995); Jürgen Moltmann, *On Human Dignity: Political Theology and Ethics* (Fortress Press 1984); Jeremy Waldron, ‘The Image of God: Rights, Reason, and Order’ in John Witte and Frank Alexander (eds), *Christianity and Human Rights: An Introduction* (Cambridge University Press 2010) 21.

¹¹⁰ Waldron, ‘Is Dignity the Foundation of Human Rights’, 136. See Immanuel Kant, *Groundwork to the Metaphysics of Morals* (Mary J Gregor tr Cambridge University Press 1998) 42-46.

¹¹¹ Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2010) 202-214.

¹¹² Joel Feinberg, ‘The Nature and Value of Rights’ (1970) 4(4) *The Journal of Value Inquiry* 243, 252.

¹¹³ Jeremy Waldron, *Dignity, Rank and Rights* (Oxford University Press 2012) 57-61.

¹¹⁴ Waldron, ‘Is Dignity the Foundation of Human Rights’, 134. Also see Laura Valentini, ‘Dignity and Human Rights: A Reconceptualisation’ (2017) 37(4) *Oxford Journal of Legal Studies* 862, 865.

¹¹⁵ *ibid* 135.

They are tied together as part of a common rationale. Waldron concludes: ‘if human dignity is a status, then we should say that it comprises not just a set of human rights, but an underlying idea which explains both the importance of each of these rights in relation to our being human and the importance of their being packaged together in this regard.’¹¹⁶

Similar to how autonomy can serve as the underlying value that aids the process of reasoning, dignity too can serve as an underlying foundational value. The ‘balancing’ process would involve comparing the impairment that the limitation causes to the dignity of the individual (whose conduct is being restricted) with the gain accruing to the dignity of others as a result of the limitation.

There is of course some scepticism surrounding the independent value of dignity. Some scholars have argued that it adds little value to already existing values such as autonomy.¹¹⁷ Instead of dismissing the value of dignity, however, it may be important to understand its relationship to values such as autonomy. Even for those who emphasise the dignitarian foundations of their moral and political philosophies, the idea of dignity is closely tied to autonomy, and its associated values.¹¹⁸ James Griffin’s theory of human rights is a good example of how dignity can shape our understanding of associated values. He suggests that

¹¹⁶ *ibid* 136.

¹¹⁷ See Steven Pinker, ‘The Stupidity of Dignity’, *The New Republic*, 28 May 2008; Ruth Macklin, ‘Dignity is a Useless Concept’ (2003) 327 *British Medical Journal* 1419.

¹¹⁸ For instance, Dworkin argues that taking rights seriously requires acceptance of one (or both of) two important ideas. He suggests: ‘The first is the vague but powerful idea of human dignity. This idea, associated with Kant, but defended by philosophers of different schools, supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust. The second is the more familiar idea of political equality. This supposes that the weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured for themselves, so that if some men have freedom of decision whatever the effect on the general good, then all men must have the same freedom. See Dworkin, *Taking Rights Seriously*, 198. Also see Waldron, ‘Is Dignity the Foundation of Human Rights’, 131.

human dignity is best understood in terms of human normative agency.¹¹⁹ The value of such agency arises from a human being's autonomy, i.e. the ability to determine the shape of one's life. Griffin then connects such autonomy to the basic requirement of liberty – the ability to act, and to make decisions about one's life without coercive interference.¹²⁰

Whichever of the two common approaches we adopt when justifying limitations on the Two Freedoms, the notion of 'balancing' is unavoidable. The foregoing discussion points to two methods through which such 'balancing' may be undertaken. On the one hand, a process of practical reasoning may be undertaken to 'balance' public reasons for and against the limitation in question. Such a process will weigh the individual's interest (and indeed the interests of others in permitting the individual to engage in the impugned conduct) against the competing interests at play. On the other hand, the process of practical reasoning may take into account certain foundational values such as autonomy and dignity to guide the process. A prior commitment to these values shapes the process of 'balancing', and we arrive at a conclusion roughly based on how the limitation serves or undermines such foundational values.

The latter method of 'balancing' appears to be more compelling if we consider the presumed foundations on which values such as individual liberty are claimed. A person's autonomy and dignity, understood in terms of the ability to shape one's life and make decisions without interference, invariably include the liberty to make choices about religion, belief and expression without interference. It is precisely for this reason that values such as autonomy and dignity have a normative bearing on the Two Freedoms and their limits. Therefore, it makes

¹¹⁹ James Griffin, *On Human Rights* (Oxford University Press 2008) 152.

¹²⁰ *ibid* 180.

sense to be cognisant of these values in the course of assessing limitations on the Two Freedoms.

E. Critiquing the two approaches

There are some merits and weaknesses in the two common approaches I have discussed thus far. On the one hand, an unconstrained interest-based approach contemplates the consideration of a wide range of interests (within the bounds of public reason) when justifying limitations on the Two Freedoms. This approach has merit, as it permits practical reasoning in a broader and more inclusive manner. Such an approach may be further strengthened when an underlying foundational value such as autonomy and dignity is factored into the reasoning process. Yet the main weakness of this approach is that it offers no concrete placeholder to signal that the weight of the competing interests (i.e. the interests in favour of the limitation) is actually greater than the weight of the interests in favour of the impugned conduct. This problem is not necessarily solved by appealing to foundational values. Therefore, the approach is missing some conceptual threshold to aspire to when determining whether the competing interests at stake actually outweigh the interests in favour of the impugned conduct.

On the other hand, a constrained interest-based approach has the normative value of placing a heavy burden on the state to justify limitations on the Two Freedoms. Such an approach would no doubt strengthen the protection of the Two Freedoms. Yet its main weakness is that it is excessively restrictive in terms of the types of interests that may be considered within the justificatory process. If individual rights actually arise from all kinds of interests that are sufficient reason to ground duties in others, there is no obvious basis to exclude those types of interests from a justificatory process concerning the limitation of the Two

Freedoms.

In the next chapter, I propose a justificatory approach that builds on the relative merits and addresses the relative weaknesses of the two common approaches I have discussed in this chapter. This alternative approach builds on the merits of an unconstrained interest-based approach, as it does not exclude any interest falling within the ambit of public reason. Yet it seeks to address the conceptual weakness of an unconstrained interest-based approach, i.e. the lack of a concrete threshold to determine when competing interests actually outweigh the interests in favour of the impugned conduct. This alternative approach will also build on the merits of a constrained interest-based approach, as it begins from the normative presumption in favour of individual liberty, and attempts to maximise protection of the Two Freedoms. Yet it also seeks to avoid the central weakness of a constrained interest-based approach, i.e. the somewhat arbitrary exclusion of certain types of interests from the justificatory process.

The liberal tradition is principally concerned with ensuring that coercive authority over individual liberty is properly justified. It is therefore no surprise that theorists from within the tradition argue strongly for a justificatory burden to be imposed on the state when it limits the Two Freedoms.

In this chapter, I discussed two common justificatory approaches found in the liberal tradition: an unconstrained interest-based approach and a constrained interest-based approach. Under an unconstrained interest-based approach, the state's justificatory burden boils down to demonstrating that compelling interests in favour of a limitation outweigh the interests in favour

of the impugned conduct of the individual. Any interest within public reason may be considered relevant to whether a particular limitation is justified. Under a constrained interest-based approach, only certain types of interests would be considered relevant. For example, according to Dworkin, rights trump all other interests. Therefore, the rights to the Two Freedoms cannot be limited on the basis of any interests that do not constitute rights. Similarly, Rawls argues that basic liberties have lexical priority over other interests. Accordingly, basic liberties such as the Two Freedoms could only be limited for the sake of basic liberties.

In the next chapter, I explore an alternative approach to limiting the Two Freedoms. This approach would not involve a complete departure from the two approaches I have discussed in this chapter. Yet I shall endeavour to argue that the approach I have in mind is more conceptually coherent, normatively compelling, and politically appealing than these approaches.

Chapter 2

Duties of Justice

States must meet a substantial justificatory burden when limiting the freedom to manifest religion or belief, and the freedom of expression (the ‘Two Freedoms’). The preceding chapter of this thesis discussed two common theoretical approaches to justifying limitations on the Two Freedoms: an unconstrained interest-based approach, and a constrained interest-based approach.

In this chapter, I make the case for adopting an alternative justificatory approach. This approach requires the state to justify limitations on the Two Freedoms by demonstrating that the competing interests at play are either individually or in combination sufficient to impose on the individual (whose conduct is being restricted) a *duty* to refrain from such conduct. In the specific approach I have in mind, the state must demonstrate that the individual concerned owes a ‘duty of justice’ (to others) to refrain from the impugned conduct. It must do so by presenting ‘good, publicly justifiable reasons’ – an idea I shall elaborate on during the course of this chapter. I call this a ‘duty-based’ justificatory approach. Whenever I use the phrase ‘duty-based justificatory approach’ I have a very particular approach in mind; it is an approach that involves two indispensable elements: first, the presentation of good, publicly justifiable reasons; and second, the demonstration of a duty of justice. I will accordingly present a case for placing duties of justice at the centre of the state’s burden to justify limitations on the Two Freedoms.

This chapter is presented in two sections. The first explains what I mean by a justificatory approach based on ‘duties of justice’. It discusses the ideas of ‘abstract’ and ‘derivative’ liberties and claim rights, and explains how limitations on basic liberties such as

the Two Freedoms require a particular type of reasoning. This section also presents a justificatory model to illustrate how an approach based on duties of justice would function. The second section presents a conceptual, normative and political case for a duty-based approach to justifying limitations on the Two Freedoms. I specifically compare the duty-based approach to the two common justificatory approaches discussed in the preceding chapter of this thesis. I accordingly argue that a justificatory approach grounded in ‘duties of justice’ imposes a more conceptually coherent, normatively compelling, and politically appealing justificatory burden on states that seek to limit the Two Freedoms.

I. GROUNDING LIMITATIONS IN DUTIES OF JUSTICE

A. Duties of justice

I begin this section by recalling what I mean by ‘duties of justice’. A right is constituted when an interest is sufficient reason to impose a duty (or duties) on others. This thesis is concerned with ‘legal rights’, i.e. the types of rights that are guaranteed by law. As noted by Jeremy Waldron, ‘I do not have a legal right to ϕ unless ϕ is in some way guaranteed to me beyond the day-to-day vicissitudes of public policy’.¹ When we speak of ‘duties’ that are imposed due to the existence of some legal right, we mean having ‘a *legal* responsibility to someone about something’;² the law has a proper place in enforcing such duties.³ Yet duties of justice must also be understood as moral duties. The mere creation of a duty through law does not

¹ Jeremy Waldron, ‘Is Dignity the Foundation of Human Rights?’ in Rowan Cruft, S Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015) 133.

² See Angela M Smith, ‘Responsibility as Answerability’ (2015) 58 *Inquiry* 99.

³ Susan James, ‘Rights as Enforceable Claims’ (2003) 103 (1) *Proceedings of the Aristotelian Society* 133; Allen Buchanan, ‘Justice and Charity’ (1987) 97(3) *Ethics* 558, 562.

automatically make it a duty of justice. States would then only have to legislate a legal duty into existence in order to meet a duty-based justificatory burden. That purely positivist understanding of legal duties is not what I have in mind when discussing duties of justice. Instead, duties of justice must be understood as the type of moral duties (owed to others) that the law has a proper role in enforcing.⁴ It is crucial to understand that duties of justice can *only* be demonstrated by reference to an entire society's conception of political justice. Public reason is therefore an indispensable element of any duty of justice. These duties are what John Stuart Mill might call 'perfect moral obligations'.⁵ Mill identifies two spheres of moral obligations – 'perfect' and 'imperfect' moral obligations – an idea analogous to what Immanuel Kant referred to as perfect and imperfect moral duties.⁶

On the one hand, 'perfect' moral duties are mandatory to fulfil. They are 'duties of justice',⁷ as they tend to translate to legal duties towards other persons. Duties of justice are duties (owed to others) that 'the state can justifiably compel people to perform'.⁸ According to Mill, the violation of these duties 'ought to be punished in some way or other'.⁹ Duties of justice

⁴ This thesis avoids the broader theoretical discussion concerning the relationship between law and morality – a discussion exemplified by the famous Hart-Fuller debate. However, it may be useful to note that duties created by law are not necessarily 'duties of justice'. See HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593; Lon Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630; Nicola Lacey, 'Philosophy, Political Morality, and History: Explaining the Enduring Resonance of the Hart–Fuller Debate' (2008) 83 *New York University Law Review* 1059; and Kate O'Regan, 'Fidelity to Law: How Bram Fischer Illuminates a Perennial Debate' (2017) 17(1) *Oxford University Commonwealth Law Journal* 171.

⁵ John Stuart Mill, *The Collected Works, Volume 10* (University of Toronto Press, 1974 [*Utilitarianism* 1861]) 247.

⁶ See Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Mary J Gregor tr Cambridge University Press 1998). Also see Julia Driver, *Ethics: The Fundamentals* (Blackwell 2007) 92; Allen W Wood, *Kant's Ethical Thought* (Cambridge University Press 1999).

⁷ Alan E Fuchs, 'Mill's Theory of Morally Correct Action' in Henry R West (ed), *The Blackwell Guide to Mill's 'Utilitarianism'* (Blackwell 2006) 147-51.

⁸ Robert E Goodin, 'Duties of Charity, Duties of Justice' (2017) 65(2) *Political Studies* 268, 268.

⁹ Mill, *The Collected Works, Volume 10*, 246.

are then the types of duties that correspond to claim rights. They are the type of duties that constrain the scope of liberties;¹⁰ liberties therefore correspond to the absence of duties of justice. On the other hand, ‘imperfect’ moral duties relate to general duties owed to others that persons are morally ‘bound to practice’, but ‘not towards any definite person, nor at any prescribed time’.¹¹ These duties do not correlate to the claim rights of others,¹² and are not the types of duties that constrain the scope of a liberty.

B. The abstract and the derivative

All individuals have the basic liberties of and claim rights to the Two Freedoms. Such abstract assertions, or what Grégoire Webber calls ‘underdeterminate formulation[s]’,¹³ denote the general human interests that the value of the Two Freedoms seeks to protect. Individuals generally have the liberty to manifest their beliefs, and express themselves. An interest in such liberty, and other associated interests such as interests in autonomy and dignity, generally supply sufficient reason to ground certain duties in others. Therefore, it is generally accurate to refer to the Two Freedoms both as liberties and claim rights – but only in the abstract sense. Conduct that is derivative of these abstract formulations may in fact be restricted. Therefore, the abstract articulation of the Two Freedoms alone tells us very little about what specific conduct associated with the Two Freedoms are free from restrictions. It does not tell us whether or not certain conduct – in specific circumstances – are actually permissible.

¹⁰ Wesley N Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (WW Cook ed Yale University Press 1919) 36-39.

¹¹ Mill, *The Collected Works, Volume 10*, 247.

¹² See Simon Hope, ‘Kantian Imperfect Duties and Modern Debates Over Human Rights’ (2014) 22 *Journal of Political Philosophy* 396.

¹³ Grégoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press 2009) 1.

Joseph Raz explains the distinction between abstract rights and their derivatives. For instance, the right to the Two Freedoms is considered a ‘general core right’, whereas making a specific statement might be conduct that is derivative of that general right.¹⁴ He observes that there could be ‘conflicting considerations’ that override such derivative conduct in particular cases. On such occasions, the general core right continues to exist in the abstract whereas the derivative conduct is overridden.¹⁵ Such occasions may arise when there is a conflict between an interest in making that statement and some other interest – for example, the conflict between the interest in expressing one’s opinion about a person, and that person’s interest in safeguarding their reputation. Raz concludes that in such cases, the reasons *against* particular derivative conduct associated with the abstract right may override those *in favour* of such derivative conduct. In such instances, there can be no ‘right’ to engage in the derivative conduct. Although one has an abstract claim right to the freedom of expression, one may not have a derivative claim right to defame a particular person. Therefore, an abstract right is ‘only a prima facie ground for the existence of a particular right in circumstances to which it applies’.¹⁶ Conduct derivative of that abstract right may be defeated by conflicting considerations, in which case the interest in question (say in expressing one’s opinion) may not be sufficient reason to ground a duty of non-interference. In such cases, the state may rightfully restrict that particular derivative conduct.

¹⁴ Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 169.

¹⁵ *ibid* 184.

¹⁶ *ibid* 249-251. Also see Carl Wellman, *Real Rights* (Oxford University Press 1995) 259-261; Jonathan Quong, ‘Rights’ in Gerald F Gaus and Fred D’Agostino (eds), *The Routledge Companion to Social and Political Philosophy* (Routledge 2012) 618, 626-627; Mark McBride, ‘Raz’s Definition of a Right’ (2018) 13(2) *Ratio Juris* 460.

If the distinction between the abstract and the derivative is properly understood, it becomes clear that limitations on the Two Freedoms ultimately concern the question of whether an individual has the liberty and claim right to engage in specific conduct. For example, although an individual possesses, in the abstract sense, the basic liberty and claim right called the freedom of expression, they may neither have a derivative liberty to incite violence, nor a derivative claim right to be free from interference with such incitement. For instance, an individual is unlikely to have a *liberty* to incite violence, as the individual is likely to owe a competing duty to others to refrain from causing physical harm to them. An individual is unlikely to have a *claim right* to incite violence, as an individual's interest in inciting violence is unlikely to offer sufficient reason to ground any duties (in others) to not interfere with such incitement. If this is indeed how limitations work, then a permissible 'limitation' on the Two Freedoms is ultimately a reasoned *conclusion* we draw about particular conduct that is associated with the abstract notion of the Two Freedoms; we conclude that the conduct, in the specific circumstances under consideration, is excluded from the protective scope of the Two Freedoms.

C. Demonstrating duties of justice

We might recall that an unconstrained interest-based approach would require states to justify a limitation on the Two Freedoms on the basis of a compelling interest or several compelling interests. Under a constrained interest-based approach, the state would need to justify the limitation on the basis that it serves a very specific type of competing interest – such as an interest in a basic liberty.

Constructing an alternative justificatory approach to limiting the Two Freedoms begins with the idea that the Two Freedoms are, first and foremost, basic liberties. According to the Hohfeldian conception of a liberty, which I think is both widely accepted and conceptually compelling, a liberty can only be constrained by a competing duty. We may then recall that this thesis is concerned with the legal domain, and therefore with duties that the law ought to concern itself with. These are called ‘duties of justice’. Individual liberty can only be constrained by competing duties of justice. Therefore, whenever an individual has the liberty to do something, it is safe to say that the individual does not owe others a duty of justice to refrain from doing that thing. This conceptual framework helps us determine whether or not an individual has the liberty to engage in specific conduct that is derivative of the abstract liberties that we refer to as the Two Freedoms. If there is a duty of justice to refrain from engaging in such specific conduct, the individual has no liberty in that respect, and the state may be justified in restricting the impugned conduct. This action can be called a ‘limitation’ because the state, in effect, has excluded the specific conduct from the protected realm of the Two Freedoms, thereby defining the *limits* of the Two Freedoms. Therefore, a ‘limitation’ basically concerns setting the boundaries of the *abstract* notions of the Two Freedoms. The derivative conduct in question is effectively excluded from the abstract notions of the Two Freedoms in the specific circumstances under consideration. In those circumstances, there would be neither a liberty nor a claim right to engage in the impugned conduct.

Demonstrating a duty of justice essentially requires the state to establish that the competing interests at stake are important enough to impose on the individual concerned a duty *to refrain from the impugned conduct*. The existence of this duty of justice only confirms that the competing interests are independently or in combination sufficient reason to ground a duty in the individual concerned. Such duties can be called ‘horizontal’ duties, because these are

duties individuals owe other individuals;¹⁷ they may be contrasted with the types of obligations that the state owes individuals. There may be situations where a single competing interest is not sufficient reason to ground such a duty of justice in the individual, but several such interests *together* supply sufficient reason to ground such a duty. I am suggesting that a duty of justice does not necessarily correlate to a single interest capable of grounding duties in others. Instead, a duty of justice could be grounded in several competing interests, which *together* are sufficient reason to ground the duty of justice. These interests can come together to constitute a specific claim right (held by others) that the individual concerned refrain from the impugned conduct. This horizontal duty then serves to carve the impugned conduct out from the protective scope of the Two Freedoms. Conceptually speaking, since the scope of a liberty is defined by the absence of duties, competing duties can set the limits of basic liberties such as the Two Freedoms.

How does the state go about demonstrating a duty of justice? One might say this is a matter of reasoning for which there can be no precise formula.¹⁸ A duty of justice is not the starting point of the reasoning process, but is instead the endpoint. It is the destination one arrives at when one convincingly establishes that the competing interests against the conduct in question are important enough to constitute a claim right against the conduct, thereby imposing a horizontal duty on the individual concerned to refrain from the conduct. The state would need to establish that the competing interests of others are sufficient *reason* to impose a duty of

¹⁷ See John H Knox, 'Horizontal Human Rights Law' (2008) 102(1) *The American Journal of International Law* 1, 2. Also see Fernando Berdion Del Valle and Kathryn Sikkink, '(Re)discovering Duties: Individual Responsibilities in the Age of Rights' (2017) 26(1) *Minnesota Journal of International Law* 189, 205; Darrel Moellendorf, *Cosmopolitan Justice* (Routledge 2002) 31-34.

¹⁸ Delving into the various conceptions of 'reasoning' is perhaps an unwarranted deviation. It suffices to say that reasoning, which often concerns 'practical reasoning', entails resolving questions of how to act through rational reflection and deliberation. See Joseph Raz, *Practical Reason and Norms* (Oxford University Press 1999) 15-16. Also see Hugh G Petrie, 'Practical Reasoning: Some Examples' (1971) 4(1) *Philosophy & Rhetoric* 29-41; David A J Richards, *A Theory of Reasons for Action* (Clarendon Press 1971).

justice on the individual concerned. Doing so would entail the presentation of good, publicly justifiable reasons for recognising the importance of the competing interests at stake.¹⁹ We may recall that in the first chapter of this thesis, I took good reasons to correspond to what John Rawls called ‘public reason’,²⁰ i.e. reasons that are publicly available, and accessible.

If a competing interest relates to a pre-recognised abstract right, the task of demonstrating a duty of justice might look easier. For example, the state could refer to the pre-recognised right to non-discrimination when asserting an individual’s duty of justice to refrain from inciting discrimination against others. An interest in non-discrimination is, typically, sufficient reason to ground a duty in an individual to *refrain from* inciting discrimination. This duty of justice could form the basis for excluding the impugned conduct (i.e. the incitement to discrimination) from an individual’s basic liberty to express views.

This type of reasoning becomes less straightforward when the competing interests do not appear to relate directly to a pre-recognised right. For instance, in a case involving the public display of obscene material, the competing interests at stake may relate to the preferences of others with respect to their own sexual experience.²¹ How should a state come to frame a duty of justice based on such competing interests? Could, for example, a ‘claim right’ to a sexual experience of one’s choice be conceived in this instance? Conceiving of such a right could lead to the proliferation of ‘rights-talk’,²² which risks recasting every human interest as an interest

¹⁹ Raz, *Practical Reason and Norms*, 16-17.

²⁰ John Rawls, *Political Liberalism: Expanded Edition* (Columbia University Press 2005) 212-254.

²¹ Ronald Dworkin cites this interest during his discussion on the restriction of the public display of pornography. See Ronald Dworkin, ‘Do We Have a Right to Pornography?’ (1980) 1 *Oxford Journal of Legal Studies* 177, 205.

²² See Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (The Free Press 1991) for an incisive critique of the proliferation of the ‘rights’ vocabulary.

that gives rise to a right. The potential danger in such an approach is that it could devalue rights that are relatively more important. In any event, our preference about our sexual experiences may not by itself be sufficient reason to impose a duty on others to refrain from expressing themselves. However, there may be other interests at stake, for example, the interests of parents to shield their children from premature exposure to sexually explicit material, and indeed the interests of children in being shielded from such material. It is not inconceivable that a combination of such interests can suffice to constitute a claim right (held by others) against the public display of ‘obscene’ material. This right would ground a horizontal duty in the individual concerned to refrain from publicly displaying obscene material. The state could conceivably present a combination of these interests as good reasons to impose on the individual a legally enforceable duty of justice. In such an event, a duty of justice to refrain from the impugned conduct could form the basis for a limitation on the individual’s freedom of expression.

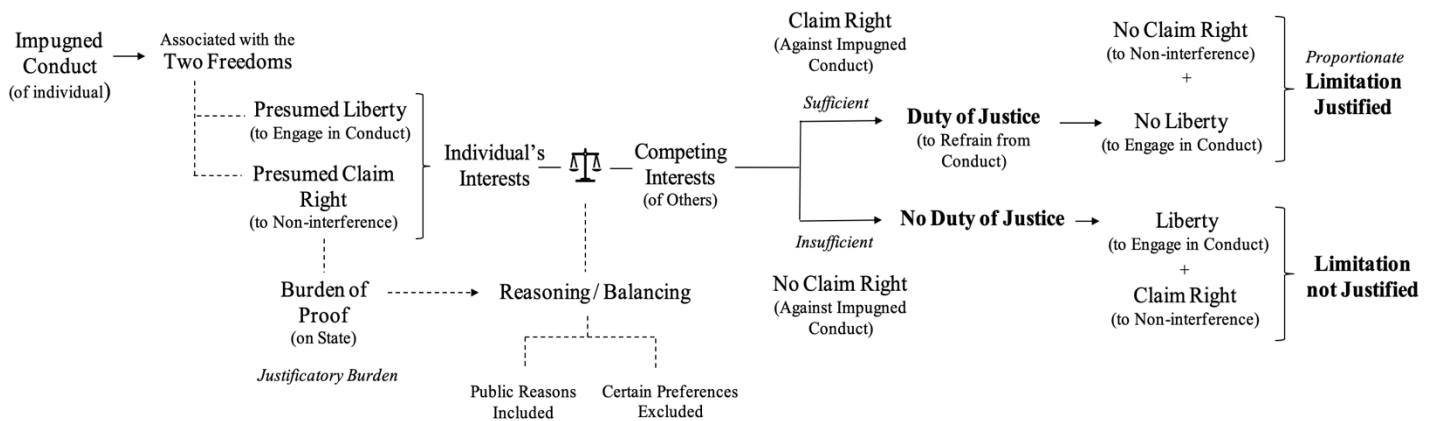
While some interests might supply good, publicly justifiable reasons for imposing duties of justice on individuals, there are certainly other interests that do not. It may then be useful to specify which types of interests usually fail to supply publicly justifiable reasons. For instance, purely subjective preferences, such as personal disagreement with a religious view, or dislike for a piece of art, usually fail to provide good reasons for limiting the Two Freedoms. We can conclude so based on the fact that none of these preferences can be ‘publicly justified’;²³ they do not fall within the rubric of ‘public reason’, i.e. those standards and values that are publicly

²³ Gerald F Gaus, *Justificatory Liberalism: An Essay on Epistemology and Political Theory* (Oxford University Press 1996) 160, 172. Gaus argues that Mill’s harm principle can be interpreted in the following way: ‘The harm principle is thus a further articulation of the idea that we are immune to justified interferences on the grounds of religion or ideas of the good life. Impositions on others justified in terms of dislike, disapproval, sinfulness, and so on, are disallowed – they are not good reasons for intervention.’

available and acceptable.²⁴ Moreover, ‘non-public reasons’,²⁵ such as reasons purely based on a religious doctrine or cultural value accepted by only part of the population, also fail to supply good reasons to ground duties of justice in individuals. A justificatory approach that compels states to engage in public justification, using public reason alone, would therefore rule out reliance on purely subjective preferences, and non-public reasons.

The duty-based approach I am proposing might be explained further through a justificatory model. This model is only meant to roughly illustrate how the approach might work, and ought not to be understood as a formula that can produce the right answers.

Figure 1



The justificatory model depicted in Figure 1 contemplates three stages. First, the individual concerned will wish to engage in particular conduct (the ‘impugned conduct’) that they assert

²⁴ Rawls, *Political Liberalism*, 213. Scholars such as Mattias Kumm and Kai Möller endorse this approach. See Mattias Kumm, ‘The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review’ (2010) 4 *Law & Ethics of Human Rights* 142, 159; Kai Möller, ‘Proportionality: Challenging the Critics’ (2012) 10 *International Journal of Constitutional Law* 709, 725.

²⁵ Rawls, *Political Liberalism*, 220.

is associated with the abstract basic liberty of the Two Freedoms. The conduct must at least in some loose and descriptive sense fit the broad contours of the Two Freedoms. For example, an artist satirising a religious leader fits within the descriptive bounds of the freedom of expression. The association of the conduct with the Two Freedoms is only tentative. Such asserted association results in the presumption that the individual has the liberty to engage in the conduct, i.e. a 'presumed liberty' to engage in the conduct. We could presume that the interest that such an individual has in making choices about what to express (i.e. an interest in personal autonomy) is sufficient reason to ground in others a duty to not interfere with the impugned conduct. Therefore, we may also presume that the individual has a claim right that no one interferes with such conduct, i.e. a 'presumed claim right' to non-interference. A 'limitation' entails the reasoned *exclusion* of the impugned conduct (in the circumstances under consideration) from the scope of the Two Freedoms. A limitation is effectively an exercise in setting the limits or boundaries of the Two Freedoms in the circumstances under consideration. If indeed individual freedom is presumed to be the default starting point, the burden of proof lies with those claiming to limit such freedom; to justify a limitation on the Two Freedoms, the state must *displace* the presumption in favour of the individual's basic liberty and claim right to engage in the conduct associated with the Two Freedoms.

Second, the state would need to identify the competing interests at play. Its justificatory burden can only be satisfied by balancing the individual's interest in engaging in the impugned conduct with the competing interests of others. This process of reasoning or 'balancing' requires the state to identify good, publicly justifiable reasons in favour of the competing interests at play. For example, the interest of others to live in a tolerant society may constitute a relevant reason for restricting an artist from satirising a religious leader. By contrast, a preference held

by others that their religion should be recognised as superior to other religions may be a subjective preference that does not constitute a publicly justifiable reason.

Third, the state would need to engage in a process of practical reasoning or ‘balancing’ to weigh the individual’s interests (e.g. in personal autonomy) against the competing interests of others. Through such a reasoning process, the state must demonstrate that the competing interests are sufficiently weighty to impose on the individual concerned a duty of justice to refrain from engaging in the impugned conduct. On the one hand, if such competing interests are sufficiently weighty, others would hold a claim right that the individual refrains from engaging in the impugned conduct. Such a claim right corresponds to a horizontal duty of justice (owed to others) to refrain from such conduct. If indeed such a duty of justice is demonstrated, the state successfully displaces the presumption in favour of the individual liberty and claim right, and the limitation in question is justified. I would only add that the specific state measure under consideration, i.e. the assigned penalty for engaging in the restricted conduct, should be ‘proportionate’. For example, imprisonment or extremely heavy fines may often be disproportionate penalties, even when a limitation of some kind is justified.²⁶ Therefore, the duty-based approach I am proposing does not dispense with the requirement of proportionality *stricto sensu*; yet it only considers this requirement at the very end of the assessment of the limitation, and only once a duty of justice has been demonstrated through the presentation of publicly justifiable reasons.

²⁶ While a duty of justice may form the basis for restricting specific conduct associated with the Two Freedoms, the *specific means* by which the restriction is imposed may be subject to further considerations, such as proportionality. For example, a duty of justice may ground the state’s justification for restricting the public display of obscene material. However, the state is still bound by considerations of proportionality. While it may be proportionate to fine a person for displaying obscene material in a public place, it may be disproportionate to incarcerate that person.

On the other hand, if the weight of the competing interests is not sufficient to impose on the individual concerned a duty of justice to refrain from engaging in the conduct, the initial presumption in favour of the individual's liberty and claim right would remain intact. The proposed limitation would not be justified. In such circumstances, the *presumed* liberty and claim right would be *established* as a concrete liberty to engage in the impugned conduct, and a concrete claim right against interference with the conduct respectively. For example, if the competing interests against an artist satirising a religious leader are not sufficient to ground in the artist a duty of justice to refrain from such satirising, the artist retains a concrete liberty to satirise the religious leader, and a concrete claim right against interference with their conduct.

II. THE CASE FOR A DUTY-BASED APPROACH

There are conceptual, normative and political reasons to adopt a duty-based approach to justifying limitations on the Two Freedoms. In this section of the chapter, I present arguments in favour of placing duties of justice at the centre of the state's burden to justify limitations. I do not intend to discard the two common approaches explored in the first chapter of this thesis, i.e. an unconstrained interest-based approach, and a constrained interest-based approach. Each of these approaches have merits worth building on. The duty-based approach that I have in mind aims to both build on these merits and to address some of the weaknesses in these two approaches. It may be useful to reiterate that my use of the phrase 'duty-based justificatory approach' reflects two indispensable elements that the state must satisfy: first, the presentation of only good, publicly justifiable reasons; and second, the demonstration of a duty of justice. Under this approach, the state must present good, publicly justifiable reasons for why the competing interests at stake are sufficient to impose on the individual concerned a duty of justice to refrain from the impugned conduct. I will accordingly present a conceptual, normative and political case for a duty-based approach to justifying limitations on the Two Freedoms.

A. The conceptual case

We can make the conceptual claim that individual liberty to engage in particular conduct reflects the absence of any duty of justice to refrain from such conduct. One has a liberty to do something whenever one has no duty to refrain from doing that thing. Therefore, it makes conceptual sense to always require the state to demonstrate a duty of justice when justifying a limitation on the Two Freedoms.

An unconstrained interest-based approach is less conceptually coherent when it comes to limiting basic liberties. This approach does not, methodologically speaking, entail the demonstration of a duty when weighing the importance of the competing interests at play. It also offers no concrete placeholder to signal that the weight of the competing interest is actually greater than the individual liberty at stake. This problem can be overcome to some extent when the competing interest must at least supply sufficient reason to ground a duty of justice. We then gain some sense of a threshold to aspire to.

The idea that rights can signal a threshold of importance or intensity is evident in Mill's writing. He refers to two means of social interference to prevent harm to others: interference through legal coercion and interference through public opinion. The two spheres of duties owed to others – perfect and imperfect moral duties – correspond to the two distinct means of interference to prevent harm to others. Mill first explains that the conditions required for fulfilling perfect moral duties (i.e. duties of justice) towards others ought to be enforced by

society ‘at all costs to those who endeavour to withhold fulfilment’.²⁷ Therefore, using the means of law and legally-sanctioned punishment to interfere with individual conduct *that violates rights* is a justified societal endeavour. Mill then explains that this is not ‘all that society may do’.²⁸ Certain individual acts may be ‘hurtful to others, or wanting in due consideration for their welfare, without going to the length of violating any of their constituted rights’.²⁹ Mill insists that in such cases, ‘the offender may then be justly punished by opinion, *though not by law*’ (emphasis added).³⁰

The state’s justification for using legally coercive means to restrict individual conduct boils down to whether the person in question has a ‘duty of justice’ to do or not to do something. If the conduct is either purely self-regarding, or only involves imperfect moral duties towards others, no ‘duty of justice’ arises. If an imperfect moral duty does exist, the most society may be permitted to do is to punish the individual by ‘opinion’, that is to say, public censure. If a person owes a ‘duty of justice’ to others to refrain from engaging in the conduct, society has jurisdiction to interfere with the conduct through both opinion *and* law. In such cases, the state could justify its authority to restrict the conduct through the coercive means of the law.

The distinction drawn by Mill is useful for the present discussion. Under a duty-based approach, limitations on the Two Freedoms through the coercive means of the law may be justified only when the competing interests in question are important enough to impose a duty of justice on the individual. This justificatory burden is similar to how the state’s burden under

²⁷ John Stuart Mill, *On Liberty* (1859) 69.

²⁸ Mill, *On Liberty*, 69.

²⁹ *ibid.*

³⁰ *ibid.*

an unconstrained interest-based approach might operate; except that under a duty-based approach, the state must establish that the interest is weighty enough to impose on the individual concerned a duty of justice to refrain from the impugned conduct. It is by demonstrating this duty of justice that the state ultimately meets its justificatory burden.

Unlike a constrained interest-based approach, a duty-based approach does not contain a starting premise that rights ‘trump’³¹ or have ‘lexical priority’³² over other interests. At the outset, it does not exclude any interest (within public reason) from the justificatory process. The array of publicly justifiable reasons that may be considered under a duty-based approach is therefore similar to what may be considered under an unconstrained interest-based approach. Yet what sets the duty-based approach apart from an unconstrained interest-based approach is that it requires the state to demonstrate that the weight of the competing interests meets some sufficiency threshold, i.e. that there is sufficient reason to impose on the individual concerned a duty of justice to refrain from engaging in the impugned conduct. A duty of justice, in this sense, signals the threshold that the weight of a competing interest must reach to justify the limitation. If indeed the scope of an individual liberty is shaped by the competing duties that an individual owes others, this type of duty-based justificatory burden appears to be conceptually coherent.

³¹ Ronald Dworkin, ‘Rights as Trumps’ in Jeremy Waldron (ed), *Theories of Rights: Oxford Readings in Philosophy* (Oxford University Press 1984).

³² John Rawls, *A Theory of Justice: Revised Edition* (Harvard University Press 1999) 177-178.

B. The normative case

Rights should be taken seriously. Interference with rights require good reasons because of the way societies conceptualise ‘rights’; they, for instance, are distinguishable from mere ‘standards’. According to Anthony Langlois, the real distinction between a ‘right’ and a ‘standard’ boils down to the ‘the manner in which people properly conceptualise what they have in a [right], and this in turn depends upon the wider form of government in which [rights] are embedded’.³³ Langlois observes that in an authoritarian system, a so-called ‘human right’ is not a right at all, but a ‘condescension, a privilege, a long leash...it is a form of charity which may be withdrawn at the whim of the individual or group in authority’.³⁴ A ‘right’, therefore, is not contingent on the permission of those in authority. If it were, it would not be a ‘right’ in a normatively meaningful sense, and would only be a ‘demand’ reflected in, at best, a ‘standard’ of some kind. Those who possess such ‘rights’ would not be in a position to claim such ‘rights’ in a meaningful sense; they would not be in a position to demand, and actually secure, the action of others.³⁵ If the normative characteristic of a ‘right’ was to be retained, the scheme through which the right may be justifiably limited should not be subject to the whims of the individual or group in authority – or indeed the whims of the state. This conclusion is merely a corollary of our chosen conception of rights; if rights are not contingent on the whims of the state, then it follows that the limitation of rights is also not contingent on the whims of the state. A heavy burden of justification would need to be imposed on a state that seeks to limit rights *because*

³³ Anthony Langlois, ‘Human Rights without Democracy? A Critique of the Separationist Thesis’ (2003) 25 *Human Rights Quarterly* 990, 1014.

³⁴ *ibid.*

³⁵ See Henry Shue, *Basic Rights: Substance, Affluence, and U.S. Foreign Policy* (2nd edn. Princeton University Press) 13. Shue argues that a right ‘provides a rational basis for a justified demand’. He adds: ‘...to have a right is to be in a position to make demands of others, and to be in such a position is, among other things, for one’s situation to fall under general principles that are good reasons why one’s demands ought to be granted.’

rights are normatively serious things. Therefore, as long as a society is serious about rights, it stands to reason that interference with rights requires justification based on good, publicly justifiable reasons. As noted by Luc Tremblay when he explains the idea that rights have priority over other interests, ‘rights block all legislative infringements that are not justified by a ‘good reason’’.³⁶ This is not to say that rights automatically trump all other interests. Instead, normative prioritisation of rights only reinforces their importance, and requires that when rights are involved – even in the abstract sense – limitations on conduct must only be for good, publicly justifiable reasons.

The normative prioritisation afforded to rights in general easily extends to the concept of individual liberty. Basic liberties such as the Two Freedoms become meaningless without a claim right to them. The interests in such liberties and the values that underlie them are surely important enough to ground duties in others. If such liberties were considered to be normatively important, then it follows that we should generally recognise claim rights to such basic liberties. By implication, limitations on such liberties and claim rights require special justification. A duty-based approach to justifying limitations on the Two Freedoms contemplates such prioritisation, and is therefore normatively compelling.

We might ascribe a special place to the Two Freedoms, and maintain that, even where other liberties may not necessarily require it, the liberties that are related to a person’s inner realm of thinking and believing – the *forum internum*³⁷ – attract a justificatory presumption in

³⁶ Luc B Tremblay, ‘An Egalitarian Defense of Proportionality-based Balancing’ (2014) 12(4) *International Journal of Constitutional Law* 864, 866.

³⁷ See Peter Petkoff, ‘Forum Internum and Forum Externum in Canon Law and Public International Law with a Particular Reference to the Jurisprudence of the European Court of Human Rights’ (2012) 7 *Religion and Human Rights* 183; Mari Stenlund and Pamela Slotte, ‘Forum Internum Revisited: Considering the Absolute

their favour. As discussed in the first chapter of this thesis, the liberal tradition has a special commitment to religious toleration.³⁸ Moreover, free speech is considered valuable to liberalism, as it enables (among other things) a process of public justification through the use of public reason – an idea fundamental to liberalism.³⁹ Therefore, at least in the case of the Two Freedoms, it would be up to those denying such liberty to justify the denial. These features are perhaps what sets conduct connected to the Two Freedoms apart from other forms of conduct. When the conduct ostensibly relates to manifesting one's religion or belief, or expressing one's opinion, those who wish to restrict such manifestation or expression, i.e. the state, bear the burden of demonstrating why such conduct ought to be restricted; it is not the individual who needs to demonstrate why such manifestation or expression should not be restricted.

The imposition of this burden of justification on the state, and not the individual, may simply boil down to the general normative importance afforded to individual liberty, and the special normative importance afforded to the Two Freedoms. This claim derives from the fundamental principle of liberalism – that freedom is the default position, and those who seek to restrict freedom bear the burden of justification. If that principle is accepted, the idea that the state must demonstrate a duty of justice to justify a limitation on the Two Freedoms plausibly follows. It follows that when certain conduct is presumptively associated with the Two Freedoms, the conduct cannot be interfered with unless it is eventually demonstrated that the conduct is not part of the Two Freedoms. This claim seems tautological. Yet it is only reflective

Core of Freedom of Belief and Opinion in Terms of Negative Liberty, Authenticity, and Capability' (2018) 19 *Human Rights Review* 425.

³⁸ Gaus, *Justificatory Liberalism*, 160. Also see David A J Richards, *Toleration and the Constitution* (Oxford University Press 1986); Heiner Bielefeldt, 'Limiting Permissible Limitations: How to Preserve the Substance of Religious Freedom' (2020) 15(1) and (2) *Religion and Human Rights* 3, 7-10.

³⁹ Gaus, *Justificatory Liberalism* 167; Mill, *On Liberty*, 24.

of a normative *presumption* that the conduct in question – so long as it is part of the Two Freedoms – cannot be interfered with. The state can displace this presumption by providing good, publicly justifiable reasons for excluding the specific conduct from the protective realm of the Two Freedoms. Such a justificatory burden helps retain the normative importance of the Two Freedoms, as particular conduct would have to be excluded from their protective realm for restrictions on such conduct to be justified. As pointed out by Heiner Bielefeldt, the language of ‘balancing’ can cause a misunderstanding that the burden of justification lies on both sides of the equation;⁴⁰ it can create the perception that those who are for and against the limitation have an equal burden of proof. Yet he correctly notes that when it comes to certain fundamental freedoms, their normative importance require a completely different starting point.⁴¹ The burden of justification lies solely with those arguing for the limitation. An unconstrained interest-based approach may not adequately capture this justificatory burden. By contrast, a duty-based approach begins with the presumption in favour of the Two Freedoms. To demonstrate that the conduct is not actually part of the Two Freedoms, the state would need to demonstrate that the individual concerned owes a *duty of justice* to refrain from engaging in the conduct. A duty of justice, once demonstrated, becomes the placeholder for the good reasons for imposing coercive legal measures against the conduct in question. This scheme is what I have sought to illustrate in the justificatory model depicted in Figure 1. It is my contention that a duty-based approach reinforces our normative commitment to the Two Freedoms.

C. The political case

A political case can be made for adopting the duty-based approach I have in mind. A duty-

⁴⁰ Bielefeldt, ‘Limiting Permissible Limitations’, 10.

⁴¹ *ibid.*

based approach can place a counter-majoritarian check on state authority to impose limitations on the Two Freedoms. There are at least two political risks associated with granting the state the authority to limit the Two Freedoms.

First, the state can use a limitation regime to advance its own interests, including interests in maintaining power through appeasing the majority community. Minorities, and those with views that offend a majority community, can be unjustly targeted, and their Two Freedoms may be limited for reasons that are not publicly justifiable. In this context, majoritarian interests can infiltrate limitation grounds such as national security, public safety, public order, public health, and public morals. These grounds can become placeholders for majoritarian conceptions of security, safety, order, health, and morality.

We see plenty of examples of majoritarian conceptions of ‘public’ interests. I referred to three such examples in the introductory chapter of this thesis. One example is Pakistan’s longstanding efforts to limit the liberty of Ahmadis to present themselves as Muslims in public. The asserted grounds for such limitation are often public order, and public morals. The state’s reasoning has usually centred on the claim that such public displays cause outrage among the Sunni majority, and that such outrage presents a threat to public order.⁴² The state has further argued that the notion that ‘Ahmadis are also Muslims’ threatens public morals, which are incidentally based on the moral sensibilities of the Sunni majority.⁴³ This type of justification has in fact translated into very serious restrictions on the religious practices of Ahmadis in

⁴² See for example, *Zaheeruddin v State* (1993) SCMR 1718 (Supreme Court of Pakistan).

⁴³ Amjad Mahmood Khan ‘Pakistan’s Anti-Blasphemy Laws and the Illegitimate use of the “Law, Public Order, and Morality” Limitation on Constitutional Rights’ (2015) 13(1) *The Review of Faith & International Affairs* 13, 19.

Pakistan.⁴⁴ Another example is the ban on certain types of Islamic attire in many countries in Europe. France, Switzerland, Belgium, and Turkey, for instance, have sought to ban certain Islamic attire of women, including the niqāb, burqa, and hijab, on grounds such as public order, and the rights of others. In France, the ban on the niqāb (a full face veil) is justified based on the claim that such attire is incompatible with ‘European’ values such as ‘living together’.⁴⁵ Similarly, in Turkey, bans on the Islamic headscarf are justified on the basis of ‘secularism’.⁴⁶ It is often asserted that these broad notions are connected to public order. Yet there is a sense that these notions of ‘living together’ and ‘secularism’ are based on a distinctly ‘European’, and majoritarian conception of public order.⁴⁷ Finally, in Russia, the state has sought to restrict the advocacy of same sex equality on the basis of public morals.⁴⁸ In this example too, a distinctly majoritarian conception of what constitutes morals is evident, as the idea that homosexuality is wrong no doubt stems from a heteronormative worldview. I shall return to these examples in later chapters of this thesis. For now, it suffices to say that they reflect how minorities and dissenting voices are especially vulnerable to unjustified limitations on their Two Freedoms. It

⁴⁴ According to one study, between April 1984 and 31 December 2017, 765 Ahmadis faced charges for publicly displaying the *kalimah* on their clothing, i.e. the declaration that ‘There is none worthy of worship except Allah and Muhammad is the Messenger of Allah’. See United Kingdom Home Office, *Country Policy and Information Note Pakistan: Ahmadis* (March 2019) 38.

⁴⁵ See for example, *S.A.S v France*, Application No 43835/11 (ECtHR judgment [GC] of 1 July 2014); *F.A v France*, Communication No 2662/2015 (CCPR views adopted on 16 July 2018), CCPR/C/123/D/2662/2015.

⁴⁶ See for example, *Leyla Şahin v Turkey*, Application No 44774/98 (ECtHR judgment [GC] of 10 November 2005). Incidentally, wearing a wig as a substitute for the headscarf has also been restricted in Turkey. See *Seyma Türkan v Turkey*, Communication No 2274/2013 (CCPR views adopted on 17 July 2018), CCPR/C/123/D/2274/2013/REV.1. In this case, the author was not allowed to attend a university she had gained admission to because she wore a wig to cover her hair in place of a headscarf.

⁴⁷ See Stephanie E Berry, ‘A “Good Faith” Interpretation of the Right to Manifest Religion? The Diverging approaches of the European Court of Human Rights and the UN Human Rights Committee’ (2017) 37(4) *Legal Studies* 672. Also see Stephanie E Berry, ‘Aligning Interculturalism with International Human Rights Law: “Living Together” without Assimilation’ (2018) 18(3) *Human Rights Law Review* 441. In the latter article, Berry notes that the French government’s conception of ‘living together’ can ‘allow the majority to set the terms of societal membership’, and ‘does not recognize the need for mutual adaptation’ (p. 469).

⁴⁸ See for example, *Fedotova v The Russian Federation*, Communication No 1932/2010 (CCPR views adopted on 31 October 2012), CCPR/C/106/D/1932/2010.

then makes sense to adopt a justificatory approach that can adequately constrain the state's ability to advance majoritarian interests when limiting the Two Freedoms of minorities and dissenters.

Second, the state can sometimes offload its own obligations towards those in society by limiting an individual's Two Freedoms. For example, when a religious practice or speech-act causes others to react in ways that harm third parties, the state may choose to restrict the specific religious practice or speech-act rather than to focus on the wrongdoers. Yet it is the state that owes a principal obligation to maintain law and order in such circumstances, and it is up to the state to punish those who engage in acts of violence. This type of evasion of obligations can take place when such acts of violence are perpetrated by members of the majority community; the state may be tempted to target the individual whose conduct prompted the wrongdoing, rather than risk confronting the majority community. In such circumstances, the state may attempt to justify restricting the religious practice or speech-act on the basis that the state has a positive obligation to third parties in society to protect them from the violent reactions of these perpetrators. It may do so regardless of how unreasonable the reaction of the perpetrators might be. Such limitations on the Two Freedoms are deeply problematic, as they are not based on the duties the individual concerned owes other individuals or the community at large, but are instead based on reasons relating to the unreasonable reactions of others.

A duty-based approach to justifying limitations on the Two Freedoms makes it slightly more difficult for the state to advance its own interests or offload its own obligations. Such an approach would require the state to establish that the competing interests of others are sufficient to ground a duty of justice in the individual concerned. If, for instance, it is an interest in public order that is being advanced in a particular context, the state would need to demonstrate that

the ‘public order’ interests that others might have in the prevention of lawlessness are actually sufficient reason to constitute their claim right against specific conduct connected to such lawlessness. Such a claim right can generally ground duties in individuals to refrain from acts of lawlessness. It can also ground in the state an obligation to maintain law and order. Yet it is not obvious that an individual merely manifesting a religious belief, or expressing themselves, also owes a duty to refrain from such conduct, even where the lawlessness is a response to such conduct – especially where such conduct is not carried out with the intention to incite others. The duty-based approach introduces an important element to this equation. Any competing interests that form the basis of a limitation on an individual’s Two Freedoms must be sufficient to ground in *that individual* a duty of justice to refrain from the *specific* conduct in question.

A constrained interest-based approach may place similar checks on political power, as the approach would, from the outset, exclude certain types of interests. The question would naturally arise as to whether a duty-based approach merely mirrors such an approach. There is, however, an important distinction between a constrained interest-based approach, and the duty-based approach that I have in mind. Under a constrained interest-based approach, certain types of interests, such as collective interests, are excluded at the outset. By contrast, the duty-based approach that I have in mind does not rule out all collective interests. The focus is not on the specific types of interests at play, but rather on whether or not the interests at play are sufficient to ground duties of justice. Such an approach is preferable to a constrained interest-based approach, where commonly-valued collective interests such as interests in public health and public safety could be excluded from the outset. It makes more political sense to include a wider range of collective interests in the equation, and to rely on a process of reasoning to determine the permissibility of limitations on the Two Freedoms. There is political value to this manner of reasoning, as the consensus reached through such reasoning is more likely to be legitimate

and stable – ideals that John Rawls identifies as important when envisioning a system of justice based on political liberalism.⁴⁹ The consensus is more likely to be legitimate if the justification for the restriction on individual conduct (through coercive legal means) is based on common reasoning that takes a wider range of interests into consideration. The consensus is more likely to be stable if many individuals relate to the justification for the limitation, and obey the law because they are convinced of the good, publicly justifiable reasons that underlie it. Rawls's insistence on public reason ultimately rests on these political values of legitimacy and stability.⁵⁰

A brief illustration may help explain the political case for the duty-based approach. We may come across situations in which an individual's criticism of a religious practice offends and incenses members of a religious community. If members of this community decide to engage in acts of violence and cause public unrest in retaliation to the state's tolerance of such criticism, the question arises as to whether the state would be justified in restricting the individual's criticism. The state may articulate its reasons for restricting such criticism in the following manner: individuals in society have an interest in public order, and so long as such criticism causes others to engage in acts of public disorder, the state may legitimately restrict such criticism.

There are good reasons for rejecting the state's asserted justification for the limitation. The interest at stake, i.e. the interest in public order, is certainly important, and may be sufficient to ground certain duties in others. The obvious duties here include the positive obligation of

⁴⁹ Rawls, *Political Liberalism*, 137, 203-206.

⁵⁰ For a useful discussion on Rawls's idea of political legitimacy and stability, see Edward Song, 'Rawls's Liberal Principle of Legitimacy' (2012) 43(2) *Philosophical Forum* 153; Silje A Langvatn, 'Legitimate, but Unjust; Just, but Illegitimate: Rawls on Political Legitimacy' (2016) 42(2) *Philosophy and Social Criticism* 132.

law enforcement officers to maintain law and order, and prevent violence. They also include the duties of individuals to refrain from engaging in such violence. But this process of reasoning does not appear to point to a duty to refrain from criticising a religious practice – even if such criticism appears to ‘cause’ others to commit acts of violence.

Let us imagine *A*, an activist, criticises the practice of child ordination among the Buddhist community, which also happens to be the majority community in the country. Child ordination in this country has deep historical roots, and is generally revered by the majority community as an important cultural practice. This criticism incenses *B*, the leader of a militant Buddhist organisation, who calls upon the state to arrest *A*, and ban similar criticism. The state initially takes no action. *B* and his organisation then decide to commit minor acts of violence targeting public buildings, causing serious disruption to the daily lives of other citizens. *C* is among those citizens seriously affected by the unrest. The state arrests some of the perpetrators, but also decides to prohibit *A* from engaging in any further criticism of child ordination. It justifies the prohibition on the basis that the impugned conduct, i.e. the criticism of child ordination, causes others (such as *B*) to take the law into their own hands, which impairs the interests of third parties such as *C*. An unconstrained interest-based approach may not be well equipped to deal with this problem. If the state’s justificatory burden only entails weighing the individual’s interest in criticising the practice against the interests of others in public order, the state’s restrictive measure may evade proper scrutiny. The state’s attempt to appease the majority, or offload its positive obligations to contain violence perpetrated by members of the majority community, could go unchecked. A duty-based approach may, however, offer clearer guidance.

The fact that *B*'s interests are not sufficient to ground a duty of justice in *A* may be fairly clear. *B*'s interests are not publicly justifiable, as they are based on subjective antagonism towards criticism of a particular religious practice. But it also does not seem obvious that *A* owes *C* a horizontal duty to refrain from criticism. *B*'s unlawful actions, which affect *C*'s interests in public order, are not publicly justifiable reasons for restricting *A*'s conduct. To say *C*'s interests are publicly justifiable reasons to limit *A*'s conduct seems unreasonable, as it ignores the fact that it is *B*'s conduct and not *A*'s conduct that actually results in setbacks to *C*'s interests. The notion that one is not liable for the actions of others is not unusual in law. In fact, as observed by Andrei Marmor, under tort law, 'one would not be held liable for harm or injury caused to the plaintiff if the harm resulted from deliberate intervention of another agent'.⁵¹ The agency of another 'may sever the causal chain'.⁵² Therefore, the state would need to do much better to demonstrate that *A* individually owes a duty of justice to *C*, if indeed it is *C*'s interest that grounds the justification for restricting *A*'s conduct.

It is not obvious that *C*'s interest in public order grounds in *A* a horizontal duty to refrain from criticism of child ordination, despite the fact that it appears to 'cause' *B* to react violently. It is after all *B* who fails in his duty to *C*. If *A* owes no one a duty of justice to refrain from criticism, then it seems unreasonable for the state to focus on *A*'s conduct. The state's obligation in this respect is to focus on maintaining law and order, which would necessarily entail taking decisive action against *B* and others. In this context, if the state is required to justify a limitation on *A*'s freedom of expression *only* on the basis that *A* individually owes others a duty of justice to refrain from the specific conduct that is being restricted, the infiltration of irrelevant considerations could be avoided. For instance, *B*'s duties towards *C*, and the state's duties

⁵¹ Andrei Marmor, 'Two Rights of Free Speech'(2018) 31 *Ratio Juris* 139-159, 153.

⁵² *ibid.* Also see Douglas Hodgson, *The Law of Intervening Causation* (Ashgate 2008).

towards *C*, are not relevant to *A*. The basic liberty that *A* enjoys in the freedom of expression can only be limited by the duties *A* owes to others. This conceptual scheme can only be properly maintained if the state's justificatory burden is directed towards demonstrating *A*'s duties of justice. This, I argue, is the fundamental political value of the duty-based approach to justifying limitations on the Two Freedoms. It is not only a more conceptually coherent and normatively compelling approach; it is also a politically useful approach, as it requires states to narrow its justification to the specific horizontal relationship between the individual concerned and others in society. The state is accordingly constrained from advancing its own majoritarian interests, or transferring its positive obligations, by imposing limitations on the Two Freedoms.

This chapter presented a case for placing duties of justice at the centre of the state's burden to justify limitations on the Two Freedoms. Inspired by elements of the two common justificatory approaches discussed in the previous chapter, I presented a case for adopting an alternative approach to justifying limitations on the Two Freedoms. I argued that, when individual conduct *prima facie* concerns the Two Freedoms, the state's justificatory burden with respect to restricting such conduct must entail demonstrating—through the presentation of good, publicly justifiable reasons—that the individual concerned owes others a duty of justice to refrain from such conduct.

Once the conceptual features of individual liberty, and the special importance attached to the Two Freedoms are appreciated, the sense in requiring the state to demonstrate a duty of justice when justifying limitations on the Two Freedoms becomes evident. Such an approach is conceptually coherent, as it helps sustain the conceptual features of a liberty; only a duty of

justice constrains the scope of a legally recognised liberty. A duty-based approach is also a normatively valuable approach, as it helps sustain the importance of the Two Freedoms by imposing a clear and substantial justificatory burden on the state. The state would need to demonstrate that the various competing interests are sufficient reason to impose on the individual concerned a duty of justice to refrain from engaging in the impugned conduct. If a limitation is justified on the basis of anything that falls short of such a duty, the limitation immediately undermines the conceptual features and normative value of the Two Freedoms.

Apart from such conceptual and normative value, a duty-based approach can be politically valuable. It places a clearer burden on the state to demonstrate how the *individual concerned* owes a horizontal duty of justice to others to refrain from engaging in the impugned conduct. The state is accordingly constrained from advancing majoritarian interests or offloading its positive obligations owed to others by limiting an individual's Two Freedoms.

There appears to be a compelling case to place duties of justice at the centre of the state's burden to justify limitations on the Two Freedoms. Our normative commitment to protecting the Two Freedoms requires that a substantial justificatory burden be placed on the state when it seeks to limit these two basic liberties and claim rights. It is hoped that the justificatory approach I have proposed in this first part of the thesis offers conceptual and normative clarity, and political persuasion, on what that justificatory burden should be. I next turn to the realm of international human rights law to discover how this justificatory approach could potentially shape legal doctrine.

PART II: The Doctrine

Chapter 3

The History

The grounds on which states may limit the freedom to manifest religion or belief and the freedom of expression (the ‘Two Freedoms’) are usually itemised in limitation clauses found in international human rights treaties. These limitation clauses frame the state’s justificatory burden when it limits the Two Freedoms under international law. The first part of this thesis interrogated two common justificatory approaches found in the liberal tradition, and presented a conceptual, normative, and political case for adopting a duty-based justificatory approach when limiting the Two Freedoms. The second part of the thesis focuses on the International Covenant on Civil and Political Rights (ICCPR), and explores the justificatory burden that states would need to fulfil when limiting the Two Freedoms under the Covenant.

This thesis focuses on the ICCPR, as it is the foremost international treaty that recognises the Two Freedoms. The present chapter commences the analysis of this treaty by exploring the historical origins of the two clauses that authorise states to limit the Two Freedoms, i.e. articles 18(3) and 19(3) of the ICCPR. I do not intend to offer an interpretation of these clauses in this chapter. An interpretation of these clauses will be presented in the remaining chapters of this thesis. The present chapter instead aims to briefly capture the historical ethos in which these two profoundly important clauses were framed.

This chapter is presented in two sections. The first explores the deep cleavages that emerged during the drafting of articles 18(3) and 19(3). It offers insights into how differences in legal systems and political ideology shaped the views of drafters, and defined the major divergences that arose during the drafting process. The second section briefly explores the

convergence that eventually emerged among states. I then explain how expediency governed the final outcome of the drafting process – an outcome that has left us with limitation clauses that are potentially vulnerable to abuse.

The ICCPR was formally adopted by the United Nations (UN) General Assembly in 1966,¹ and came into force in 1976. However, the process of drafting the treaty actually began decades earlier. The UN Economic and Social Council (ECOSOC) adopted a resolution in February 1946 to establish a Commission on Human Rights. It then instructed the Commission to submit proposals on an international bill of human rights.² The Commission held its first session in January and February 1947 and studied a number of draft bills on human rights with a view to formulating proposals. The ECOSOC thereafter appointed a drafting committee comprising eight members of the Commission – Australia, Chile, China, France, Lebanon, the Soviet Union, the United Kingdom, and the United States. This committee was tasked with proposing a draft international bill of human rights; it held its first session in June 1947. Initial discussions were based on a Secretariat outline prepared by the UN Division of Human Rights and on a draft convention proposed by the United Kingdom.³ The second session of the Commission in 1948 resulted in a revised draft. The drafting process then went on between the fifth and tenth sessions of the Commission.⁴ The Commission completed its work in 1954, and the ECOSOC transmitted the report of the Commission to the General Assembly in July that year. In 1954, at the ninth session of the General Assembly, the task of finalising the Covenant

¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ('ICCPR').

² UN General Assembly, *Draft International Covenants on Human Rights*, 10th Session, 1 July 1955, A/2929, 5.

³ John Humphrey, *Human Rights and the United Nations: a Great Adventure* (Transnational Publishers 1984) 42.

⁴ Marc Bossuyt, *Guide to the 'travaux Préparatoires of the International Covenant on Civil and Political Rights* (Martinus Nijhoff Publishers 1987) xix-xx.

was allocated to the Third Committee to the General Assembly. In 1963, the Third Committee submitted a report with the substantive articles of the Covenant.⁵ Then, in 1966, the Third Committee completed its work, and the General Assembly finally adopted the Covenant by 106 votes, and the Optional Protocol thereto with 66 votes in favour, two votes against, and 38 abstentions.⁶

The deliberations of the drafting committee of the Commission on Human Rights constitute part of the preparatory material relevant to the ICCPR, i.e. the Covenant's *travaux préparatoires*. These deliberations are certainly relevant to how articles 18(3) and 19(3) of the ICCPR should be interpreted. In subsequent chapters, I will return to certain specific aspects of these deliberations, as they support the task of interpreting articles 18(3) and 19(3) in good faith. However, in this chapter, I explore the drafting history of articles 18(3) and 19(3) with a view to better understanding the historical context in which the drafters framed these clauses. It is hoped that an exploration of the broader historical discourse surrounding the two clauses would enrich our appreciation of the complexity of the interpretative task that lies ahead.

I. DIVERGENCES ON SUBSTANCE AND FORM

A draft International Covenant on Human Rights was discussed at the second session of the Commission on Human Rights in December 1947. This draft was basically guided by the text of the Universal Declaration on Human Rights (UDHR),⁷ and was to later evolve into two

⁵ UN General Assembly, *Draft International Covenants on Human Rights, Report of the Third Committee*, 10 December 1963, A/5655.

⁶ Bossuyt xx.

⁷ Economic and Social Council, *Summary Record of the Hundred and Forty-Seventh Meeting*, 11th Session, 9 August 1950, E/AC7/SR.147, 7.

covenants: one on civil and political rights (the ICCPR), and one on economic, social and cultural rights (the International Covenant on Economic, Social and Cultural Rights⁸). Recounting in meticulous detail the various contributions made by states during a drafting process that spanned nearly a decade would not serve the purpose of this chapter. It is better to organise these voluminous commentaries in a manner that provides an insight into why articles 18(3) and 19(3) of the ICCPR are what they are today. This section organises the commentaries under two major debates among drafters: first, a debate on the substance of the limitation clauses; second, a debate on the form of the limitation clauses.

A. The debate on substance

The drafters of the ICCPR diverged on two aspects of the substance of articles 18(3) and 19(3). The first divergence derived from certain distinctions in the types of legal systems that the drafting states subscribed to. The second divergence derived from distinctions in the types of political ideologies with which the drafters associated themselves.⁹

One of the challenges that confronted the drafters of the Covenant was that they subscribed to different legal systems. Some countries, such as the United Kingdom and countries associated with the British Commonwealth, considered themselves common law jurisdictions. Others, such as France and other continental European countries, considered

⁸ International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3.

⁹ Certain broader geopolitical developments, including ‘The Cold War’, and decolonisation, shaped the process through which the ICCPR was drafted. See Maya Hertig Randall, ‘The History of the Covenants: Looking Back Half a Century and Beyond’ in Daniel Moeckli, Helen Keller, and Corina Heri (eds), *The Human Rights Covenants at 50: Their Past, Present, and Future* (Oxford University Press 2018) 10-14; Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2010) 69-70; Christopher Roberts, *The Contentious History of the International Bill of Human Rights* (Cambridge University Press 2015). In this chapter, I focus on factors that specifically impacted the drafting of articles 18(3) and 19(3) of the ICCPR.

themselves civil law jurisdictions.¹⁰ Some disagreements over the substance of articles 18(3) and 19(3) can be traced to differences in opinion stemming from how these two groups of countries understood certain legal concepts. The lengthy discussion on the concept of ‘public order’ is a good example of the first divergence. This discussion began during the negotiation of the limitation clause pertaining to the freedom to manifest religion or belief. States observed that the English concept of ‘public order’ differed significantly from the French concept of ‘*l’ordre public*’. The English concept, found in common law countries, ordinarily meant ‘the absence of public disorder’.¹¹ The French expression, used in civil law countries, is a legal concept that ordinarily concerns the negation of private agreements, the exercise of police powers, or the application of foreign law.¹² This idea of ‘*l’ordre public*’ would, in common law jurisdictions, be more akin to the notion of ‘public policy’ than to ‘public order’.¹³

The United Kingdom attempted to reconcile the divergent meanings attached to the words ‘public order’ by suggesting the replacement of the phrase ‘protection of public order’ with ‘prevention of public disorder’.¹⁴ The revision would have effectively confined the meaning of the limitation ground to the common law idea of ‘preventing disorder’. The United Kingdom warned that the French conception of ‘ordre public’ was too similar to ‘public policy’

¹⁰ A longer discussion on the distinctions between common law and civil law jurisdictions is perhaps beyond the scope of this chapter. For a useful discussion on such distinctions, see Thomas Lundmark, *Charting the Divide Between Common and Civil Law* (Oxford University Press 2012); David Baragwanath, ‘The Interpretative Challenges of International Adjudication Across the Common Law/Civil Law Divide’ (2014) 3(2) *Cambridge Journal of International and Comparative Law* 450.

¹¹ UN General Assembly, A/2929, 139.

¹² *ibid.*

¹³ *ibid.*

¹⁴ The United Kingdom preferred the formula ‘prevention of disorder or crime’ to the United States’ expression ‘public order’, which it argued was too broad. See Economic and Social Council, *Summary Record of the Hundred and Forty-Eighth Meeting*, 11th Session, 10 August 1950, E/AC7/SR.148, 5; Commission on Human Rights, *Summary Record of the Three Hundred and Nineteenth Meeting*, 8th Session, 17 June 1952, E/CN.4/SR.319, 4.

in the English vocabulary, and that if ‘public policy could be invoked to restrict freedom of religion, the restrictions could be stringent indeed’.¹⁵ In 1952, the French representative René Cassin argued against the United Kingdom’s proposal, and observed that ‘the prevention of disorder’ in French ‘implied little more than police action to prevent street riots’.¹⁶ ‘Ordre public’ by contrast has ‘both material and moral connotations and embrace[d] the whole of the principles on which the state was built’.¹⁷ He suggested that the term ‘ordre public’ be retained in the French text, and that the phrase ‘in the interests of...[preventing] public disorder’ be equated to ‘ordre public’. States including the Soviet Union supported this broader limitation on the freedom to manifest religion or belief. Other states, such as Lebanon, urged the adoption of the United Kingdom’s proposal precisely due to the overbroad meaning attached to the French term. It was observed:

If the maintenance of order included action by the courts and enforcement of respect for the general principles governing a society, it was far too broad a basis for limitations of freedom of religion, since those principles might, in some cases, be contrary to freedom of religion. The United Kingdom amendment...would permit restrictions only for the purpose of preventing public disturbances, and was therefore entirely reasonable.¹⁸

¹⁵ Commission on Human Rights, E/CN.4/SR.319, 12.

¹⁶ *ibid* 4, 12.

¹⁷ *ibid*.

¹⁸ *ibid* 13. This position was also supported by New Zealand in 1952. See Commission on Human Rights, *Draft International Covenants on Human Rights and Measures of Implementation*, 8th Session, 20 March 1952, E/CN.4/528/Add, 38.

The United Kingdom's proposal was, however, rejected by eight votes to seven, with three abstentions.¹⁹ The same discussion arose with respect to the freedom of expression; the United States and certain other states preferred the term 'public order', whereas the United Kingdom pressed for the phrase 'the prevention of disorder'.²⁰ It explained that 'public order was much too vague and would enable governments to place unjustified restrictions' on the freedom of expression.²¹ Of course, the United States' preference for the words 'public order' was not predicated on the need for a broader limitation ground. To the contrary, the United States was sceptical about phrases such as 'prevention of crime and disorder', which the United Kingdom had proposed. It argued that such a framing was dangerous, as the state could merely criminalise any act and maintain that the limitation was necessary for preventing that 'crime'. The United States did not appear to directly engage the United Kingdom's specific argument that the 'prevention of disorder' was actually narrower than the French conception of 'ordre public'. Meanwhile, France proposed the adoption of the term 'ordre public', which was a broader notion equivalent to 'public policy'; this counterproposal was identical to the counterproposal it had presented during the discussions on the freedom to manifest religion or belief. Accordingly, familiar arguments for and against the terminology of 'public order', 'public disorder', and 'ordre public' were proffered by states. The United Kingdom's proposal was ultimately rejected by seven votes to six, with two abstentions,²² and the term 'public order' with 'ordre public' in parenthesis was adopted when finalising article 19(3) of the ICCPR.

¹⁹ Commission on Human Rights, E/CN.4/SR.319, 14.

²⁰ Commission on Human Rights, *Summary Record of the Hundred and Sixty-Sixth Meeting*, 6th Session, 1 May 1950, E/CN.4/SR.166, 8.

²¹ *ibid.*

²² Commission on Human Rights, *Summary Record of the Hundred and Sixty-Seventh Meeting*, 6th Session, 5 May 1950, E/CN.4/SR.167, 6.

While there was significant debate on the meaning of ‘public order’ as a ground for limiting the Two Freedoms, no major discussions took place on some of the other key limitation grounds. A brief segue into how states agreed on the inclusion of some limitation grounds might be useful to illustrate the point that the discussion among drafters was not always hampered by disagreement. For example, very little disagreement arose over the suitability of ‘morals’ or ‘public morals’ as a ground for limiting the Two Freedoms.²³ The Soviet Union’s proposal in 1948 to subject the freedom to manifest religion or belief to ‘the laws of the country and the dictates of public morality’ was rejected by the drafting committee as being ‘too general’.²⁴ Yet the limitation clause on the freedom to manifest religion or belief, as framed in the 1947 draft International Covenant on Human Rights, included ‘morals’ as a limitation ground. This specific inclusion of ‘morals’ did not appear to attract opposition. The clause provided:

The above rights and freedoms shall be subject only to such limitations as are prescribed by law and are necessary to protect public order and welfare, morals and the rights and freedoms of others.²⁵

²³ It is not clear whether states meant to describe this limitation ground as ‘morals’ or ‘public morals’. The punctuation in the final text of article 18(3) suggests that the ground should be read as ‘public morals’, as the term ‘public’ is used as a common descriptor for ‘safety’, ‘order’, ‘health’ and ‘morals’. By contrast, the punctuation in the final text of article 19(3) is less clear, as the term ‘public’ precedes the phrase ‘health and morals’. It is noted, however, that some drafters use the words ‘public morals’ when discussing the limitation clause pertaining to the freedom of expression. See Commission on Human Rights, *Summary Record of the Hundred and Sixty-Fifth Meeting*, 6th Session, 2 May 1950, E/CN.4/SR.165, 18.

²⁴ UN General Assembly, A/2929, 141. Also see Commission on Human Rights, *Drafting Committee, Summary Record of the Thirty-Second Meeting*, 2nd Session, 26 May 1948, E.CN.4/AC.1/SR.32, 5.

²⁵ Commission on Human Rights, *Report of the Commission on Human Rights*, Second Session, 17 December 1947, E/6000, 27. The drafting committee later added the term ‘fundamental’ to qualify ‘the rights and freedoms of others’ that can form a basis for limiting the freedom to manifest religion or belief. See Commission on Human Rights, *Report of the Drafting Committee, consisting of the representatives of France, Lebanon, and the United Kingdom, on Article 16*, 13 May 1948, E/CN.4/AC.1/35.

The 1947 draft International Covenant on Human Rights included the drafting committee's proposal on a suitable limitation clause with respect to the freedom of expression.²⁶ The proposal included a long list of grounds on which this freedom may be limited. It provided:

The freedoms of speech and information referred to in the preceding paragraphs of this Article may be subject only to necessary restrictions, penalties or liabilities with regard to: matters which must remain secret in the interests of national safety; publications intended or likely to incite persons to alter by violence the system of Government, or to promote disorder or crime; obscene publications; (publications aimed at the suppression of human rights and fundamental freedoms); publications injurious to the independence of the judiciary or the fair conduct of legal proceedings; and expressions or publications which libel or slander the reputations of other persons.²⁷

Interestingly, the 1947 draft did not include 'morals' as grounds for limiting the freedom of expression. The inclusion of 'morals' was later suggested by South Africa. In a communication to the Commission on Human Rights in 1948, it argued that the draft Covenant failed to enumerate certain permissible grounds for restricting the freedom of expression under domestic law, such as 'good morals'.²⁸ Apart from this exchange, however, no specific justification was furnished for including 'morals' as grounds for limiting the freedom of expression in the ICCPR. The United Kingdom had previously insisted on the inclusion of 'morality' as a limitation ground in the Universal Declaration on Human Rights – on the basis that 'it

²⁶ Commission on Human Rights, E/6000, 28. The Commission did not consider this proposal at this stage, as it was decided that the Commission would await the views of the Sub-Commission on the Freedom of Information and of the Press, and of the United Nations Conference on Freedom of Information.

²⁷ *ibid.*

²⁸ Commission on Human Rights, *Comments from Governments on the Draft International Declaration on Human Rights: Draft International Covenant on Human Rights and the Question of Implementation*, 3rd Session, 16 April 1948, E/CN.4/82.

introduced an ethical concept' which was not covered by any other ground.²⁹ Such thinking may have eventually prevailed on the drafters of the Covenant.

By mid-1948, the draft Covenant included three proposals for a limitation clause on the freedom of expression: a French proposal, a text submitted at the UN Conference on Freedom of Information, and a proposal by the Soviet Union. Notably, the French proposal included 'good morals' as a limitation ground:

The freedoms referred to in the preceding paragraphs may be subject only to the restrictions, penalties or liabilities provided by law for the protection of public order, national security, good morals, respect for law and the reputation or rights of other persons.³⁰

The limitation clause in the text emerging from the UN Conference on Freedom of Information stated: 'The right to freedom of expression carries with it duties and responsibilities and may, therefore, be subject to penalties, liabilities or restrictions clearly defined by law...' However, the proposal sought to confine the types of expressions that are subject to limitations:

- (a) matters which must remain secret in the interest of national safety;
- (b) expressions which incite persons to alter by violence the system of Government;
- (c) expressions which directly incite persons to commit criminal acts;
- (d) expressions which are obscene;
- (e) expressions injurious to the fair conduct of legal proceedings;
- (f) infringements of

²⁹ UN General Assembly, Third Committee, *Minutes of 153rd Meeting*, Third Session, 23 November 1948, A/C.3/SR.153, 647.

³⁰ Economic and Social Council, *Report of the Third Session of the Commission on Human Rights*, 28 June 1948, E/800, 28.

literary or artistic rights; (g) expressions about other persons natural or legal which defame their reputations or are otherwise injurious to them without benefiting the public; (h) the systematic diffusion of deliberately false or distorted reports which undermine friendly relations between peoples and states.³¹

This proposal did not include ‘morals’, although it referred to obscene expressions, which are often associated with moral sensibilities. The case for including ‘morals’ as a specific ground for limiting the freedom of expression nevertheless persisted without much opposition, and the French proposal became the template for future discussions.³²

The second divergence that drove the debate on the substance of articles 18(3) and 19(3) of the ICCPR concerned political ideologies, and the state’s role in promoting those particular ideologies. Some states considered themselves liberal democracies, whereas others subscribed to forms of Marxist socialism. As observed by Manfred Nowak, sharp disagreements between ‘liberal’ and ‘socialist’ conceptions of freedom ‘had an impact on the historical background of the Covenant’.³³ Certain disagreements on the substance of the two limitation clauses appeared to emanate from differences in opinion among these two ideological groups; these disagreements essentially depended on where states placed themselves along the ideological spectrum. States along this spectrum also entertained varying degrees of suspicion or antagonism towards particular ideologies such as fascism. One of the Soviet proposals on the

³¹ *ibid* 29.

³² Due to the subsequent proliferation of draft texts, the Commission on Human Rights adopted a revised text by the United States as the basic text for discussion in 1950. See Commission on Human Rights, *Summary Record of the Hundred and Sixty-Third Meeting*, 6th Session, 2 May 1950, E/CN.4/SR.163, 13. The text was as follows: ‘The right to seek, receive and impart information and ideas shall be subject only to such limitations as are provided by law and necessary in the interest of national security, public order, safety, health or morals, or for the protection of the rights, reputation or freedoms of other persons.’

³³ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: Committee Commentary* (NP Engel 2005) 439.

freedom of expression is a good example of this ideological antagonism. The proposal stated: ‘The use of freedom of speech and of the press for the purposes of propagating Fascism and aggression or of inciting war between nations shall not be tolerated.’³⁴ It also proposed that the following positive obligation be imposed on states:

In order to ensure the right of the free expression of opinion for large sections of the peoples and for their organizations, State assistance and co-operation shall be given in providing the material resources (premises, printing presses, paper, and the like) necessary for the publication of democratic organs of the press.³⁵

The Soviet Union justified this proposal based on the need to prevent the propagation of war, and to teach and educate the public about the dangers of fascism.³⁶ Yet, other drafters resisted this proposal. The Chinese representative T.Y. Wu claimed such a positive obligation could not be accepted by many states.³⁷ Eleanor Roosevelt, the United States’ representative, argued that such a positive obligation implied socialisation of the press, which might not be essential under all economic systems, and would be a mistake to include.³⁸ Pierre Ordonneau, the French representative at the time, also rejected the Soviet proposal by arguing that ‘there was no

³⁴ Economic and Social Council, E/800, 28. The Soviet Union later proposed that ‘the interests of national security’ be included as a limitation ground (at p. 42).

³⁵ *ibid.*, 28-29. The Soviet Union had included such a positive obligation in article 14 of the 1918 Soviet Constitution, which provides: ‘For the purpose of securing the freedom of expression to the toiling masses, the Russian Socialist Federated Soviet Republic abolishes all dependence of the press upon capital, and turns over to the working people and the poorest peasantry all technical and material means of publication of newspapers, pamphlets, books, etc., and guarantees their free circulation throughout the country.’

³⁶ Commission on Human Rights, *Drafting Committee, Summary Record of the Thirty-Second Meeting*, 2nd Session, 26 May 1948, E.CN.4/AC.1/SR.32, 7.

³⁷ *ibid.* 6.

³⁸ *ibid.*

freedom of the press if the state could in any way interfere'.³⁹ He argued that the use of the press to propagate fascism was already covered in the French text, which was more broadly framed, and that 'Fascism' and similar terms such as 'Nazism' were difficult to define.⁴⁰ He also argued that there should be 'no discrimination on grounds of political opinions, even against Fascists', and that '[i]f there was real freedom of speech and of the press, there could be no danger from Fascist propaganda, as it would be rejected by public opinion'.⁴¹ The drafters eventually rejected the Soviet proposal.

A divergence in political views is also evident in the discussion on whether to refer to 'democracy' as a qualifier within a limitation clause. The Soviet proposal on the freedom of expression, which was rejected by the majority of drafters, began with the phrase '[i]n accordance with the principles of democracy'.⁴² Some states took objection to the Soviet Union's reference to 'democracy'. For instance, in 1948, the Lebanese representative Charles Malik commented that '[i]t was apparent that democracy meant one thing in the Soviet Union and another outside, and it became more vague and meaningless according to the context of its origin'.⁴³ The Soviet representative A.P. Pavlov responded by explaining that, for the Soviet Union, the term 'democracy' meant 'that which worked for the interests of all peoples'.⁴⁴ This tension with respect to the meaning of the term 'democracy' was to later shape the discussion on whether the phrase 'in a democratic society' could be added to qualify a limitation clause in

³⁹ *ibid.*

⁴⁰ *ibid* 8-9.

⁴¹ *ibid* 9.

⁴² Commission on Human Rights, *Drafting Committee, Union of Soviet Socialist Republics: Amendment to Article 17 of the Draft International Covenant on Human Rights*, 2nd Session, 13 May 1948, E/CN.4/AC.1/34.

⁴³ Commission on Human Rights, E.CN.4/AC.1/SR.32, 9.

⁴⁴ *ibid.*

general, or certain specific limitation grounds. For example, France proposed that the phrase ‘in a democratic society’ should be added after the words ‘public order’ to qualify the limitation clause pertaining to the freedom of expression in terms of the standards found in a democratic society.⁴⁵ It also justified the inclusion on the basis that the phrase ‘public order in a democratic society’ appeared in article 29 of the UDHR.⁴⁶ Some states, including Chile, supported this addition.⁴⁷ However, the United States objected to the phrase because, in its view, the phrase was ‘subject to varying interpretations and would introduce an ambiguous and unnecessary concept into the formula of general limitations’.⁴⁸ It specifically observed that the term ‘democracy’ was ‘not interpreted in the same way everywhere: two entirely different systems of government both laid claim to democratic principles’.⁴⁹ It accordingly argued that, although the phrase ‘in a democratic society’ is found in the UDHR, the Covenant – as a legal instrument – should avoid such a phrase, as it ought to be drafted as concisely and precisely as possible.⁵⁰ The objection of the United States was clearly shaped by the previous Soviet use of the term, and the possible legitimisation that the Soviet conception of ‘democracy’ might gain as a result of including the term in a limitation clause. The drafters eventually rejected the French proposal by eight votes to five, with two abstentions, and the phrase ‘in a democratic society’ was omitted from article 19(3) of the ICCPR.⁵¹

⁴⁵ Economic and Social Council, E/AC7/ SR.147, 18.

⁴⁶ Commission on Human Rights, E/CN.4/SR.166, 8.

⁴⁷ *ibid* 10.

⁴⁸ Commission on Human Rights, *Summary Record of the Hundred and Sixty-Second Meeting*, 6th Session, 28 April 1950, E/CN.4/SR.162, 4.

⁴⁹ Commission on Human Rights, E/CN.4/SR.166, 9.

⁵⁰ *ibid*. The United Kingdom also rejected the French proposal on the basis that ‘[t]he covenant may come into force in countries where the word ‘democracy’ did not have its traditional meaning’. Commission on Human Rights, E/CN.4/SR.167, 4.

⁵¹ Commission on Human Rights, E/CN.4/SR.167, 6. The phrase ‘necessary in a democratic society’ did, however, find its way into article 21 of the ICCPR, which deals with the right to peaceful assembly.

B. The debate on form

The debate on the form of the limitation clauses centred on the level of detail that the clauses would contain. The debate appeared to focus more on the freedom of expression, although the general divergence of opinion applied to the freedom to manifest religion or belief as well.⁵² By 1948, the list of possible limitation grounds pertaining to the freedom of expression included over thirty grounds. Apart from the French list, and the grounds specifically contained in the text that emerged from the UN Conference on Freedom of Information, the drafting committee maintained an additional list of twenty-five other possible grounds. Fourteen grounds on this additional list arose out of discussions at the Conference on Freedom of Information.⁵³ The additional list also included ten recommendations by South Africa, including blasphemy, treasonable statements, statements about the identity of criminal suspects who are minors, and ideological propaganda. Meanwhile, a suggestion by the Netherlands relating to certain types of adverse expressions about government authorities and national or racial groups was included in this additional list of twenty-five grounds.

The proliferation of possible limitation grounds prompted a debate among the drafters on the appropriate approach to formulating limitation clauses. On the one hand, some states

⁵² For example, Egypt suggested that some 'juridical' restrictions also be included in terms of the freedom to change one's religion, where the person changes religion for fraudulent purposes. This suggestion was rejected by the Commission on Human Rights. See Commission on Human Rights, *Summary Record of the Hundred and Sixty-First Meeting*, 6th Session, 28 April 1950, E/CN.4/SR.161, 6-10.

⁵³ Economic and Social Council, E/800, 30-31. These include: the disclosures of professional secrets; disclosures arising out of marital and personal relationships; expressions which are fraudulent or part of a, fraudulent scheme; expressions detrimental to public decency or morals; matters of contract; control of advertising or economic matters; proper conduct of political elections or campaigns; matters affecting the civil service; disclosures of governmental information; communications with foreign governments; profanity in public places; operation of radio broadcasting and similar media without a license; statements by corporations, partnerships or individuals, in the issue of bonds and shares of stock; and unforeseeable future matters relating to development of new media of information or new social practices.

advocated the formulation of limitation clauses that set out parameters for state authority in a *general* manner, and for the specifics to be left to domestic legislation. These states preferred ‘a simple limitation clause than to prepare an inventory of [say] thirty limitations’.⁵⁴ The United States in particular was of the view that ‘the attempt to define in detail all the limitations permissible under each article...is likely to create serious difficulties in the field of domestic law...and might result in the Covenant being a retrogressive rather than a progressive document’.⁵⁵ It argued that listing specific limitations would ‘almost certainly lead the General Assembly to add further limitations’.⁵⁶ On the other hand, some states expressed the concern that ‘if limitations were not clearly defined, but couched in general terms, there was little guarantee that the rights would not be violated’.⁵⁷

The evolution of the text of articles 18(3) and 19(3) was thus shaped by the competing requirements of generality and specificity.⁵⁸ For some drafters, the text needed to be sufficiently general without being vague; for others, it needed to be sufficiently specific without being cumbersome.

The debates on substance and form continued until the early 1950s. It is not immediately clear what political considerations ultimately settled these debates. Yet a major development in international human rights law is likely to have influenced the outcome of discussions. By 1950,

⁵⁴ UN General Assembly, A/2929, 25.

⁵⁵ ‘Observations, Suggestions and Proposals of the United States’ in Commission on Human Rights, *Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation*, 3rd Session, 16 April 1948, E/CN.4/82, 9.

⁵⁶ Commission on Human Rights, E/CN.4/SR.162, 5.

⁵⁷ UN General Assembly, A/2929, 26-27.

⁵⁸ See Bryan Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press 2004) 466-470, 512-519.

the European Convention on Human Rights (ECHR) had been finalised.⁵⁹ The text of this Convention is likely to have influenced the substance and form of articles 18(3) and 19(3) of the ICCPR to some degree. In 1952, the United Kingdom – one of the principal drafters of the ECHR – proposed that language nearly identical to the ECHR be adopted for the purposes of articles 18(3) and 19(3) of the ICCPR. The finalised version of article 18(3) is very similar to the formulation that the United Kingdom recommended based on the text of article 9(2) of the ECHR.⁶⁰

Article 9(2) of the ECHR:	UK Recommendation:	Final version of Article 18(3):
<p>Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others</p>	<p>Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.</p>	<p>Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.</p>

When comparing the United Kingdom’s proposal with the 1947 draft limitation clause, it is clear that the United Kingdom’s proposal was fairly influential with respect to the final text of article 18(3). Notably, the grounds of ‘public safety’ and ‘public health’ were added to the 1947 draft clause, and ‘public welfare’ was omitted.⁶¹

⁵⁹ European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5, articles 9(2) and 10(2).

⁶⁰ Commission on Human Rights, E/CN.4/528/Add.1, 38.

⁶¹ The 1947 draft clause read: ‘The above rights and freedoms shall be subject only to such limitations as are prescribed by law and are necessary to protect public order and welfare, morals and the rights and freedoms of others.’

Meanwhile, the draft limitation clause on freedom of expression recommended by the United Kingdom also mirrored the ECHR's equivalent provision, i.e. article 10(2).⁶²

Article 10(2) of the ECHR:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

UK Recommendation:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Final version of Article 19(3):

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals

The final version of article 19(3) retained much of the United Kingdom's proposal, although it ultimately included fewer limitation grounds. The grounds of 'territorial integrity', 'public safety', 'the prevention of disorder or crime', and 'preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary' were excluded from article 19(3) of the ICCPR. Such exclusion was in fact suggested by the United States in 1950. The United States claimed that 'the United Kingdom text listed additional

⁶² Commission on Human Rights, E/CN.4/528/Add.1, 40.

exceptions which might pave the way for excessive limitations on freedom of information'.⁶³ For instance, the formula 'disorder or crime' was considered too general.⁶⁴ The United States also argued against the French proposal on including 'respect for law' as a limitation ground. It argued:

Governments would merely have to enact legislation designating any act as a crime in order to be able to prohibit or punish any expression relating to that act. In the absence of any possible test or standard to evaluate the reasonableness of such a measure, the United States delegation deemed that provision an improper and unreasonable limitation...⁶⁵

The United States' reference to the standard of reasonableness is worth noting. It preferred a limitation clause that generally referred to such standards, as opposed to one that merely itemised a list of limitation grounds. It also contended that treating domestic legality (i.e. that the limitation is provided by domestic legislation) as a *sufficient* basis for limiting the Two Freedoms was highly dangerous; the requirement that a state legislate on a limitation would not actually ensure that the limitation is reasonable. For instance, the United States observed that the phrase 'disorder or crime' was highly problematic as '[d]ictators might enact legislation making crimes of acts not normally considered such and thereby bypass the provisions of the covenant.'⁶⁶ This type of thinking appears to have shaped the ultimate formulation of articles

⁶³ Commission on Human Rights, *Summary Record of the Hundred and Sixtieth Meeting*, 6th Session, 27 April 1950, E/CN.4/SR.160, 11.

⁶⁴ *ibid.* It also argued that the provision for 'maintaining the authority and impartiality of the Judiciary' was not clear and might serve to broaden the limitations on freedom of expression even further.

⁶⁵ Commission on Human Rights, E/CN.4/SR.162, 5.

⁶⁶ Commission on Human Rights, E/CN.4/SR.160, 11. It should be noted, however, that the United Kingdom presented equally compelling concerns about the alternative term that the United States was offering – 'public order'; it argued that this term was 'too vague and general to be satisfactory'. Commission on Human Rights, E/CN.4/SR.162, 10.

18(3) and 19(3) of the ICCPR. The requirement that the limitation be provided by law is only a *necessary* criterion for the permissibility of a limitation. Domestic legality would not be a *sufficient* basis for the limitation. It would need to also fulfil other normative criteria – criteria I will examine in the next chapter of this thesis.

II. CONVERGENCE FOR EXPEDIENCY

The multiple divergences that arose with respect to the substance and form of articles 18(3) and 19(3) of the ICCPR slowed down the drafting process. Several concerns raised during the drafting of articles 18(3) and 19(3) were ultimately left unaddressed due to these divergences. The most serious of these concerns relate to the ambiguity and obscurity of specific limitation grounds. States warned that the lack of clarity with respect to specific terms such as ‘public order’ – because they mean very different things in different jurisdictions – ‘would create uncertainty’ and might constitute a basis for ‘far-reaching’ limitations on the rights guaranteed.⁶⁷ States were also of the view that grounds such as ‘national security’ were ‘not sufficiently precise to be use[d] for the limitation of the exercise of the rights guaranteed’.⁶⁸ States expressed similar concerns with respect to the phrase ‘for the protection of public safety, health or morals...’ For example, Yugoslavia observed that such a phrase was ‘vague and flexible and might give rise to differing interpretations’.⁶⁹ It also observed that terms such as ‘public order’ and ‘national security’ were open to abuse by the state, and required ‘formal definitions’.⁷⁰ This general concern with respect to ambiguity and obscurity prompted Canada

⁶⁷ UN General Assembly, A/2929, 139.

⁶⁸ *ibid.*

⁶⁹ Commission on Human Rights, E/CN.4/SR.161, 18.

⁷⁰ Commission on Human Rights, E/CN.4/SR.162, 6-7.

to urge that the limitation clauses be formulated in a ‘uniform manner, except where a difference in substance was intended’, to avoid future issues of interpretation and application.⁷¹

The deliberations of the drafting committee clearly reflect a general desire among states to avoid ambiguity and obscurity, and to constrain the scope for states to abuse their authority to limit the Two Freedoms. Some limitation grounds were in fact rejected on the basis that they were overbroad, vague, or open to abuse. For example, the proposal to include ‘the maintenance of peace and good relations among states’ as a ground to limit the freedom of expression was rejected on the basis that it was not capable of ‘precise interpretation’.⁷² Similarly, an Indian proposal to include a limitation on ‘spreading of deliberately false or distorted reports which might undermine friendly relations between peoples and states’⁷³ was rejected by six votes to five, with four abstentions.⁷⁴ The United States argued that the revision would ‘do away with all freedom of expression’;⁷⁵ other states, such as Australia, observed that ‘the interpretation of what appeared to be simple, laymen’s language could become extremely controversial’.⁷⁶ It maintained that since it was ‘difficult to see how false and distorted reports could be prevented without some form of censorship’, it was not possible to support the Indian proposal.⁷⁷

⁷¹ UN General Assembly, A/2929, 138-139. See Commission on Human Rights, E/CN.4/528/Add.1, 38.

⁷² UN General Assembly, A/2929, 150.

⁷³ Commission on Human Rights, 5 May 1950, E/CN.4/SR.167, 7.

⁷⁴ *ibid* 12.

⁷⁵ *ibid* 7.

⁷⁶ *ibid* 11.

⁷⁷ *ibid*.

Despite the drafters' wish to avoid ambiguity and obscurity, the outcome of negotiations on the text of articles 18(3) and 19(3) of the ICCPR appears to have fallen short of this wish. When the draft prepared by the Commission on Human Rights was handed over to the General Assembly in 1954,⁷⁸ many of the major concerns with respect to ambiguity, obscurity, and scope for abuse had not been resolved. States including Belgium had previously warned against proceeding with haste, and prioritising expediency over 'doing things as perfectly as possible'.⁷⁹ One of the main concerns, once again, was the retention of 'vague terms' such as 'public order' and 'national security', where there were 'many examples in history of flagrant abuses sanctioned by the use of such a vocabulary'.⁸⁰ The following warning recorded during the tenth session of the General Assembly captures this concern with respect to the grounds of 'public order' and 'national security':

If freedom of worship and freedom of information might be abridged on the basis of vague expressions as "public order" and "national security", such freedoms were in great jeopardy...In the name of "public order" many a saintly character had been crucified, in the name of "national security" many a patriot guillotined. Better no covenant than that it should be an instrument to suppress human liberty.⁸¹

Other states, such as Chile, expressed apprehension over the retention of vague terms such as 'national security', which 'could be put forward as justification for many abuses'.⁸² It intimated,

⁷⁸ Commission on Human Rights, *Report on the 10th Session*, E/2573.

⁷⁹ Economic and Social Council, E/AC7/SR.147, 8-9.

⁸⁰ *ibid* 9.

⁸¹ *ibid* 27.

⁸² Commission on Human Rights, E/CN.4/SR.163, 9.

however, that in the absence of ‘a more satisfactory proposal’, it was ‘essential to have some confidence in the good faith of the states which would sign the covenant’.⁸³ This idealism is not without some value, for it is on the idea of good faith that I will principally rely when interpreting articles 18(3) and 19(3) of the ICCPR in the sixth and seventh chapters of this thesis.

The twelve years that passed between the submission of the Commission’s draft in 1954, and the final adoption of the Covenant by the General Assembly in 1966 did not add any further clarity to articles 18(3) and 19(3) of the ICCPR. Therefore, no proposal that was more satisfactory was actually made following the Commission’s initial proposal. In this context, and due to the often debilitating divergences that exemplified the negotiation process with respect to specific limitation grounds, states eventually opted for an expedient outcome. The text of articles 18(3) and 19(3) proposed by the Commission on Human Rights – which for many states was wholly unsatisfactory due to ambiguity, obscurity and scope for abuse – was left virtually untouched by the Third Committee of the General Assembly. Even a period of over a decade did not prompt the Third Committee to reopen discussions that had attracted so much disagreement. While timeliness in the adoption of the Covenant was not actually achieved, the outcome was expedient, as the Third Committee effectively avoided reopening the contentious subject of limitations on the Two Freedoms. As a result, the text of articles 18(3) and 19(3) retained broad, highly disputed, and ultimately undefined limitation grounds such as ‘public order’ and ‘national security’. Even grounds such as ‘morals’, which did not attract much disagreement, remained undefined.

⁸³ *ibid.*

Ordinarily, a treaty's preparatory material is relevant to the task of interpretation when a treaty provision contains ambiguous or obscure terms. International legal rules on treaty interpretation state that when a treaty provision is 'ambiguous or obscure' 'recourse may be had to...the preparatory work of the treaty'.⁸⁴ The limitation grounds found in articles 18(3) and 19(3) of the ICCPR certainly attract the concerns of ambiguity and obscurity.⁸⁵ However, the historical exploration undertaken in this chapter reveals that recourse to the *travaux préparatoires* of the ICCPR may not provide much guidance on the precise meaning of these grounds. In fact, such preparatory work serves to confirm that these grounds are ambiguous and obscure – and that the drafters thought so. Yet states ultimately opted for expediency, and left the problem of ambiguous and obscure limitation grounds for future interpreters to resolve. The next chapter of this thesis examines the consequences of such expediency in terms of the justificatory burden that the two limitation clauses potentially impose on states.

This chapter set out to explore the drafting history of articles 18(3) and 19(3) of the ICCPR. The myriad debates and discussions on the substance and form of these limitation clauses offer a fascinating insight into the historical context in which the clauses were drafted. But what, one might ask, is the ultimate purpose of engaging in this historical exploration?

⁸⁴ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 32.

⁸⁵ See Erica-Irene A Daes, 'Restrictions and Limitations on Human Rights' in René Cassin (ed), *Amicorum Discipulorumque Liber III* (Pedone 1971) 175; John Humphrey, 'The Just Requirements of Morality, Public Order and the General Welfare in a Democratic Society' in R St J MacDonald and John Humphrey (eds), *The Practice of Freedom: Canadian Essays on Human Rights and Fundamental Freedoms* (Butterworths 1979).

In the previous chapter of this thesis, I emphasised the need for a conceptually coherent, normatively compelling, and politically appealing approach to justifying limitations on the Two Freedoms. This thesis focuses on articles 18(3) and 19(3) of the ICCPR to explore the relevance of such a justificatory approach within international human rights law. In this context, a historical exploration into the challenges experienced during the drafting of these limitation clauses may help us understand why, at present, these limitation clauses can be read in ways that are conceptually, normatively and politically problematic. For our purposes, if articles 18(3) and 19(3) can be interpreted in a manner that imposes a deficient justificatory burden on states, it makes sense to interrogate the process through which these limitation clauses were framed. These historical debates and discussions therefore permit us to understand why we are now confronted with ambiguity and obscurity when interpreting these limitation clauses.

This chapter did not seek to rely on the preparatory work relevant to articles 18(3) and 19(3) of the ICCPR to interpret the meaning of these clauses. In fact, the ambiguity and obscurity of the various limitation grounds contained in these clauses are confirmed when we explore such preparatory work. Therefore, it does not seem sensible to look for interpretative answers among historical discussions when attempting to understand the precise meaning of grounds such as ‘national security’, public order, public safety, public health, or public morals. However, I will return to this preparatory work with a different interpretative purpose in mind. Such material still provides us with insights on how to interpret the ICCPR, and indeed articles 18(3) and 19(3) in good faith.

In the next chapter of this thesis, I take further steps in the doctrinal exploration of articles 18(3) and 19(3) of the ICCPR. I examine what the orthodox reading of these clauses might be – first through a literal reading of these clauses, and then through a ‘guided’ reading

based on contemporary sources of interpretative guidance. Through such an exercise, I hope to illustrate how these limitation clauses are commonly interpreted, and to point out why more work needs to be done to advance a good faith interpretation of these clauses. It is in such a good faith interpretation that we may discover a more conceptually coherent, normatively compelling, and politically appealing approach to justifying limitations on the Two Freedoms.

Chapter 4

The Orthodoxy

The International Covenant on Civil and Political Rights (ICCPR)¹ authorises states to limit the freedom to manifest religion or belief, and the freedom of expression (the ‘Two Freedoms’). The grounds on which the Two Freedoms may be limited, and the terms on which states may impose such limitations, are found in articles 18(3) and 19(3) of the ICCPR. The nature of the justificatory burden that states ought to fulfil when limiting the Two Freedoms therefore depends on how these two treaty provisions are interpreted.

In the preceding chapter of this thesis, I pointed to how some of the ICCPR’s drafters were concerned about the imprecision of limitation grounds such as ‘national security’ and ‘public order’, and cautioned against leaving such grounds undefined. While the *travaux préparatoires* pertaining to the ICCPR do little to clarify the precise meanings of terms such as ‘national security’ and ‘public order’, they do, however, establish the fact that states sharply disagreed on the meaning of these limitation grounds. Drafters initially expressed a strong desire to avoid ambiguous or obscure language due to an apprehension that they may facilitate the abuse of state authority to limit the Two Freedoms. Yet I noted that this challenge was not overcome; protracted divergences over the substance and form of the limitation clauses eventually prompted states to seek an expedient outcome when finalising these clauses. The Covenant ultimately featured limitation clauses that appeared to retain the very ambiguity, obscurity, and scope for abuse that the drafters wished to avoid. Any exercise in interpreting

¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (‘ICCPR’).

the text of articles 18(3) and 19(3) of the ICCPR ought to be undertaken bearing these historical realities in mind.

The present chapter focuses on how articles 18(3) and 19(3) of the ICCPR are currently interpreted. It illustrates what may be understood as the prevailing orthodoxy with respect to the interpretation of these two limitation clauses. The chapter is presented in two sections. The first section examines the text of articles 18(3) and 19(3), and explains what a literal reading of these clauses might be. It then examines certain ‘soft law’ sources, which offer a ‘guided’ reading of these limitation clauses. I discuss three sources of interpretative guidance: the general comments of the United Nations (UN) Human Rights Committee, the statements of UN special rapporteurs, and the Siracusa Principles. In the second section, I attempt to juxtapose these two interpretative approaches against the justificatory approaches discussed in the first part of this thesis. Although a duty-based justificatory approach is not evident in the prevailing orthodoxy, I argue that the trajectory that appears to be advanced through a guided reading of the two limitation clauses is promising.

I. INTERPRETING ARTICLES 18(3) AND 19(3)

This chapter aims to explain how the two limitation clauses are *currently* interpreted. Therefore, it presents an impression of what the orthodoxy looks like. By contrast, in the sixth chapter of this thesis, I explain how articles 18(3) and 19(3) of the ICCPR *ought to be* interpreted in light of the Covenant’s object and purpose. This later chapter will include a more comprehensive discussion on what a good faith interpretation² of the ICCPR entails, as I hope to build my case for a duty-based justificatory approach on such a good faith interpretation.

² See Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (‘VCLT’), art 31(1), which provides: ‘A treaty shall be interpreted in good faith in accordance

A. A literal reading

It may be useful to begin our examination by recalling the words of articles 18(3) and 19(3) of the ICCPR.

Article 18(3): Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Article 19(3): The exercise of the rights provided for in paragraph 2 of this article³ carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

The language in the two limitation clauses clearly authorises states to limit the Two Freedoms for the purpose of advancing specific interests. Article 18(3) lists public safety, order, health or morals, and the fundamental rights and freedoms of others. Article 19(3) contains a very similar list of interests; it omits public safety, and includes national security. It also does not list the 'fundamental rights and freedoms of others', but instead refers to the 'rights or reputations of

with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

³ Article 19(2) of the ICCPR provides: 'Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.'

others'. It is immediately noticeable that the rights of others is only one of several types of interests that can form the basis for limitations on the Two Freedoms.

A literal reading of the text of these two limitation clauses suggests that states are not required to establish, in all cases, that the limitation serves to protect the rights of others. There is nothing to suggest that protecting the rights of others is a necessary condition for a limitation; it is only one of many options available to the state. Needless to say, under a literal reading of the two clauses, the state would only need to justify the limitation on the basis that it is provided by law, and is necessary for the protection of one of the interests mentioned in the clauses.

The magnitude of the state's justificatory burden appears to depend on the meaning ascribed to the interests listed in the two clauses. However, if the interests themselves are ambiguous or obscure, they would remain open to the interpretation of states. States are likely to give themselves maximum leeway in such interpretation. For example, if the term 'public order' can either mean the 'absence of disorder' in the narrower sense, or 'public policy' in the broader sense, it is likely that states will select the broader sense of the term. As explained in the previous chapter of this thesis, the drafters of the Covenant sharply disagreed on the precise definition of the words 'public order'.⁴ The representative of the United Kingdom urged drafters to adopt a narrower conception that confined the ground specifically to the 'prevention of disorder'; the French representative argued for a broader conception of 'ordre public', which according to the United Kingdom, would be more akin to the notion of 'public policy' than to

⁴ See Commission on Human Rights, *Summary Record of the Three Hundred and Nineteenth Meeting*, 8th Session, 17 June 1952, E/CN.4/SR.319, 4-14.

‘prevention of disorder’.⁵ Since the United Kingdom’s proposal was defeated,⁶ it can be presumed that the reference to ‘public order’ in the two limitation clauses reflects the broader French conception. In fact, the inclusion of the words ‘ordre public’ in parenthesis in article 19(3) appears to confirm that it is indeed the broader conception with which we are left. Yet we are no closer to discovering what precisely is meant by ‘public order (ordre public)’ when its common meaning can be equated to ‘public policy’. Under this broader conception of ‘public order’, a state seeking to invoke ‘public order’ as the justification for limitations on the Two Freedoms would then only need to assert that the limitation serves some public policy purpose.

We run into similar challenges when it comes to limitation grounds such as ‘national security’ and ‘public morals’. A literal reading of articles 18(3) and 19(3) of the ICCPR offers little clarity on what exactly these interests represent, and leaves states with broad discretion to interpret their meaning. For instance, states that rely on ‘morals’ to justify a limitation could enjoy near *carte blanche* over *what* constitutes ‘morals’, and *when* a limitation on the grounds of ‘morals’ is justified.

Let us consider an illustration to examine what a state’s justificatory burden under articles 18(3) and 19(3) might look like if a literal reading of the text was adopted. Imagine *A* displays a banner on the gate of his own home, describing *B*’s religion as ‘false’. A majority of the country practices *B*’s religion, and *B* succeeds in convincing over a thousand adherents of the religion to sign a petition calling for *A* to be prosecuted for offending the majority religious community. The state decides to prosecute *A* under the ‘Religious Harmony Law’, which prohibits the display of material that is offensive to any religious community. *A* claims that the

⁵ *ibid.*

⁶ Commission on Human Rights, E/CN.4/SR.319, 14.

banner reflects his belief in secularism, and that the prosecution violates his freedom to manifest belief, and his freedom of expression. Let us imagine that the state is now required to justify the restriction on *A*'s conduct on the basis of articles 18(3) and 19(3) of the ICCPR. The state would need to justify the limitation on the basis that it is provided by law and is necessary for the purpose of advancing one of the interests listed in these clauses. In this case, the state may assert that the limitation is provided by law, as the Religious Harmony Law prohibits the display of material that is offensive to any religion. Next, it may assert that the limitation is related to public order (*ordre public*), as it is the policy of the state to promote harmony between religious communities. The state may choose to equate 'harmony' with 'public order', and point to similar examples in countries such as France, where the value of 'living together' is considered to be an extension of public order (*ordre public*).⁷ It can then assert that the limitation is necessary for promoting harmony, and point to *B*'s petition as evidence of the intensity of the offence caused by *A*'s banner. None of these assertions are easily contestable under a literal reading of articles 18(3) and 19(3). The limitation appears to be provided by law. In the absence of any clear boundaries as to what 'public order' entails, the limitation is also arguably related to the protection of public order. The question of necessity may come down to whether there is any evidence that declaring *B*'s religion as 'false' actually poses a threat to religious harmony in the country. It is entirely possible that the state can meet this justificatory burden if all we are doing is interpreting literally the criteria set out in articles 18(3) and 19(3). This illustration signals just how light the justificatory burden of the state can be if the text of articles 18(3) and 19(3) are read literally. I return to this important question in the final section of this chapter, where I explore the conceptual, normative and political challenges that are encountered when a literal reading of the two limitation clauses is adopted.

⁷ *S.A.S v France*, Application No 43835/11 (ECtHR judgment [GC] of 1 July 2014).

B. A guided reading

The ICCPR does not establish a judicial body with the authority to interpret its provisions in a legally binding manner. However, several attempts have been made to offer guidance on how articles 18(3) and 19(3) of the ICCPR ought to be interpreted. Three sources of guidance are worth mentioning in this regard. First, the work of the Human Rights Committee – the treaty body established to supervise the implementation of the Covenant – is a rich source of guidance for the interpretation of articles 18(3) and 19(3). Second, the statements of UN special rapporteurs remain extremely useful to the interpretation of these clauses. Third, soft law instruments such as the 1984 Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR can offer valuable guidance.⁸ These Principles were formulated by a group of experts as part of a non-state initiative, and were subsequently presented to the (former) UN Commission on Human Rights. The Human Rights Committee has in fact occasionally cited the Principles in its jurisprudence.⁹

The Human Rights Committee was established under article 28 of the ICCPR. It consists of eighteen members,¹⁰ who are nationals of the states that are parties to the Covenant, and who are ‘persons of high moral character and recognised competence in the field of human rights’.¹¹ In determining the composition of the Committee, consideration is also given to the ‘usefulness

⁸ Commission on Human Rights, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 41st Session, 28 September 1984, E/CN.4/1985/4 (annex).

⁹ *Fedotova v The Russian Federation*, Communication No 1932/2010 (CCPR views adopted on 31 October 2012), CCPR/C/106/D/1932/2010, para 5.11.

¹⁰ ICCPR, art 28(1).

¹¹ *ibid.* art 28(2).

of the participation of some persons having legal experience'.¹² These members are elected and serve in their personal capacity.¹³ Article 40(4) of the Covenant mandates the Committee to transmit to the states parties its reports on their implementation of the Covenant, and certain 'general comments'. These reports have come to be known as the Committee's 'concluding observations' on a particular state party's record on implementing the Covenant. The general comments, by contrast, are not directed at particular states, but instead offer more general clarifications on the interpretation and implementation of the Covenant.

The question arises as to what status we should assign to the Committee's interpretation of the ICCPR. I explore this question in some detail in the next chapter of this thesis, where I examine the jurisprudence of the Committee. For now, it suffices to say that there is no basis in international law to treat the Committee's interpretation of the Covenant as legally binding on states. Yet such an interpretation can offer immensely important guidance. Philip Alston explains that general comments are:

[M]eans by which a UN human rights expert committee distils its considered views on an issue which arises out of provisions of the treaty, whose implementation it supervises, and presents those views in the context of a formal statement.¹⁴

¹² *ibid.*

¹³ *ibid.* art 28(3).

¹⁴ Philip Alston, 'The Historical Origins of 'General Comments' in Human Rights Law' in Laurence De Charzournes and Vera Gowlland-Debbas (eds), *The International Legal System in Quest of Equity and Universality* (Martinus Nijhoff 2001) 764. Also see Michael O'Flaherty, 'Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34' (2012) 12(4) *Human Rights Law Review* 627, 644.

According to Michael O’Flaherty, general comments ‘constitute authoritative legal analysis of the provisions of the treaty, except to the extent that the text might indicate otherwise’.¹⁵ He clarifies that, where the comments appear to deviate from the text of a provision, they would ‘constitute no more than policy-level suggestions’.¹⁶ There appear to be two types of content in a general comment. On the one hand, a general comment may cite legally binding obligations. Such content does not *create* legally binding obligations; it merely reiterates obligations that are already legally binding on states. On the other hand, particularly where the text of the provision is unclear and when it is ‘appropriate to avoid language of formal obligation’,¹⁷ the general comment may contain policy recommendations that are non-binding. The Committee itself has opined that the purpose of general comments is to promote the implementation of the Covenant, to draw the attention of states parties to insufficiencies disclosed by a large number of state party reports, to improve reporting procedure, and ‘to stimulate the activities of these States and international organisations in the promotion and protection of human rights’.¹⁸

Two currently valid general comments are relevant to the Two Freedoms. First, General Comment No. 22 of 1993 (GC 22) deals with the freedom of thought, conscience and religion including the freedom to manifest religion or belief under article 18 of the ICCPR.¹⁹ It observes that article 18 ‘does not permit any limitations whatsoever on the freedom of thought and

¹⁵ O’Flaherty 644. See Human Rights Committee, *Summary Record of the 2674th Meeting*, 23 October 2009, CCPR/C/SR.2674, para 2.

¹⁶ O’Flaherty 644.

¹⁷ *ibid* 646.

¹⁸ Human Rights Committee, ‘Report of the Human Rights Committee’ in *Official Records of the General Assembly*, 36th Session, Supplement No 40 (A/36/40), annex VII, introduction; Human Rights Committee, *General Comments Adopted by the Human Rights Committee under Article 40, paragraph 4, of the International Covenant on Civil and Political Rights*, 19 May 1989, CCPR/C/21/Rev.1.

¹⁹ Human Rights Committee, *General Comment No 22 – Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4 (‘GC 22’).

conscience or on the freedom to have or adopt a religion or belief of one's choice.'²⁰ It draws a parallel between the absolute nature of these freedoms, and the freedom of opinion guaranteed by article 19(1) of the Covenant.²¹ Second, General Comment No. 34 of 2011 (GC 34)²² deals with the freedoms of opinion and of expression. It replaces the previous General Comment on the freedom of expression – General Comment No. 10.²³ As recalled by O'Flaherty, who was appointed rapporteur for the development of the text of GC 34, the Committee's jurisprudence was one of the key sources for the General Comment's contents.²⁴ I examine this jurisprudence in the next chapter of this thesis. The Committee meanwhile observes that the freedom of opinion and the freedom of expression are 'closely related', with the freedom of expression 'providing the vehicle for the exchange and development of opinions'.²⁵ While the Covenant does not permit any limitation on the freedom of opinion,²⁶ it sets out the grounds on which the freedom of expression may be limited.

I do not separately survey the concluding observations of the Committee as possible sources of interpretative guidance. However, they do remain relevant in an indirect manner. Concluding observations are often cited within general comments, and can provide useful support for the positions advanced in these comments. For instance, in GC 34, concluding

²⁰ *ibid*, para 3.

²¹ *ibid*.

²² Human Rights Committee, *General Comment No 34 – Article 19 (Freedoms of opinion and expression)*, 12 September 2011, CCPR/C/GC/34 ('GC 34').

²³ Human Rights Committee, *General Comment No 10: Freedom of expression (Article 19)*, 29 June 1983.

²⁴ O'Flaherty 646. The Committee's jurisprudence appears to inform GC 34 in a more robust manner than in GC 22. O'Flaherty also mentions three other sources: the previous General Comment on FOE (General Comment No 10), other general comments including General Comment No 27, and the concluding observations of the Committee.

²⁵ GC 34, para 2.

²⁶ *ibid*, para 9.

observations are frequently cited to support policy recommendations, and to point out typical violations. They are also cited in the discussions on limitations. For example, in GC 34, the Committee's concluding observations with respect to Hong Kong, Russia and Uzbekistan are cited to buttress the view that laws that seek to limit the freedom of expression on the grounds of national security must comply with the strict requirements of article 19(3) of the ICCPR.²⁷

Special rapporteurs are 'special procedures mandate-holders' appointed either by the Commission on Human Rights, or the UN Human Rights Council, which succeeded the Commission. They are experts with mandates that are either thematic or country-specific. These rapporteurs are tasked with reporting and advising states on specific human rights issues. They currently report to the Human Rights Council on an annual basis, and on occasion, to the Third Committee of the UN General Assembly. Two special procedures mandate holders are relevant to the present discussion: the Special Rapporteur on the Freedom of Religion or Belief, and the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression. Although the statements of these rapporteurs are not legally binding on states, they offer clarity on the nature and scope of articles 18(3) and 19(3) of the ICCPR.

The Siracusa Principles were adopted at a time when major concerns were raised over the potential abuse of limitation clauses. The introductory note to the Principles, prepared by the American Association for the International Commission of Jurists, observed: 'The abuse of applicable provisions allowing governments to limit...certain rights contained in the [ICCPR] has resulted in the need for a closer examination of the conditions and grounds for permissible

²⁷ Human Rights Committee, *Concluding Observations on Hong Kong*, 21 April 2006, CCPR/C/HKG/CO/2; Human Rights Committee, *Concluding Observations on the Russian Federation*, 1 December 2003, CCPR/CO/79/RUS; Human Rights Committee, *Concluding Observations on Uzbekistan*, 26 April 2001, CCPR/CO/71/UZB.

limitations...'²⁸ Meanwhile, in the *note verbale* that presented the Principles to the Commission on Human Rights, the Netherlands observed that '[t]he interpretation and application of the limitation clauses...of the [ICCPR] have also become matters of great concern'.²⁹ Therefore, the Principles arose out of the same overarching intuition that drives this thesis – an intuition about the ICCPR's *vulnerability* in terms of how it sets out the state's burden to justify limitations on Covenant rights and freedoms. This vulnerability is evident when articles 18(3) and 19(3) are interpreted literally. The Siracusa Principles appear to have been a response to this vulnerability.

The general comments, special rapporteurs, and the Siracusa Principles offer guidance on the interpretation of three specific aspects of limitation clauses: first, on the possible definitions of limitation grounds; second, on the primary criteria for determining the permissibility of a limitation; and third, on certain additional normative constraints that may be imposed on states when they limit rights and freedoms. The normative value of each of these sources of guidance may not be identical. The general comments flow directly from the Covenant, and concern a treaty-based mandate that states have provided for and accepted. The mandates of special rapporteurs are also state-endorsed, i.e. through resolutions adopted by the Commission on Human Rights.³⁰ However, they do not flow directly from the ICCPR. By contrast, the Siracusa Principles flow from a non-state initiative. Yet these source of guidance

²⁸ The American Association for the International Commission of Jurists (AAICJ), *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (AAICJ 1985) 3.

²⁹ *Note verbale dated 24 August 1984 from the Permanent Representative of the Netherlands to the United Nations Office at Geneva addressed to the Secretary-General*, 28 September 1985, E/CN.4/1985/4.

³⁰ See for example Commission on Human Rights, Resolution 1986/20, 10 March 1986, E/CN.4/RES/1986/20; Commission on Human Rights, Resolution 1993/45, 5 March 1993, E/CN.4/RES/1993/45.

are, to some extent, comparable; they are not legally binding sources of interpretation, yet they contain the potential to guide states in the interpretation of limitation clauses.

a. Defining limitation grounds

The three sources of interpretation considered in this section can offer some guidance on how to define the specific limitation grounds listed in articles 18(3) and 19(3) of the ICCPR. In the preceding chapter of this thesis, I explained that the deliberations of the drafters of the ICCPR offer little clarity on the definitions of these grounds. In this context, these sources of guidance can contribute towards a better understanding of these limitation grounds. Yet the potential for these sources to meaningfully fill the definitional lacuna left in the text of articles 18(3) and 19(3) ultimately depends on the extent to which *states* accept such interpretative guidance.

The Human Rights Committee has offered some clarifications on the limitation grounds contained in articles 18(3) and 19(3) of the ICCPR. While GC 22 is silent on the definitions of most limitation grounds, it clarifies the scope of ‘morals’ as a ground for limiting the freedom to manifest religion or belief. Meanwhile, in GC 34, the Committee elaborates on most of the limitation grounds on which the freedom of expression may be limited. It only omits a view on what constitutes ‘public health’.

The first limitation ground discussed in GC 34 concerns respecting ‘the rights or reputations of others’. The Committee explains that the term ‘others’ can mean ‘other persons individually or as members of a community’.³¹ It also cites its concluding observations on Austria, Slovakia and Israel to note that others could also include ‘individual members of a

³¹ GC 34, para 28.

community defined by its religious faith or ethnicity’.³² The Committee then clarifies that the term ‘rights’ includes Covenant rights and human rights recognised more generally in international human rights law.³³ The Committee does not explain what is meant by the term ‘reputations’, but appears to suggest that the term is closely related to the ‘rights’ of others. It specifically cites the rights recognised by article 17 of the ICCPR as a basis on which a limitation may be imposed on the freedom of expression. Article 17(1) provides that ‘[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and *reputation*’ (emphasis added). It would then seem that the term ‘reputations’ in article 19(3)(a) can be interpreted in light of the specific right to be free from unlawful attacks on one’s reputation.³⁴ In essence, a limitation on the freedom of expression for ‘the respect of the reputations of others’ must relate to the right held by others to be free from unlawful attacks on their reputation. Manfred Nowak appears to disagree with this position. He suggests that even ‘insults, defamations and vilifications [that] do not fall within the protective scope of article 17’ may be statutorily restricted pursuant to article 19(3) insofar as it may be ‘necessary to respect the reputation of others’.³⁵ While Nowak clarifies that such limitations must be subject to the principle of proportionality, an interpretation of the term ‘reputations’ in article 19(3) as extending beyond the right protected in article 17 is both conceptually and normatively problematic. I shall return to this claim in the final section of this chapter.

³² *ibid.* Human Rights Committee, *Concluding Observations on Austria*, 30 October 2007, CCPR/C/AUT/CO/4; Human Rights Committee, *Concluding Observations on Slovakia*, 22 August 2003, CCPR/CO/78/SVK; Human Rights Committee, *Concluding Observations on Israel*, 5 August 2003, CCPR/CO/78/ISR.

³³ GC 34, para 28.

³⁴ Human Rights Committee, *General Comment No 16: Article 17 (The right to respect of privacy, family, home and correspondence, and protection of honour and reputation)*, 28 September 1988, HRI/GEN/1/Rev.9 (Vol. I), para 11. The Committee observes that states parties must enact ‘adequate legislation’ to protect personal honour and reputation.

³⁵ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: Committee Commentary* (NP Engel 2005) 462.

The Siracusa Principles also offer insights into the meaning of the phrases ‘the rights and freedoms of others’ or the ‘rights and reputations of others’ found in articles 18(3) and 19(3) respectively. The Principles stipulate that the scope of the rights and freedoms of others that may form the basis for a limitation on rights in the Covenant extends beyond the rights and freedoms recognised in the Covenant.³⁶

The next limitation ground considered in GC 34 is ‘national security’. The Committee’s observations in this regard are somewhat ambiguous. It maintains that invoking national security as a ground for limiting the freedom of expression must conform ‘to the strict requirements’ of article 19(3) of the ICCPR. It provides an example of what may be an unwarranted use of national security as a ground to limit the freedom of expression: suppressing or withholding from the public ‘information of legitimate public interest’. Yet it clarifies that such ‘information of legitimate public interest’ should not be information that harms national security. This caveat results in a tautology – it suggests that a state cannot invoke national security as grounds for limiting the freedom of expression, unless the conduct in question harms national security. In any event, the Committee does not clarify what ‘national security’ actually means. Where there is no precise definition offered for the concept of ‘national security’, the state becomes the ultimate arbiter of what constitutes ‘national security’.

According to the Siracusa Principles, ‘national security’ is confined to the protection of ‘the existence of the nation, its territorial integrity or political independence against force or threat of force’.³⁷ It is clarified that this ground cannot be invoked ‘as a reason for imposing

³⁶ Siracusa Principles, clause A(35).

³⁷ *ibid* clause A(29).

limitations to prevent merely local or relatively isolated threats to law and order'.³⁸ The Principles recognise the particular risks associated with this limitation ground. They also embed respect for human rights as a necessary element of national security. The Principles clarify that '[t]he systematic violation of human rights undermines national security and may jeopardize international peace and security'.³⁹ Therefore, a state that is responsible for such violation must not invoke national security as 'a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against its population'.⁴⁰

Special rapporteurs have also commented on the scope of national security. For example, former special rapporteur Frank La Rue observes that 'the use of an amorphous concept of national security to justify invasive limitations on the enjoyment of human rights is of serious concern'.⁴¹ He argues that the concept is 'broadly defined' and is 'vulnerable to manipulation' by states.⁴²

GC 34 also deals with the ground of 'public order (ordre public)'. The Committee clarifies that it may be permissible to regulate speech in a 'particular public place', such as a court of law, under this limitation ground.⁴³ It does not, however, elaborate on the reasons for the specific reference to the French conception of 'ordre public' in the English version of article 19(3) of the ICCPR – a reference that is absent in the English version of article 18(3). Nowak

³⁸ *ibid* clause A(30).

³⁹ *ibid* clause A(32).

⁴⁰ *ibid*.

⁴¹ Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, 17 April 2013, A/HRC/23/40, para 60.

⁴² *ibid*.

⁴³ GC 34, para 31.

accordingly explains that ‘ordre public’ in article 19(3) may entail a wide range of interferences, including preventing disorder and crime, limiting certain forms of expression of security forces and public officials, and restricting the freedom of information of prisoners.⁴⁴ In fact, John Humphrey describes this ground as ‘highly dangerous’ precisely due to such inordinate breadth.⁴⁵

According to the Siracusa Principles ‘public order (ordre public)’ may be defined as ‘the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded’.⁴⁶ This idea seems to be consistent with what some drafters had in mind when they explicitly included ‘ordre public’ in the English text of article 19(3) of the ICCPR. Notably, the Principles stipulate that ‘respect for human rights’ is an embedded part of public order (ordre public). They add that the state organs or agents responsible for the maintenance of public order (ordre public) must be ‘subject to controls in the exercise of their power through the parliament, courts or other competent independent bodies’.⁴⁷

The Siracusa Principles define ‘public health’ as concerning ‘a serious threat to the health of the population or individual members of the population’.⁴⁸ It is explained that a limitation on the grounds of public health must be ‘specifically aimed at preventing disease or

⁴⁴ Nowak 465.

⁴⁵ John Humphrey, ‘Political and Related Rights’ in Theodor Meron (ed), *Human Rights in International Law: Legal and Policy Issues* (Oxford University Press 1986) 185.

⁴⁶ Siracusa Principles, clause A(22). Clause A(23) states that public order (ordre public) must be interpreted ‘in the context of the purpose of the particular human right which is limited on this ground’.

⁴⁷ *ibid* clause A(24).

⁴⁸ *ibid* clause A(25).

injury or providing care for the sick and injured’.⁴⁹ ‘Public safety’ is meanwhile defined to mean ‘protection against danger to the safety of persons, to their life or physical integrity or serious damage to their property’.⁵⁰ The Principles maintain that the grounds of public safety ‘cannot be used for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse’.⁵¹

Both GC 22 and GC 34 offer some guidance on the concept of ‘morals’ or ‘public morals’.⁵² In GC 22, the Committee observes that ‘the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on [the freedom to manifest religion or belief] for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition’.⁵³ This position is reiterated in GC 34.⁵⁴ The Committee stipulates that any limitation based on the protection of morals ‘must be understood in the light of universality of human rights and the principle of non-discrimination’.⁵⁵ O’Flaherty recalls that the Committee added this clarification in GC 34 to bolster its previous position expressed in GC 22. He argues that the clarification ‘lessens the scope for abuse of

⁴⁹ *ibid* clause A(26).

⁵⁰ *ibid* clause A(33).

⁵¹ *ibid* clause A(31) and (34).

⁵² The question of whether articles 18(3) and 19(3) refer to ‘morals’ or ‘public morals’ has not been resolved. The punctuation in the two clauses suggests that the term ‘public’ can apply to ‘morals’. Yet GC 22 and GC 34 do not appear to frame the limitation ground as ‘public morals’, but instead refer only to the interest of protecting ‘morals’.

⁵³ GC 22, para 8. Also see Elizabeth K Cassidy, ‘Restricting Rights? The Public Order and Public Morality Limitations on Free Speech and Religious Liberty in UN Human Rights Institutions’ (2015) 13(1) *The Review of Faith & International Affairs* 5, 9-10.

⁵⁴ GC 34, para 32.

⁵⁵ *ibid*. Also see UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23.

ICCPR rights through invocation of the protection of morals'.⁵⁶ The Committee's views on morals were, however, not always precise during the drafting of GC 34. In fact, preliminary drafts of the General Comment contained the view that morals may 'differ widely from society to society' and that 'there is no universally applicable common standard'.⁵⁷ This position would have amounted to a regression, given that GC 22 had already clarified that 'morals' for the purpose of limiting the freedom to manifest religion or belief must derive from more than one tradition. As pointed out by Alfred de Zayas and Áurea Roldán Martín, 'fortunately...the final version of [GC 34] abandons previous relativism',⁵⁸ and reinforces the position adopted in GC 22.

By contrast, the 1984 Siracusa Principles appear to adopt a view that is more relativist. The Principles suggest that 'public morality' can 'vary over time and from one culture to another', and that states enjoy 'a certain margin of discretion' when they invoke this limitation ground.⁵⁹ It is clarified that this discretion cannot justify a limitation that is discriminatory.⁶⁰ The Principles also specify that the concept of 'public morals' refers to 'the maintenance of respect for fundamental values of the community'.⁶¹ Some special rapporteurs have endorsed this idea.⁶² It is in any event clear that the Human Rights Committee has departed from the view

⁵⁶ O'Flaherty 652.

⁵⁷ Alfred de Zayas & Áurea Roldán Martín, 'Freedom of Opinion and Freedom of Expression: Some Reflections on General Comment No 34 of the UN Human Rights Committee' (2012) *Netherlands International Law Review* 425, 442. The authors refer to draft versions of the General Comment dated 16 September 2010, 4 October 2010, and 3 May 2011.

⁵⁸ *ibid.*

⁵⁹ Siracusa Principles, Clause A(27).

⁶⁰ *ibid* clause A(28).

⁶¹ *ibid* clause A(27).

⁶² Human Rights Council, *Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt*, 23 December 2015, A/HRC/28/66/Add.1 ('Bielefeldt Report'), para 28.

that ‘morals’ can be left to states to define. It appears that the more contemporary guidance on the matter is that a moral principle must derive from *more than one* social, philosophical and religious tradition for it to qualify for the purpose of limiting the Two Freedoms.

Although the Committee has made important observations on the grounds on which the Two Freedoms may be limited, it has also displayed some reticence in terms of elaborating on the precise definitions of these grounds. O’Flaherty recalls that during the first reading of the draft GC 34, the Committee specifically removed definitional language originally submitted by him.⁶³ During the second reading, it declined to accept proposals on including such language. Therefore, there appears to have been some resistance to including language that may further guide states on the definitional contours of the limitation grounds. O’Flaherty justifies this reluctance as understandable, as the Committee may have wished to refrain from adopting ‘strict definitions’ that could ‘hamper legitimate future application’ of article 19(3).⁶⁴ Yet, we may recall that at the time of the ICCPR’s drafting, some states were deeply concerned that the ambiguity and obscurity of certain limitation grounds could lead to abuse. In this context, leaving definitions open to interpretation may be unwarranted, and may even perpetuate the abuse of state authority to limit the Two Freedoms.

b. Primary criteria

Through its general comments, the Committee has elaborated on three primary criteria that ought to be fulfilled for limitations on the Two Freedoms to be permissible. Prior to delving into these criteria, I wish to recall the discussion in the introductory chapter of this thesis on the

⁶³ O’Flaherty 652.

⁶⁴ *ibid.*

two ‘fora’ that concern the Two Freedoms. Limitations can only be imposed on manifestations of religion or belief, and expressions – the *forum externum*, so to speak. No limitations may be placed on the *forum internum* – the right to have and adopt a religion or belief, and the right to hold an opinion.⁶⁵ According to Heiner Bielefeldt, ‘the main function of [articles 18 and 19] is to protect every individual’s inner faculty of forming, holding or changing, inter alia, opinions, ideas, conscientious positions, religious and non-religious convictions against coercion and interference’.⁶⁶ For example, no one can be forced to conceal their true position or conviction or to feign a belief. He also clarifies that this distinction warrants an interpretation of articles 18(2)⁶⁷ and 19(1)⁶⁸ of the ICCPR ‘in close analogy to the unconditional prohibition of slavery and the equally unconditional prohibition of torture’.⁶⁹ The distinction between these two fora was clearly intended by the drafters of the ICCPR. For example, drafters noted:

The freedom of opinion and freedom of expression were not of the same character: the former was purely a private matter, belonging as it did to the realm of the mind, while the latter was a public matter, or a matter of human relationship, which should be subject to legal as well as moral restraint.⁷⁰

⁶⁵ Bielefeldt Report, para 18.

⁶⁶ *ibid*, para 19. Also see *Alger v Australia*, Communication No 2237/2013 (CCPR views adopted 13 Jul 2017), CCPR/C/120/D/2237/2013. The Committee clarified that the terms ‘religion’ and ‘belief’ includes ‘various theistic creeds’, and other beliefs such as agnosticism, free thought, atheism and rationalism (para 4.8). It also opined: ‘Although the contents of a religion or belief should be defined by the worshippers themselves, in general, beliefs are formed by a system of principles or philosophical consideration of life’ (para 6.5).

⁶⁷ Article 18(2) of the ICCPR provides: ‘No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice’.

⁶⁸ Article 19(1) of the ICCPR provides: ‘Everyone shall have the right to hold opinions without interference’.

⁶⁹ Bielefeldt Report, para 19.

⁷⁰ UN General Assembly, *Draft International Covenants on Human Rights*, 10th Session, 1 July 1955, A/2929, 145.

The special protection that the *forum internum* enjoys has implications on how limitations on the *forum externum* may be imposed. Bielefeldt explains that these two fora ‘should be generally seen as a continuum’.⁷¹ Distinctions between the two fora ‘should not be misperceived as a clear-cut separation of different spheres of life’.⁷² These two fora are interdependent. Freedom within the *forum internum* would be ‘inconceivable’ without free interaction with the social world; freedom within the *forum externum* would lack meaning without ‘respect for the faculty of every individual to come up with new thoughts and ideas and to develop personal convictions, including dissident and provocative positions’.⁷³ Therefore, the inviolable protection of the *forum internum* strengthens the normative value of the Two Freedoms (which are part of the *forum externum*) – even though these Two Freedoms can be subject to certain limitations.

The primary criteria, which must be fulfilled for a limitation to be permissible under articles 18(3) and 19(3) of the ICCPR, rest on the premise that limitations can *only* be placed on the *forum externum*.⁷⁴ These criteria are specified in the two limitation clauses: limitations must be (1) provided by law, (2) applied only for a purpose advancing a specific interest mentioned in the clause, i.e. one of the specific limitation grounds, and (3) ‘directly related and proportionate to the specific need on which they are predicated’.⁷⁵ The special rapporteurs and Siracusa Principles endorse these same criteria. A limitation that does not fulfil one of these criteria is not permissible under the Covenant.

⁷¹ Bielefeldt Report, para 22.

⁷² *ibid.*

⁷³ *ibid.*

⁷⁴ Heiner Bielefeldt, ‘Limiting Permissible Limitations: How to Preserve the Substance of Religious Freedom’ (2020) 15(1) and (2) *Religion and Human Rights* 3, 7.

⁷⁵ GC 22, para 8; GC 34, para 22.

In GC 34, the Committee explains that under the first criterion, ‘law’ must be ‘formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public’.⁷⁶ Special rapporteurs have meanwhile added that the limitation should have ‘a clearly formulated legal basis’,⁷⁷ ‘so that individuals can know with certainty what conduct is prohibited’.⁷⁸ According to the Siracusa Principles, laws must not be arbitrary or unreasonable, must be clear and accessible, and must contain adequate safeguards and effective remedies against abuse.⁷⁹

In terms of the second criterion, the Committee observes that the limitation grounds contained in articles 18(3) and 19(3) are exhaustive.⁸⁰ For example, in GC 22, it clarifies that article 18(3) of the Covenant ‘is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security’.⁸¹ The Committee reiterates this position in GC 34.⁸² Special rapporteurs and the Siracusa Principles maintain that the grounds listed in a limitation clause are exhaustive, and that no limitation can be applied for any other purpose.⁸³ These ideas appear to be consistent with article 5 of the Covenant, which provides:

⁷⁶ GC 34, para 24. Also see Antoon De Baets, ‘A Historian's View of the International Freedom of Expression Framework’ 1(1) *Secrecy and Society*, art 8, 8.

⁷⁷ Bielefeldt Report, para 25.

⁷⁸ Human Rights Council, *Freedom of religion or belief: Report of the Special Rapporteur on freedom of religion or belief*, 5 March 2019, A/HRC/40/58 (‘Shaheed’), para 17.

⁷⁹ Siracusa Principles clauses A(16), (17) and (18).

⁸⁰ GC 22, para 8; GC 34, para 22.

⁸¹ GC 22, para 8.

⁸² GC 34, para 22.

⁸³ Siracusa Principles, clause A(6); Shaheed para 17.

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

The general comments also deal with the third criterion, i.e. that the limitation must be necessary and proportionate. The criterion of necessity is clearly found in the text of articles 18(3) and 19(3) of the ICCPR. The additional requirement of proportionality has been introduced as a corollary of necessity; it is a requirement that follows if indeed the limitation is necessary for the protection of some compelling (or ‘legitimate’) interest. The concept of necessity is not clearly defined in the general comments, and is instead explained by way of illustration. For example, in GC 34, the Committee explains that prohibiting commercial advertising in one language to protect the language of a particular community fails to meet ‘the test of necessity’.⁸⁴ The Committee more clearly explains the related concept of proportionality, which appears to be a reference to proportionality *stricto sensu*. In General Comment No. 27, it observes that ‘restrictive measures... must be appropriate to achieve their protective function’ and ‘must be the least intrusive instrument amongst those which might achieve their protective function’.⁸⁵ In GC 34, the Committee expands on its previous views by positing that the principle of proportionality has particular relevance to the freedom of expression. It opines that the principle ‘must also take account of the form of expression at issue as well as the means of

⁸⁴ GC 34, para 33. The principle of necessity is explained elsewhere as stipulating that the restriction must ‘address a pressing social need’. See De Baets 12. Also see Bielefeldt Report, para 54.

⁸⁵ Human Rights Committee, *General Comment No 27(67) – Freedom of movement (article 12)*, 1 November 1999, CCPR/C/21/Rev.1/Add.9, paras 14-15; GC 34, para 34.

its dissemination'.⁸⁶ For example, it observes that the Covenant highly values uninhibited freedom of expression 'in the circumstances of public debate in a democratic society concerning figures in the public and political domain'.⁸⁷

Special rapporteurs also clarify that the limitation must be 'strictly necessary' to pursue one of the prescribed purposes listed in the limitation clause, i.e. the purpose should not be capable of being served by 'a less far-reaching intervention'.⁸⁸ For instance, measures to protect the right to non-discrimination, and combat religious intolerance may often involve limiting the freedom of expression. However, such measures may not necessarily require criminal sanctions as a first resort, as far less restrictive measures, such as awareness-raising and counter-messaging can be adopted first. Former special rapporteur Bielefeldt argues: 'From the perspective of freedom of religion or belief, seen in conjunction with freedom of expression, the primacy of non-restrictive policies should always be upheld'.⁸⁹ This notion of being the least restrictive means is usually associated with the criterion of necessity, but is sometimes framed as a matter of proportionality. The rapporteurs often combine the standards of necessity and proportionality *stricto sensu*, and articulate them as part of a single criterion.⁹⁰

The Siracusa Principles also clarify what is meant by the term 'necessary'. They stipulate that the term 'necessary' requires that the limitation 'responds to a pressing public or

⁸⁶ GC 34, para 34.

⁸⁷ *ibid.*

⁸⁸ Bielefeldt Report, paras 25 and 54.

⁸⁹ *ibid.*, para 55.

⁹⁰ *ibid.*, paras 26-27.

social need’, ‘pursues a legitimate aim’, and is ‘proportionate to that aim’.⁹¹ They also specify that the necessity of the limitation should be made on *objective* considerations.⁹²

The three primary criteria found in the text of articles 18(3) and 19(3) of the ICCPR form the foundation of the legal test to determine the permissibility of limitations on the Two Freedoms. These three criteria would almost certainly rule out limitations imposed through certain types of laws. For example, the Committee in GC 34 expresses concern about laws on matters such as *lèse-majesté*, *desacato*, disrespect for authority, disrespect for flags and symbols, defamation of the head of state, and the protection of the honour of public officials.⁹³ It is doubtful that these laws would meet the primary permissibility criteria. Moreover, blasphemy laws, ‘defamation of religion’ laws, or vaguely defined public order and anti-hatred laws, which often criminalise conduct that is ‘offensive’ towards a particular religious belief, would not meet the criteria.⁹⁴ As noted by special rapporteur Ahmed Shaheed, ‘an uncritical approach to the development and application of laws against “hate speech” can be problematic’.⁹⁵ He explains: ‘When laws against “hate speech” limit the subject matter of free speech, rather than [entail] contextual assessments to decide whether violence is imminent...the effects can be similar to that of a law against blasphemy’.⁹⁶ These laws do not meet the permissibility criteria – not because they fall short of general requirements such as accessibility

⁹¹ Siracusa Principles, clause A(10).

⁹² *ibid.* Clause A(11) meanwhile adds: ‘In applying a limitation, a State shall use no more restrictive means than are required for the achievement of the purpose of the limitation.’

⁹³ GC 34, para 38.

⁹⁴ Bielefeldt Report, para 61. Also see Shaheed paras 25-30.

⁹⁵ Shaheed, para 33.

⁹⁶ *ibid.* Also see Nadine Strossen, *Hate: Why We Should Resist it with Free Speech, Not Censorship* (Oxford University Press 2018) chapter 4.

or preciseness, but because they fail to comply with the object and purpose of the Covenant. I return to this principle of covenant compatibility in the next subsection of this chapter.

The strict fulfilment of the three primary criteria alone does not necessarily ensure that a substantial justificatory burden is imposed on states that seek to limit the Two Freedoms. Even fairly precise and facially neutral laws, such as laws that are meant to prevent public disorder or the incitement of violence, can be applied in problematic ways. As discussed in the second chapter of this thesis, there are occasions on which the state may employ a neutrally termed law to advance a majoritarian interest, or offload its positive obligations. For instance, public disorder laws can be employed to restrict ‘offensive’ speech on the grounds that ‘public peace has to be protected against actions by offended members of the public’.⁹⁷ The application of such laws where there is a genuine threat of public disorder may be framed as ‘necessary’. However, such situations may be quite complex. For instance, the ‘disorder’ may arise from unreasonable violent responses to religious manifestations such as proselytization, wearing religious attire, or displaying religious symbols, all of which may be entirely non-violent forms of religious manifestation. Moreover, the criticism of religious or cultural practices of some communities may similarly attract violent outrage. Restricting such manifestations and expressions on the basis of the unreasonable behaviour of others undermines the normative value of the Two Freedoms, and facilitates the abuse of state authority for majoritarian purposes. The sources of guidance I have discussed in this chapter respond to this challenge by articulating certain additional normative constraints that may be placed on state authority to limit the Two Freedoms.

⁹⁷ *ibid*, para 32.

c. Additional constraints

In addition to the three primary criteria, the Human Rights Committee has articulated certain additional normative constraints that may be placed on state authority to limit the Two Freedoms. Two types of constraints are discussed in the Committee's general comments.

The first constraint concerns the primacy of the Two Freedoms. This normative constraint is common to a liberal conception of the Two Freedoms. In the first part of this thesis, I discussed the 'fundamental liberal principle'⁹⁸ – that freedom is the default position, and that 'the onus of justification is on those who would use coercion to limit freedom'.⁹⁹ The Committee appears to base much of its views on this understanding of the Two Freedoms' primacy. It emphasises the need to construe the authority of states to limit the Two Freedoms in the narrowest possible manner, so as to afford the widest possible space for the exercise of the Two Freedoms, and other rights and freedoms that are intimately connected to them. Meanwhile, in GC 22, the Committee opines that a limitation 'must not be applied in a manner that would vitiate the rights guaranteed in article 18' of the Covenant.¹⁰⁰ This reference to 'rights' concerns both the freedom to manifest religion or belief, and the unconditional freedoms contained in article 18. According to Stephanie Berry '[w]hile the right to manifest religion was intended to be construed widely, its limitation clause was intended to be construed

⁹⁸ Gerald F Gaus, *Justificatory Liberalism: An Essay on Epistemology and Political Theory* (Oxford University Press 1996) 162-166.

⁹⁹ Gerald F Gaus, 'Liberalism', *Stanford Encyclopaedia of Philosophy* (1996), (revised version as of 22 January 2018).

¹⁰⁰ GC 22, para 8.

narrowly.’¹⁰¹ State non-interference ‘should be the default position’.¹⁰² Therefore, no limitation may be imposed on the freedom to manifest religion or belief where it results in a further limitation on any other freedom guaranteed in article 18, such as the freedom of conscience or the freedom to have or to adopt a religion or belief – freedoms that are absolute and unconditional. For example, a restriction on children wearing particular attire within primary school premises is a common type of limitation on the freedom to manifest religion. When such a limitation can result in the denial of a basic need, such as education, to persons of a particular faith, it may also amount to coercion that would impair the freedom to have or to adopt a religion or belief of one’s choice.¹⁰³ In such cases, the limitation in question may be impermissible, as it vitiates the unconditional freedom to have or to adopt a religion or belief guaranteed under article 18(2) of the Covenant. The Committee places a similar constraint on limitations with respect to the freedom of expression by stipulating that they ‘may not put in jeopardy the right itself’.¹⁰⁴ It explains that ‘the relation between right and restriction and between norm and exception must not be reversed’.¹⁰⁵ The Siracusa Principles similarly insist on the general primacy of rights and freedoms. They stipulate that a limitation must not jeopardise the essence of the right or freedom concerned; they must be interpreted strictly and in favour of the right or freedom at issue.¹⁰⁶

¹⁰¹ Stephanie E Berry, ‘A “Good Faith” Interpretation of the Right to Manifest Religion? The Diverging approaches of the European Court of Human Rights and the UN Human Rights Committee’ (2017) 37(4) *Legal Studies* 672, 681.

¹⁰² *ibid.*

¹⁰³ GC 22, para 5. See article 18(2) of the ICCPR. The Human Rights Committee upheld this position in *Raihon Hudoyberganova v Uzbekistan*, Communication No 931/2000 (CCPR views adopted on 5 November 2004), CCPR/C/82/D/931/2000. The Committee found that the author’s exclusion from studies on account of her religious manifestation violated her right to be free from coercion in matters of religion.

¹⁰⁴ GC 34, para 21.

¹⁰⁵ *ibid.*

¹⁰⁶ Siracusa Principles, clauses A(2), (3), and (4).

The second normative constraint concerns covenant compatibility. The Committee stipulates that a limitation must be compatible with all other Covenant rights. It articulates in GC 22 an interpretative approach whereby states parties ‘should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination’ when ‘interpreting the scope of permissible limitation clauses’.¹⁰⁷ This articulation suggests that article 18(3) must be read in line with the overarching aim of protecting Covenant rights and freedoms. For example, the Committee explicitly states that a limitation on the freedom to manifest religion or belief cannot be ‘imposed for discriminatory purposes or applied in a discriminatory manner’.¹⁰⁸ The special rapporteurs similarly insist that limitations cannot be enacted with a discriminatory intention or effect.¹⁰⁹ In fact, Shaheed lists non-discrimination as the fourth criterion that a limitation must fulfil to be deemed permissible.¹¹⁰ The Siracusa Principles also propose a reading of limitation clauses that is harmonious with general prohibitions on arbitrariness and discrimination found in the Covenant.¹¹¹ They accordingly specify that a limitation should not be imposed in an arbitrary or discriminatory manner.¹¹² The principle of covenant compatibility could be extended to require that a limitation be compatible with a range of Covenant rights and freedoms. For instance, it could rule out limitations on the Two Freedoms where such limitations are imposed

¹⁰⁷ GC 22, para 8.

¹⁰⁸ *ibid.*

¹⁰⁹ Bielefeldt Report, para 56. The Rabat Plan of Action meanwhile notes that ‘article 20 of the Covenant requires a high threshold because, as a matter of fundamental principle, limitation of speech must remain an exception’. See Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred (Rabat Plan of Action)*, 11 January 2013, A/HRC/22/17/Add.4, para 18.

¹¹⁰ Shaheed, para 17.

¹¹¹ See ICCPR, art 2(1).

¹¹² Siracusa Principles, clauses A(7) and (9).

in a cruel or degrading manner, which would undermine the freedom from such treatment as guaranteed in article 7 of the Covenant.

The Committee reaffirms the additional normative constraint of covenant compatibility in GC 34. It opines that a particular law must itself be ‘compatible with the provisions, aims and objectives of the Covenant’ in order to be the basis for a limitation on the freedom of expression.¹¹³ Laws that violate the right to non-discrimination, or sanction corporal punishment, do not meet the criterion of legality, as they violate provisions of the Covenant.¹¹⁴ Accordingly, an additional constraint is placed on the criterion of legality. To remain permissible, the limitation must not only be ‘provided by law’, but must also be provided by a law that is substantively compatible with the provisions of the Covenant. The Siracusa Principles meanwhile offer a similar view. According to the Principles, the phrase ‘prescribed by law’ (or ‘provided by law’) is a reference to ‘national law of general application which is consistent with the Covenant and is in force at the time the limitation is applied’.¹¹⁵ Therefore, the law that forms the legal basis for a limitation must be compatible with the object and purpose of the ICCPR.

The Committee also cites article 5(1) of the Covenant in this regard.¹¹⁶ Article 5(1) prohibits states parties from engaging in any activity aimed at destroying any right or freedom recognised in the Covenant. The Committee observes that states parties must bear article 5(1)

¹¹³ GC 34, para 26.

¹¹⁴ *ibid.*

¹¹⁵ Siracusa Principles, clause A(15).

¹¹⁶ GC 34, para 21.

in mind when limiting the freedom of expression,¹¹⁷ and by necessary implication, the freedom to manifest religion or belief. The principle of covenant compatibility is accordingly reinforced by the requirements of this article, as it stipulates that limitations on particular rights or freedoms must be compatible with all other Covenant rights and freedoms in order to be permissible.

Both general comments refer to article 20 of the ICCPR as relevant to the scope of limitations on the Two Freedoms. Article 20 obliges states to prohibit '[a]ny propaganda for war' and the 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'. In GC 22, the Committee observes that 'no manifestation of religion or belief may amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'.¹¹⁸ Therefore, the freedom to manifest religion or belief may be limited where the specific manifestation amounts to acts prohibited by article 20. The Committee meanwhile clarifies in GC 34 that the scope of the freedom of expression 'embraces even expression that may be regarded as deeply offensive', subject to limitations contained in article 19(3) and article 20.¹¹⁹ While article 20 does not place additional constraints on the authority of the state to limit the Two Freedoms, it is closely related to articles 18(3) and 19(3). Both prohibitions contained in article 20 are forms of limitations. They are accordingly subject to the criteria set out in articles 18(3) and 19(3).¹²⁰ They must be provided by law, and necessary and proportionate in terms of advancing a compelling interest of some kind, i.e. the protection of persons from war

¹¹⁷ *ibid.*

¹¹⁸ GC 22, para 7.

¹¹⁹ GC 34, para 12.

¹²⁰ *ibid.*, para 50.

propaganda or particular types of discrimination, hostility or violence. Such prohibitions cannot be incompatible with articles 18(3) and 19(3). For instance, the penalty for disseminating propaganda for war should not be excessive, and must meet the criterion of proportionality.

The additional normative constraint concerning covenant compatibility relates to the general rule on interpreting treaties. It relates to the rule in article 31 of the VCLT, which stipulates that treaty provisions be interpreted in good faith, in their context, and in light of the treaty's 'object and purpose'. According to the Human Rights Committee, the object and purpose of the Covenant concerns the creation of legally binding standards for the universal respect for, and observance of, human rights and freedoms.¹²¹ It would appear that the normative constraint concerning covenant compatibility ultimately flows from an overarching requirement to interpret the ICCPR in good faith. The sixth chapter of this thesis returns to this question, and explores what it means to interpret articles 18(3) and 19(3) in good faith, in their context, and in light of the Covenant's object and purpose.

Additional normative constraints ought to be distinguished from the primary criteria for permissible limitations. The primary criteria are found in explicit terms within the text of articles 18(3) and 19(3) of the ICCPR. By contrast, additional normative constraints are implicit, and emerge when articles 18(3) and 19(3) are read in good faith, in their context, and in light of the Covenant's object and purpose.¹²² The Committee's general comments suggest the existence of two types of additional constraints. The first type reaffirms the principle that limitations on the Two Freedoms cannot result in their vitiation. The second type requires

¹²¹ See Human Rights Committee, *General Comment No 24(52) – Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, 11 November 1994, CCPR/C/21/Rev.1/Add.6, para 7.

¹²² See VCLT, art 31(1).

limitations to be compatible with all rights and freedoms guaranteed under the Covenant. If the distinction between primary criteria and additional normative constraints is properly understood, it is possible to conceive of limitations that technically meet the primary criteria, and yet remain impermissible owing to an incompatibility with some other covenant norm, such as the principle of non-discrimination. Therefore, the Committee has outlined a host of criteria and constraints that determine the permissibility of limitations on the Two Freedoms. These criteria and constraints remain highly relevant to imposing on states a substantial justificatory burden when they seek to limit the Two Freedoms.

II. JUSTIFICATORY APPROACHES

This section of the chapter re-examines the literal and guided readings of article 18(3) and 19(3) of the ICCPR with a view to understanding the underlying justificatory approach that is contemplated under each reading of these limitation clauses.

A. Justification under a literal reading

The justificatory approach contemplated under a literal reading of articles 18(3) and 19(3) of the ICCPR appears to be fairly clear. Under such a reading, states are required to demonstrate that the limitation is provided by law and necessary for the protection of one of the specific interests listed in articles 18(3) and 19(3). Since this list is exhaustive, the justificatory approach is not, strictly speaking, ‘unconstrained’. The compelling interests available to the state to rely on are ‘constrained’ to the extent that there is a finite list contained in each limitation clause. Yet the range of interests available to states is still broad, and is certainly broader than the type of constrained interest-based approach I discussed in the first chapter of this thesis. For instance,

states are not required to justify limitations on the Two Freedoms on the basis that the limitations serve a specific type of individual interest, such as an interest in a basic liberty. Such a type of interest appears to be only one among many other compelling interests listed in the limitation clauses. Collective interests such as public order, health or morals are included within the list of compelling interests. A literal reading of these limitation clauses therefore does not rule out collective interests. The state's justificatory burden would only entail demonstrating that the limitation in question is necessary for protecting one of these compelling interests.

At the conclusion of the second chapter of this thesis, I presented a case for a more conceptually coherent, normatively compelling, and politically appealing justificatory burden to be placed on the state when it limits the Two Freedoms. A literal reading of articles 18(3) and 19(3) of the ICCPR does not contemplate such a justificatory burden. First, conceptually speaking, the Two Freedoms are liberties. Liberty is what remains when we account for the duties of justice an individual owes others. It would then be conceptually important to demonstrate that the individual concerned owes others a duty of justice to refrain from the conduct in question if indeed a restriction on the conduct is to be justified. Yet a literal reading of these limitation clauses does not require such a demonstration. Although article 19(3) refers to the 'special duties and responsibilities' individuals owe others, it does not (on a literal reading) seem to make the permissibility of a limitation contingent on the demonstration of such duties. Second, a literal reading does not necessarily recognise the normative primacy of the Two Freedoms. When interpreted literally, the two limitation clauses do not explicitly establish a normative presumption in favour of the Two Freedoms. The Two Freedoms are then vulnerable to being easily limited when broad limitation grounds such as public order and morals are at the disposal of the state. Finally, a literal reading of the two clauses exposes individuals – particularly those belonging to minority groups, or who hold unpopular views –

to unwarranted restrictions on their conduct. For example, the state could frame a limitation on the basis of protecting morals, but in reality conceptualise ‘morals’ according to the moral preferences of the majority community. The limitation in question may then have a discriminatory impact on those who follow or subscribe to alternative moral traditions. Accordingly, under a literal reading of articles 18(3) and 19(3), states could potentially rely on broadly termed interests to limit the Two Freedoms for majoritarian purposes.

B. Justification under a guided reading

Some of the deficiencies in the justificatory burden contemplated under a literal reading of articles 18(3) and 19(3) of the ICCPR are addressed through a ‘guided’ reading of these two clauses. Although the lists of limitation grounds contained in the two clauses are exhaustive, it would seem that the justificatory approach contemplated under a guided reading of these clauses is still closer to an unconstrained interest-based approach. The three sources of guidance acknowledge that the interests listed in limitation clauses are not confined to individual interests alone. For example, the definitions offered by the Siracusa Principles to the terms ‘public order (ordre public)’, ‘public morals’ and ‘national security’ clearly include collective interests.

The justificatory approach contemplated under a guided reading of the two clauses appears to be more normatively compelling and politically appealing than what a literal reading offers. From a normative standpoint, the Human Rights Committee explains that the state carries the particular burden of proof when limiting the Two Freedoms. It is not the individual who must justify the Two Freedoms; instead, the state bears the burden of justifying the limitations on the Two Freedoms. The Committee observes in GC 34 that it is the state that must ‘demonstrate in specific and individualised fashion the precise nature of the threat, and

the necessity and proportionality of the specific action taken'.¹²³ It must accordingly establish 'a direct and immediate connection between the expression and the threat'.¹²⁴ While GC 22 does not contain an explicit reference to this burden, the principle is applicable to limitations on the freedom to manifest religion or belief.¹²⁵ It would accordingly seem that these general comments acknowledge the need for the justificatory burden to be imposed solely on the state when it seeks to limit the Two Freedoms.

From a political standpoint, the weight of the justificatory burden contemplated through a guided reading is notably heavier than what a literal reading of the limitation clauses might entail. A heavier burden no doubt reduces the scope for abuse. The justificatory burden of the state is heavier due to three reasons. First, a guided reading offers greater clarity on the definitional scope of limitation grounds, thereby mitigating misapplications of these grounds. The state would have to demonstrate that the interest that is being pursued falls within the definitional parameters of a specific limitation ground. For example, the state may be precluded from limiting the Two Freedoms based on a moral principle that is unique to just one religious tradition. The definitional requirement that 'morals' derive from more than one tradition imposes a heavier justificatory burden on the state. Second, the more tightly defined requirement of necessity imposes a heavier burden on states to demonstrate both the objective basis on which the limitation is applied, and the proportionality of the limitation. Third, certain additional normative constraints, such as the requirement of covenant compatibility, help rule

¹²³ GC 34, para 35.

¹²⁴ *ibid.*

¹²⁵ See for example, Commission on Human Rights, *Civil and Political Rights, including the Question of Religious Intolerance – Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir*, 9 January 2006, E/CN.4/2006/5, para 53. Also see Heiner Bielefeldt, 'Misperceptions of Freedom of Religion or Belief' 35(1) *Human Rights Quarterly* 33, 39.

out certain types of abuses, such as a discriminatory application of a limitation. In this context, a guided reading contemplates imposing a relatively heavy justificatory burden on states. Such a burden can, to some extent, constrain the state's ability to impose limitations for majoritarian purposes.

Although a guided reading contemplates a more normatively compelling and politically appealing justificatory approach than a literal reading, it still attracts some weaknesses. The first weakness is conceptual; the second is political.

Conceptually speaking, it is worth reiterating two thoughts that were more fully explored in the second chapter of this thesis. First, our starting premise is that the Two Freedoms are liberties¹²⁶ in the abstract sense. Because of the importance attached to these liberties, the interests underlying them are usually sufficient to ground duties in others. Therefore, they are also rights, as they ground duties in others, including duties of non-interference. They are claim rights, as they are claimable against those who owe such duties.¹²⁷ Limitations, however, may be imposed on derivatives of the abstract notions of the Two Freedoms. For instance, an individual's liberty to express *a particular thing* essentially retains its status as a liberty *unless* a competing claim right (of another) can be demonstrated whereby a duty is imposed on the individual to not express that thing. We are then confronted with a matrix of interests, some of which come together to create duties in the individual concerned. This matrix also depicts how these duties shape the extent of the individual's liberty. A court or treaty body empowered to determine the permissibility of a particular limitation must carefully consider the web of

¹²⁶ Wesley N Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (W W Cook ed Yale University Press 1919) 36-39.

¹²⁷ *ibid* 39; Onora O'Neill, *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* (Cambridge University Press 1996) 131.

interests, claim rights, liberties, and *duties* that make up this matrix. An interest, or a combination of interests, that are insufficient to ground duties in others cannot limit a liberty, as only a claim right (which correlates to a duty of justice) can limit the scope of a liberty. If a competing interest, or a combination of competing interests, is weighty enough to ground in the individual a duty to refrain from the impugned conduct, the state can restrict the conduct, and effectively exclude it from the protective realm of the Two Freedoms. Despite its normative and political value, a guided reading seems to lack this conceptual coherence. Under such a reading, states are still ultimately permitted to limit so-called liberties such as the Two Freedoms without *explicitly* demonstrating the duty-generating aspect of the competing interests that are being advanced through the limitation. Such a justificatory burden is not coherent from a conceptual standpoint.

The conceptual weakness of a guided reading may not be particularly worrisome if such a reading still produces salutary outcomes in terms of protecting individuals from unwarranted limitations. As discussed in the next chapter of this thesis, the Human Rights Committee's jurisprudence indicates that many unwarranted limitations can be properly detected through criteria and constraints applied by the Committee when it determines the permissibility of a limitation. Yet a guided reading contains another weakness worth noting. This weakness pertains to the risk that the state may offload (onto the individual) its positive obligations towards others in society by targeting the individual's conduct. I return to the illustration discussed in the second chapter of this thesis to explain this point.

Recall that in this illustration, *A*, an activist, criticises the practice of child ordination among the Buddhist community, which also happens to be the majority community in the country. Child ordination is revered among this majority community as an important cultural

practice. *A*'s criticism outrages *B*, the leader of a militant Buddhist organisation, and *B* and his followers cause public unrest with a view to compel the state to arrest *A* and ban similar criticism. *C* is among those seriously affected by the unrest. The state ultimately decides to prohibit *A* from engaging in any further criticism of child ordination. Let us imagine the state justifies its actions under article 19(3) of the ICCPR, and specifically on the basis of public order. It contends that the criticism of child ordination 'causes' *B* and others to take the law into their own hands, and that such public unrest impairs the interest that *C* has in the maintenance of public order. This scenario is somewhat analogous to the public unrest that took place in countries such as Pakistan following the publication of cartoons of the Prophet Mohammed in Denmark.¹²⁸

It is clear that individuals such as *B*, who are directly responsible for the unrest, have no interests that are sufficient to impose any duty on *A* to refrain from her criticism. These individuals have no claim right against the dissemination of criticism that they subjectively find offensive. Other individuals such as *C* have specific interests, such as interests in physical security and in being free from violence, that are in fact sufficient to impose duties on others. They have claim rights with respect to the maintenance of public order. The question remains as to *who* owes them the duties that correspond to their claim rights. *C* certainly has claim rights against the state, and against other individuals. The state certainly owes *C* a duty – a positive obligation – to maintain public order. Such a duty entails bringing wrongdoers such as *B* to justice. Moreover, *B* himself owes *C* a 'horizontal' duty to refrain from engaging in acts of

¹²⁸ See Malcolm D Evans, 'From Cartoons to Crucifixes: Current Controversies Concerning the Freedom of Religion and the Freedom of Expression before the European Court of Human Rights' (2010) 26(1) *Journal of Law and Religion* 345; '70,000 gather for violent Pakistan cartoons protest', *The Times* (United Kingdom), 15 February 2006. Also see Koen Lemmens, 'Irreligious' Cartoons and Freedom of Expression: A Critical Reassessment' (2018) 18(1) *Human Rights Law Review* 89; Sejal Parmar, 'Freedom of Expression Narratives after the Charlie Hebdo Attacks' (2018) 18(2) *Human Rights Law Review* 267.

violence. *A* owes similar duties to refrain from violence, and from inciting such violence.¹²⁹ Yet it is not at all obvious that *A* owes *C* a duty to refrain from her criticism of child ordination; *C* has no claim right that *A* refrains from her criticism. After all, *A* is neither committing the violence, nor is she inciting others to commit acts of violence. The violence is a result of the unreasonable response of others such as *B* to *A*'s criticism. It does not seem reasonable for the state to hold *A* duty bound to refrain from her criticism instead of focusing on the wrongdoers who actually cause the unrest. By focusing on *A*'s conduct, the state appears to be offloading onto *A* its own obligations (to *C*) to maintain public order. If the presumptive normative value of the freedom of expression is accepted, a restriction on *A*'s conduct, i.e. her criticism of child ordination, would be unwarranted. A guided reading of article 19(3) does not necessarily avert such unwarranted limitations. The state may still enjoy space to manipulate limitation grounds such as public order. It may restrict the conduct of individuals under the guise of protecting the interests of others – even when the actual harm caused to others emanates from certain unreasonable responses to the individual's conduct. In *A*'s case, the state is fully cognizant of the fact that the cultural practice that is being criticised is revered by the majority community. When it places limitations on *A*'s freedom of expression, it is in fact offloading its own positive obligations (in terms of maintaining public order), and avoiding the actual problem in the case, i.e. the unreasonable behaviour of certain members of the majority community. In such circumstances, a guided reading of limitation clauses may not always constrain the state from using limitations on the Two Freedoms to target minorities, and those with unpopular political views.

¹²⁹ Incitement ought to be understood as an intentional act to provoke or encourage others to commit unlawful acts. Incitement creates 'an imminent risk of discrimination, hostility or violence'. See ARTICLE 19, *The Camden Principles on Freedom of Expression and Equality* (ARTICLE 19 2009), principle 12.1.

This chapter discussed two approaches to interpreting articles 18(3) and 19(3) of the ICCPR: a literal reading and guided reading. As noted in the previous chapter, many of the limitation grounds contained in these clauses are ambiguous or obscure. In this context, a literal reading of the clauses imposes too light a burden on states to justify limitations on the Two Freedoms. However, I have endeavoured to show that a guided reading of these limitation clauses strengthens that justificatory burden. Three sources of guidance were discussed in this regard: the Human Rights Committee's general comments, the statements of special rapporteurs, and the Siracusa Principles. These sources offer clarity on the meaning of limitation grounds; they also explain the primary permissibility criteria, and the additional normative constraints that are relevant to limitations on the Two Freedoms. Although these sources do not create legally binding standards, they offer crucial guidance on the interpretation of articles 18(3) and 19(3) of the ICCPR; effectively, they impose a fairly substantial justificatory burden on states when they limit the Two Freedoms.

The justificatory approach that a guided reading contemplates, however, contains certain conceptual and political weaknesses. I returned to an illustration from the second chapter of this thesis to explain how, even under a guided reading, certain unwarranted limitations on the Two Freedoms may escape our attention. The illustration exemplified the need to devise a more robust justificatory approach. The orthodox guidance with respect to interpreting articles 18(3) and 19(3) may need to be built on to ensure that states are constrained from advancing majoritarian interests, or offloading their positive obligations, through limitations on the Two Freedoms. As discussed in the next chapter of this thesis, the Committee, in its jurisprudential practice, appears to be cognisant of this problem, as it is often motivated by a normative instinct

to maximise the protection of the Two Freedoms and minimise the ability of states to impose unwarranted limitations.

Chapter 5

The Jurisprudence

The United Nations (UN) Human Rights Committee has a unique mandate to supervise the implementation of the International Covenant on Civil and Political Rights (ICCPR). Within this overarching mandate, it has developed a body of jurisprudence that provides important guidance on how limitation clauses pertaining to the freedom to manifest religion or belief and the freedom of expression (the Two Freedoms) should be interpreted. The present chapter offers an analytical account of this jurisprudence.

This chapter is presented in two sections. It begins with a discussion on the authoritative status of the Committee's interpretation of the Covenant, and how states have responded to the Committee's interpretative work. In this section, I conclude that although the Committee's interpretation of the ICCPR is not legally binding on states, its pronouncements offer important interpretative guidance. The second section of the chapter presents an analytical account of the Committee's jurisprudence on articles 18(3) and 19(3) of the ICCPR. I argue that the Committee's views appear to reflect a normative instinct about the need to protect the Two Freedoms from unwarranted limitations. This chapter lays the groundwork for the sixth and seventh (final) chapters of this thesis. In the sixth chapter, I ask what a good faith interpretation of the ICCPR actually entails, and attempt to illustrate how the Covenant *ought to be* interpreted. In that chapter, I return to the Committee's jurisprudence, but with the specific and limited aim of evaluating whether such jurisprudence reflects the interpretative approaches that I discuss in that chapter. In the final chapter of the thesis, I ask whether a duty-based justificatory approach can be accommodated within a good faith interpretation of the ICCPR, based on the Covenant's object and purpose. I argue that such a justificatory approach is more

conceptually coherent, normatively compelling, and politically appealing, and that the Human Rights Committee is well-placed to advance such an approach.

I. THE STATUS OF THE COMMITTEE

A. The Committee's contention

The Committee has postulated that its interpretation of the ICCPR has authoritative force. Its general comments – formulated and transmitted under article 40 of the ICCPR – remain the principal means through which such interpretation might be offered. Scholars including Philip Alston and Michael O'Flaherty argue that general comments must indeed be understood as having some weight in terms of the proper interpretation of the treaty in question.¹ However, an overarching notion in treaty-making and interpretation must be borne in mind, i.e. that 'agreement on interpretation among the treaty parties is the very best indicator of its proper interpretation'.² Richard Gardiner correctly observes that '[b]eyond the imposition of a few peremptory rules, international law allows states free reign in treaty-making. Hence the parties can interpret a treaty *authoritatively*' (emphasis added).³

The view that the Committee has a role to play in offering authoritative interpretations of the ICCPR is reflected in General Comment No. 24 (GC 24), where the Committee considers

¹ Philip Alston, 'The Historical Origins of 'General Comments' in Human Rights Law' in Laurence De Charzournes and Vera Gowlland-Debbas (eds), *The International Legal System in Quest of Equity and Universality* (Martinus Nijhoff 2001) 764; Michael O'Flaherty, 'Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34' (2012) 12(4) *Human Rights Law Review* 627, 644.

² O'Flaherty 644.

³ Richard Gardiner, 'The Vienna Convention Rules on Treaty Interpretation' in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press 2012) 484-485.

the question of reservations to the ICCPR. It opines: ‘The Committee’s role under the Covenant, whether under article 40 or under the Optional Protocol, necessarily entails interpreting the provisions of the Covenant and the development of a jurisprudence’.⁴ It accordingly concludes: ‘a reservation that rejects the Committee’s competence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of that treaty.’⁵

The Committee presents an interesting argument with respect to its own competence to assess a reservation’s compatibility with the Covenant. This argument has wider implications on the Committee’s general competence to interpret the ICCPR. The Committee observes that articles 19, 20, and 21 of the Vienna Convention on the Law of Treaties (VCLT) govern the question of reservations. Generally speaking, a reservation would need to be compatible with the object and purpose of a treaty in order to be permissible. Thereafter, states may accept or object to such reservations; if at least one state party accepts the reservation of a state, that state becomes bound by the treaty despite other states objecting to its reservations.⁶ As noted by Catherine Redgwell, the Committee does not appear to consider the distinction between permissible and impermissible reservations.⁷ States can only object to permissible reservations, as impermissible reservations would generally prevent the state concerned from being a party

⁴ Human Rights Committee, *General Comment No 24(52) – Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, 11 November 1994, CCPR/C/21/Rev.1/Add.6 (‘GC 24’), para 11. Article 40(4) of the ICCPR authorises the Committee to formulate general comments ‘as it may consider appropriate’ and transmit them to states parties and the Economic and Social Council.

⁵ GC 24, para 11. Article 19(3) of the VCLT provides that a state may not formulate a reservation that is ‘incompatible with the object and purpose of the treaty’. See Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

⁶ VCLT, art 20(4)(c).

⁷ Catherine J Redgwell, ‘Reservations to Treaties and Human Rights Committee General Comment No 24(52)’ (1997) 46(2) *International and Comparative Law Quarterly* 390, 404.

to the treaty, and no other state can accept or object to such a reservation.⁸ However, both the Committee and Redgwell note that this scheme has led to confusion in practice, as many states object to reservations on the basis that they are incompatible with the object and purpose of the treaty, and still declare that they recognise that the reserving state is bound by the treaty.⁹ A good early example of this phenomena is the state response to the United States reservations to the ICCPR. Denmark, Finland, France, Spain and Sweden objected to these reservations on the basis that they were incompatible with the object and purpose of the Covenant. Yet they also declared that their objection ‘does not preclude the entry into force of the Covenant between themselves and the United States’.¹⁰ Therefore, despite the VCLT stipulating that a reservation that is incompatible with the object and purpose of a treaty is impermissible, in practice, states tend to recognise that a state can be bound by a treaty despite depositing an impermissible reservation.¹¹

The same trend is evident in the state response to Pakistan’s initial reservations to the ICCPR, including its reservation to article 40, which in effect resulted in Pakistan’s refusal to recognise the Committee’s competence. As many as twenty states¹² objected to this reservation on the basis that it was incompatible with the object and purpose of the Covenant. Each of these

⁸ *ibid* 405. Also see Robert Jennings and Arthur Watts (eds), *Oppenheim’s International Law Volume 1: Peace* (9th edn, Oxford University Press 2008) 1247; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion [1951] ICJ Reports 15, 23.

⁹ Redgwell 406.

¹⁰ *ibid* 405.

¹¹ Redgwell notes that the proper approach to such reservations may be to nullify them by virtue of their impermissibility while still recognising the state’s consent to be bound by the treaty. See Redgwell 407.

¹² Austria, Belgium, Canada, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Latvia, Poland, Portugal, Slovakia, Spain, Sweden, Switzerland, the United States, Uruguay, and the Netherlands.

states parties, however, specifically declared that their objections did not constitute any obstacle to the entry into force of the Covenant between themselves and Pakistan.¹³

Bearing this general inconsistency in mind, the Committee argues that the response of states parties to a reservation cannot always offer proper legal guidance on the compatibility of that reservation with the object and purpose of the ICCPR. The Committee contends that a particular state response, or even the ‘absence of protest’ by states parties, ‘cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant’.¹⁴ This argument is based on the premise that the ICCPR is of a ‘special character’ because it is a human rights treaty.¹⁵ The Committee opines: ‘[human rights] treaties, and the Covenant specifically, are not a web of inter-state exchanges of mutual obligations. They concern the endowment of individuals with rights.’¹⁶ Therefore, the principle of inter-state reciprocity (i.e. whether or not a state accepts or rejects a reservation) has ‘no place’¹⁷ in determining the permissibility of a reservation.

¹³ In any event, in a communication on 20 September 2011, Pakistan notified the UN Secretary-General that it had decided to partially withdraw its reservations, including the reservation to article 40 of the ICCPR.

¹⁴ GC 24, para 17.

¹⁵ *ibid*, para 18. Also see *Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Second Phase)* [1970] ICJ Reports 32. The ICJ opined that when treaties concern individual rights, the obligations of the state are the concern of all states. It accordingly notes: ‘In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.’

¹⁶ GC 24, para 17.

¹⁷ *ibid*. See International Law Commission, *Report of the Study Group on Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, finalized by Martti Koskenniemi (13 April 2006), ILC 58th Session, A/CN.4/L.682 (‘Fragmentation Report’) 198. The ILC makes the following observation with respect to obligations owed *erga omnes* in the field of human rights: ‘[T]he law does not create reciprocal obligations between States in the bilateralist manner. An obligation to respect the right to freedom of speech in a State’s territory, for example, is not directed towards any particular States or the citizens of particular States. Rather, under such a norm a State assumes a responsibility in relation to all persons under its jurisdiction. There is no *quid pro quo* in such relations. A State is obliged to respect that right irrespectively how other States may have behaved.’ Also see Bruno Simma, ‘Bilateralism and Community Interest in the Law of State Responsibility’ in Yoram Dinstein (ed), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Nijhoff 1988) 823.

In this broader context, the Committee makes the case for its own authority to interpret the Covenant. It argues that ‘it necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant’.¹⁸ The Committee presents two reasons for this position: first, such an interpretative task is ‘inappropriate’ for states parties to undertake in relation to human rights treaties;¹⁹ second, such interpretation is a task that the ‘Committee cannot avoid in the performance of its functions’.²⁰ It accordingly concludes that ‘[b]ecause of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well-placed to perform this task’.²¹ This conclusion has implications beyond the question of reservations.

If indeed the ICCPR, by virtue of being a human rights treaty, ought not to be left to the interpretation of states, but to an ‘objective’ body of experts,²² then the Committee may be ‘well-placed’ to offer authoritative interpretations of the ICCPR. This view is very much reflected in GC 24, i.e. that the Committee’s role under the Covenant entails interpreting the Covenant and developing a jurisprudence.²³ It is a view that appears to be an expansion of how

¹⁸ GC 24, para 18. The Committee does, however, observe that a state’s objection to a reservation ‘may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant’.

¹⁹ *ibid.*

²⁰ *ibid.*

²¹ *ibid.*

²² The Human Rights Committee ought to be viewed as an objective body of experts. This is not to say, however, that there are no concerns raised with respect to the politicisation of UN treaty bodies. See Valentina Carraro, ‘The United Nations Treaty Bodies and Universal Periodic Review: Advancing Human Rights by Preventing Politicization?’ (2017) 39(4) *Human Rights Quarterly* 943.

²³ GC 24, para 11.

the Committee understood its role during the early stages of its existence. According to a report issued in 1981, the Committee suggested that general comments had a threefold purpose: to convey its own experience in assessing state party reports and draw attention to insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedure; and to stimulate the activities of states and international organisations in the promotion and protection of human rights.²⁴ More recent general comments do much more than what this early view might suggest. In fact, in General Comment No. 33 (GC 33), the Committee states that it is ‘the organ established under the Covenant...charged with the interpretation of that instrument’.²⁵ Accordingly, the Committee appears to be presenting itself as an authoritative interpreter of the Covenant.

The Committee has similarly asserted that its views in individual communications (submitted under the First Optional Protocol to the ICCPR) have authoritative force, and have ‘some of the principal characteristics of a judicial decision’, including ‘the considered interpretation of the language of the Covenant, and the determinative character of the decisions’.²⁶ Therefore, apart from its mandate to interpret the ICCPR through general comments, the Committee has suggested that its jurisprudence in the context of individual communications is another important domain in which it is called upon to interpret the Covenant. Some scholars have suggested that the Committee’s views in individual communications, though legally non-binding, are comparable to judicial decisions.²⁷

²⁴ Human Rights Committee, *Report of the Human Rights Committee*, Official Records of the General Assembly, 36th Session, Supplement No 40 (A/36/40) 107.

²⁵ Human Rights Committee, *General Comment No 33 – Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, 25 June 2009, CCPR/C/GC/33 (‘GC 33’), para 13.

²⁶ GC 33, para 11.

²⁷ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: Committee Commentary* (NP Engel 2005) XXVII; Sarah Joseph, Melissa Castan, and Jenny Schultz, *The International Covenant on Civil and Political*

B. The response of states

I next turn to the question of how states have responded to the Committee's asserted status in dispensing authoritative interpretations of the ICCPR. Two strands of thought have emerged in this regard.

First, states have generally avoided any direct acceptance of the Committee's authority to interpret the ICCPR. A good example of this type of discourse can be seen in the statements of states parties with respect to reservations to article 40 of the Covenant. On the one hand, states have observed that article 40 of the ICCPR, which authorises the Committee to receive and comment on state party reports, and formulate and transmit general comments, is deeply connected to the object and purpose of the ICCPR.²⁸ This observation comes out quite clearly in the numerous statements submitted by states that objected to Pakistan's initial reservation to article 40. Many objecting states suggested '[t]he exclusion of the competence of the Committee [under article 40] is...incompatible with the object and purpose of the Covenant'.²⁹ However, there was no specific reference to the Committee's competence under article 40 to issue general comments. Some of the objecting states instead referred to the fact that article 40 provided for 'an effective mechanism for monitoring obligations under the Covenant',³⁰ and that such a

Rights – Cases, Materials and Commentary (2nd edn, Oxford University Press 2004) 24; Dominic McGoldrick, *The Human Rights Committee – Its Role in the Development of the International Covenant on Civil and Political Rights* (Clarendon Press 1991) 150-151; Thomas Buergenthal, 'The U.N. Human Rights Committee' (2001) 5 *Max Planck Yearbook of United Nations Law* 341, 397.

²⁸ I return to the question of what this object and purpose entails in the next chapter of this thesis.

²⁹ See objections of Austria dated 24 June 2011, Denmark dated 28 June 2011, France dated 24 June 2011, Spain dated 9 June 2011, and the Netherlands dated 30 June 2011 at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en#36 [last accessed 18 February 2020].

³⁰ *ibid.* See objections of Belgium dated 28 June 2011, Denmark dated 28 June 2011, Greece dated 22 June 2011, Poland dated 20 June 2011, and Uruguay dated 23 June 2011.

mechanism was envisaged by the Covenant's object and purpose. Moreover, it was observed that the reporting mechanism under article 40 of the ICCPR was 'a central procedural element of the Covenant system', and that a reservation to article 40 was therefore contrary to the Covenant's object and purpose.³¹ On the other hand, the tone and content of these objections reveal that states prefer to focus on the 'procedural' monitoring function of the Human Rights Committee. They do not appear to possess (or wish to convey) any strong sentiment with respect to the authoritative status of the Committee's interpretation of the Covenant. In fact, states appear to be studiously avoiding any reference to the interpretative function of the Committee; they instead confine themselves to reinforcing the Committee's procedural function in monitoring the implementation of the Covenant. Since article 40 also deals with the competence of the Committee to formulate and transmit general comments, this avoidance may not be coincidental. It seems likely that states have evaded any overt recognition of the Committee as an authority on the interpretation of the Covenant.

Second, some states have taken the extra step of overtly dismissing the authoritative status of the Committee's interpretation of the ICCPR. For example, the United States, France, and the United Kingdom objected to the Committee's position that it is best placed to determine whether a reservation is compatible with the object and purpose of the ICCPR.³² Another notable example in this regard is the United Kingdom's comments on the Committee's draft GC 33, which deals with obligations of states parties under the Optional Protocol to the ICCPR.

³¹ *ibid.* See objections of Germany dated 28 June 2011, Portugal dated 28 June 2011, and Sweden dated 22 June 2011. Interestingly, the United Kingdom objected to Pakistan's reservation, but did not specifically state that it viewed the reservation to be incompatible with the object and purpose of the Covenant. See objections of United Kingdom dated 28 June 2011.

³² *Observation by France on GC No 24 on Reservations to the ICCPR* (8 September 1995), CCPR A/51/40, 104–6; *Observation by the United States of America on General Comment No 24* (28 March 1995), CCPR A/50/40/Annex VI 126–29; *Observations by the United Kingdom on GC No 24* (21 July 1995), CCPR A/50/40/Annex VI 130–34.

In the original draft of GC 33, the Committee implied that its views have a binding legal character.³³ This position became evident in the language it used to describe its views: ‘determinative’,³⁴ and representative of ‘an authoritative determination’.³⁵ The Committee suggested that it was not justifiable to treat these views as ‘purely recommendatory or advisory’.³⁶ It also considered itself an ‘authentic interpreter’³⁷ of the ICCPR. In this earlier draft, the Committee suggested that its views had ‘most of the characteristics of a judicial decision’.³⁸ States including the United Kingdom, however, rejected this position. For example, the United Kingdom commented that it did not regard the Committee’s views as legally binding, and that ‘any change to the legal status of the Committee’s views’ would require an amendment to the First Optional Protocol.³⁹ The United Kingdom also rejected the claim that the Committee was *the* ‘authentic interpreter’ of the Covenant. But it acknowledged that ‘the Committee’s

³³ Geir Ulfstein, ‘The Legal Status of Views Adopted by the Human Rights Committee – From Genesis to Adoption of General Comment No 33’ in Asbjørn Eide, Jakob Th Möller and Ineta Ziemele (eds), *Making Peoples Heard: Essays on Human Rights in Honour of Gudmundur Alfredsson* (Brill – Nijhoff 2011) 160.

³⁴ Human Rights Committee, *Draft General Comment No 33 (Second revised version as of 18 August 2008): The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, 22 August 2008, CCPR/C/GC/33/CRP.3 (‘Draft GC 33’), para 11.

³⁵ *ibid*, para 14.

³⁶ *ibid*, para 13.

³⁷ *ibid*, para 14. The term ‘authentic’ has particular significance in this regard. The International Law Commission (ILC) has observed: ‘The term “authentic”...refers to different forms of “objective evidence” or “proof” of conduct of the parties, which reflects the “common understanding of the parties” as to the meaning of the treaty.’ See International Law Commission, *Report of the International Law Commission, Seventieth Session (30 April–1 June and 2 July–10 August 2018)*, General Assembly Official Records, 73rd Session, Supplement No 10 (A/73/10) (‘ILC Report 2018’) 12-24. For example, the Commission has observed that subsequent practice under article 31(3)(b) of the VCLT, ‘being objective evidence of the understanding of the parties as to the meaning of the treaty, are *authentic* means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31’ (emphasis added).

³⁸ Draft GC 33, para 11.

³⁹ See United Kingdom, *Comments of the Government of the United Kingdom of Great Britain and Northern Ireland on draft General Comment 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, 17 October 2008, <https://www.ohchr.org/Documents/HRBodies/CCPR/GC33/UK.doc> [last accessed 24 February 2020] (‘UK comment on GC 33’) 1.

interpretation will certainly carry weight’ although ‘it is *not the only body* which may provide authoritative guidance on the interpretations of States Parties’ obligations under the ICCPR’.⁴⁰ This comment may in fact be read as an acknowledgement that the Committee is one of many bodies that provide ‘authoritative’ guidance on how to interpret the Covenant. In this sense, it gives some credence to the position that the Committee’s interpretation of the ICCPR – although not determinative – remains important.

The Committee goes on to claim in the draft of GC 33 that its ‘general body of jurisprudence’ constitutes ‘subsequent practice in the application of the treaty which establishes the agreement of the parties regarding [the treaty’s] interpretation’⁴¹ in terms of article 31(3)(b) of the VCLT.⁴² According to this claim, the Committee’s views in individual communications would reflect the agreement of states parties on how the ICCPR is to be interpreted. The Committee added that, alternatively, ‘the acquiescence of states parties in those determinations constitutes such practice’.⁴³ Geir Ulfstein correctly notes that article 31(3)(b) of the VCLT refers to the subsequent practice of *states*, and that the practice of the Committee cannot be equated with the practice of states.⁴⁴ The Committee is an international organ and ‘not a forum

⁴⁰ *ibid* 2.

⁴¹ Draft GC 33, para 17.

⁴² Article 31(3)(b) provides: ‘There shall be taken into account, together with the context: (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.’

⁴³ *ibid*. The Committee appears to cite the International Law Association’s report on International Human Rights Law and Practice as a source for this claim. See International Law Association, Committee on International Human Rights Law and Practice, *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies: Report of the 71st Conference of the International Law Association* (2004) 628-629. However, the report does not appear to support the Committee’s view, and instead correctly observes that the views of treaty bodies do not constitute the subsequent practice of states. Also see ILC Report 2018, 33, 37 (draft conclusion 5 on conduct as subsequent practice). The ILC observes that it is ‘the parties themselves, acting through their organs, or by way of conduct in the application of the treaty, who engage in practice that may establish their agreement’ in terms of article 31(3)(b) of the VCLT.

⁴⁴ Ulfstein 162.

for expression of states' opinion (or actual practice)'.⁴⁵ Twenty-one states commented on the draft of GC 33; none of these states supported the view that the Committee's practice reflected 'state practice', or that state acquiescence with respect to the Committee's views in individual communications constituted such state practice.⁴⁶ For instance, the United Kingdom observed that its '[f]ailure to comment on public statements made by the Committee should not be taken as acquiescence with [respect to] the content of those statements'.⁴⁷ The claim that the jurisprudence of the Committee (or the acquiescence of states thereto), constitutes subsequent state practice accordingly appears to be unfounded.⁴⁸ The finalised version of GC 33 abandons notions that the Committee's views contain 'most of the characteristics of a judicial decision', and instead contains the more modest claim that they exhibit 'some of the principal characteristics of a judicial decision'.⁴⁹ Moreover, the Committee abandons the claim that its views, or states' implementation of its views, constitute subsequent state practice in terms of article 31(3)(b) of the VCLT.

⁴⁵ *ibid.* This view was also advanced by the United Kingdom. See UK comment on GC 33, 2. Also see P R Ghandhi, *The Human Rights Committee and the Right of Individual Communication* (Ashgate 1998).

⁴⁶ Ulfstein 164. See Office of the UN High Commissioner for Human Rights, *Consultation on the draft General Comment 33 of the Human Rights Committee on States Parties' obligations under the first Optional Protocol to the International Covenant on Civil and Political Rights*, <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC33-ObligationsofStatesParties.aspx> [last accessed 24 February 2020]. States commented that acquiescence would be limited to the state concerned, as other states would not have an opportunity to express their opinion in individual communications. Moreover, it was observed that the implementation of the Committee's views by a state does not reflect acceptance of a legal obligation to do so. Such implementation would be a matter of 'good faith' only.

⁴⁷ UK comment on GC 33, 2-3.

⁴⁸ The ILC has clarified this point by examining the draft GC 33, the response of states, and the Committee's eventual decision to abandon its claim. See ILC Report 2018, 109.

⁴⁹ GC 33, para 11.

The Committee's pronouncements,⁵⁰ however, remain valuable sources of interpretative guidance. We see such value in at least two respects. First, such pronouncements may be *relevant* to 'assessing the subsequent practice' of states.⁵¹ Such pronouncements can accordingly assist in the process of identifying subsequent practice both in the narrow sense under article 31(3)(b) of the VCLT, and in the broad sense under article 32 of the VCLT.⁵² I return to the distinction between subsequent state practice in the 'narrow' sense and in the 'broad' sense in the next chapter of this thesis. Second, the Committee's pronouncements may themselves be supplementary means of interpretation, and may be relied on to confirm the meaning to be given to a treaty provision under the general rule of interpretation. Regardless of the fact that the Committee lacks an authoritative status in terms of issuing legally binding views, or the fact that its work does not constitute subsequent practice of states, the Committee remains an important source of interpretative guidance. This value is recognised by the International Court of Justice in the *Ahmadou Sadio Diallo* case. It observed: 'Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the [ICCPR] on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty...'⁵³ Therefore, it seems clear that the Committee does

⁵⁰ I rely on the ILC's use of the term 'pronouncements', which includes 'views' and 'comments'. See ILC Report 2018, 108. Also see International Law Association 5.

⁵¹ ILC Report 2018, 39-40. The ILC refers to 'other conduct' that does *not* constitute subsequent practice, but may be 'relevant when assessing the subsequent practice of parties to a treaty'. It then includes within the category of 'other conduct' pronouncements by independent treaty monitoring bodies in relation to the interpretation of a treaty.

⁵² *ibid* 109-112. The Committee's pronouncements can 'give rise' to subsequent practice, as states may respond to such pronouncements or act on them when applying a treaty provision. In this sense, the pronouncement may be a catalyst for subsequent practice. Also see Eckart Klein and David Kretzmer, 'The UN Human Rights Committee: The General Comments — The Evolution of an Autonomous Monitoring Instrument (2015) 58 *German Yearbook of International Law* 189, 205-206.

⁵³ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo), Merits, Judgment* [2010] ICJ Reports 639, 663-664. Also see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* [2004] ICJ Reports 136, 179, where the ICJ cites the 'constant practice

have a crucial role to play in advancing a good faith interpretation of the ICCPR. While it lacks binding authority, and does not reflect state practice, it can certainly guide state practice towards achieving the object and purpose of the Covenant.

II. THE JURISPRUDENCE OF THE COMMITTEE

The Human Rights Committee is mandated under the 1966 Optional Protocol to the ICCPR to receive communications from individuals subject to the jurisdiction of states that are party to the Protocol.⁵⁴ Such communications would typically contain claims that the state party concerned had violated an individual's rights set forth in the Covenant. The Committee determines the admissibility of such communications based on several criteria. First, the individual who claims that a violation has taken place must exhaust 'all available domestic remedies' prior to submitting a written communication to the Committee.⁵⁵ Second, the communication must not be anonymous.⁵⁶ Third, it must not be an 'abuse of the right of submission of such communications'.⁵⁷ Fourth, the communication must not be 'incompatible with the provisions of the Covenant'.⁵⁸ Finally, the Committee must not consider any communication from an individual unless it has ascertained that '[t]he same matter is not being examined under another procedure of international investigation or settlement'.⁵⁹ The

of the Human Rights Committee' to support the Court's own interpretation of the ICCPR. See ILC Report 2018, 115.

⁵⁴ Optional Protocol to the International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, art 1.

⁵⁵ *ibid.* art 2 and art 5(2)(b).

⁵⁶ *ibid.* art 3.

⁵⁷ *ibid.*

⁵⁸ *ibid.*

⁵⁹ *ibid.* art 5(2)(a).

Committee is required to declare as inadmissible any communication that fails to meet these criteria. Such communications are declared inadmissible prior to any consideration of their merits.

If the communication is deemed admissible, the Committee then offers its ‘views’ on the communication; thus it performs a ‘quasi-adjudicative’ function as part of its role in monitoring the implementation of the Covenant.⁶⁰ As discussed in the previous section of this chapter, the Committee’s views ought not to be characterised as legally binding. As noted correctly by Manfred Nowak,⁶¹ and others including Dominic McGoldrick,⁶² Sarah Joseph,⁶³ P.R. Gandhi,⁶⁴ and Thomas Buergenthal,⁶⁵ the Committee’s views, though following a ‘judicial pattern’, are ultimately legally non-binding.⁶⁶ Meanwhile, as Patrick Thornberry observes, the transformative value of individual communications ought not to be overstated. He notes that ‘holistic violations of rights are not always best addressed through individual communications’.⁶⁷ Despite these limitations, the Committee’s views in individual

⁶⁰ Andrew M Robinson, ‘Would International Adjudication Enhance Contextual Theories of Justice? Reflections on the UN Human Rights Committee, Lovelace, Ballantyne and Waldman’ 39(2) *Canadian Journal of Political Science* 271, 280.

⁶¹ Manfred Nowak XXVII.

⁶² McGoldrick, *The Human Rights Committee*, 150-151.

⁶³ Sarah Joseph, Melissa Castan, and Jenny Schultz, *The International Covenant on Civil and Political Rights – Cases, Materials and Commentary* (2nd edn, Oxford University Press 2004) 24.

⁶⁴ P R Gandhi, *The Human Rights Committee and the Right of Individual Communication* (Ashgate 1998) 329-330.

⁶⁵ Buergenthal 397.

⁶⁶ Martin Scheinin, ‘The Human Rights Committee’s Pronouncements on the Right to an Effective Remedy – An Illustration of the Legal Nature of the Committee’s Work under the Optional Protocol’ in Nisuke Ando (ed), *Towards Implementing Universal Human Rights: Festschrift for the Twenty-Fifth of the Human Rights Committee* (2004) 104.

⁶⁷ Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press 2002) 224.

communications remain important to understanding how articles 18(3) and 19(3) of the ICCPR are interpreted and applied in practice.

The Committee's general comments both inform and draw from the Committee's jurisprudence concerning individual communications. General Comment No. 34 of 2011 (GC 34)⁶⁸ for instance draws from the Committee's views in thirty-five specific cases. Yet an analysis of a broader sample of cases⁶⁹ on the Two Freedoms may be needed to assess the manner in which the Committee applies the primary permissibility criteria and additional normative constraints concerning limitations.

The analysis of the Committee's jurisprudence is presented in two subsections. The first subsection assesses the rigour of the Committee's legal test on whether a particular limitation on the freedom to manifest religion or belief, or the freedom of expression, meets the three primary criteria for permissibility. These criteria are: (1) that the limitation is provided by law, (2) that it relates to one of the limitation grounds found in the relevant limitation clause, and (3) that it meets the standards of necessity and proportionality. The Committee's jurisprudence depicts both *flexible* and *rigorous* versions of a permissibility test. In the first chapter of this thesis, I explained that an unconstrained interest-based approach to justifying limitations often features what is commonly described as a four-part 'proportionality test', and that in practice such a test is applied flexibly or rigorously. I suggested that, since proportionality *stricto sensu* is only the fourth and final element of that test, it may be more sensible to call the test a

⁶⁸ Human Rights Committee, *General Comment No 34 – Article 19 (Freedoms of opinion and expression)*, 12 September 2011, CCPR/C/GC/34 ('GC 34').

⁶⁹ I examined 242 individual communications concerning the freedom to manifest religion or belief or the freedom of expression (or both). 63 of these cases explicitly deal with limitations under article 19(3) of the ICCPR, whereas 18 cases deal with limitations under article 18(3).

‘permissibility test’. The question of ‘proportionality’ may not feature if an earlier limb of the test is not satisfied in the first place. For this same reason, I refer to the Committee’s three-part test to assess limitations on the Two Freedoms simply as a ‘permissibility test’.⁷⁰

The second subsection examines the extent to which the Committee has applied additional normative constraints on the state’s authority to limit the Two Freedoms. In this subsection, I conclude that the Committee’s recent jurisprudence reflects a promising trend in the application of such constraints.

A. The application of primary criteria

Two strands of cases are evident in the Committee’s jurisprudence on the Two Freedoms. The first strand involves a *flexible* test with respect to the primary criteria for the permissibility of a limitation. In these cases, the Committee does not engage in a rigorous assessment of whether the limitation in question satisfies each of the three criteria. The second strand of cases involves a *rigorous* test, wherein the Committee has more rigorously applied the three criteria. In these cases, the Committee has insisted that each criterion be systematically satisfied for the limitation in question to be permissible.

⁷⁰ The Committee’s permissibility test, envisaged by articles 18(3) and 19(3) of the ICCPR, contains three criteria: (1) that the limitation is provided by law (legality), (2) that it relates to one of the limitation grounds found in the relevant limitation clause (legitimacy), and (3) that it meets the standards of necessity and proportionality. Similarly, the common permissibility test cited by a number of scholars appears to have four limbs: (1) legitimacy, (2) rationality, (3) necessity, and (4) proportionality *stricto sensu*. The distinction does not appear to be a material one. See Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press 2012); Francisco J Urbina, ‘Is it Really That Easy? A Critique of Proportionality and ‘Balancing as Reasoning’ (2014) 27(1) *Canadian Journal of Law & Jurisprudence* 167; Luc B Tremblay, ‘An Egalitarian Defense of Proportionality-based Balancing’ (2014) 12(4) *International Journal of Constitutional Law* 864.

a. Flexible permissibility test

In its earliest jurisprudence on the Two Freedoms, the Committee did not clearly set out any criteria for limitations. It instead afforded a high level of deference to the state party concerned. In *Leo Hertzberg et al v Finland* (1985), five individuals complained that the state-controlled Finnish Broadcasting Company interfered with their freedom of expression by imposing sanctions against participants in certain radio and television programmes dealing with homosexuality.⁷¹ The state invoked the limitation ground on protecting morals to justify the limitation on the freedom of expression. The Committee adopted the view that conceptions of morals ‘differ widely’ and that ‘[t]here is no universally applicable common standard’.⁷² It accordingly observed that ‘a certain margin of discretion must be accorded to the responsible national authorities’.⁷³ It specifically found that deference to the state was appropriate in this case, as radio and television audiences could include minors, and ‘harmful effects on minors cannot be excluded’.⁷⁴ It concluded that the impugned limitation on freedom of expression was permissible under the Covenant. Yet in failing to interpret the scope of the limitation ground on morals, the Committee deferred to the state party not only on *when* it was appropriate to limit the freedom of expression to protect morals, but also on *what* actually constituted ‘morals’.

Although the ‘margin of discretion’ doctrine no longer features in the Committee’s assessment of limitations, the Committee has on numerous occasions afforded states a certain

⁷¹ Communication No 61/1979 (CCPR views adopted 2 April 1982), CCPR/C/OP/1, para 2.1.

⁷² *ibid*, para 10.3.

⁷³ *ibid*.

⁷⁴ *ibid*, para 10.4.

measure of deference when considering the primary criteria for limitations.⁷⁵ O’Flaherty meanwhile, makes a crucial observation with respect to state practice on the specification of limitation grounds in article 19(3) of the ICCPR. He observes that, ‘in the context of the individual communications procedure, states often fail to indicate which of the grounds is being relied on’.⁷⁶ He notes that states often refer to all the limitation grounds or merely refer to article 19(3) in general.⁷⁷ His observations are equally applicable to cases concerning article 18(3) of the ICCPR. Therefore, despite the Committee insisting in its general comments that states must be precise about invoking specific limitation grounds, its jurisprudence does not always reflect such insistence.⁷⁸

In a number of cases dealing with the Two Freedoms, the Committee has applied a *flexible* test to assess the permissibility of a limitation. The Committee has preferred not to rigorously assess whether the limitation in question satisfies each of the three permissibility criteria. Five illustrative cases may be discussed in this regard: *Mukong v Cameroon* (1994),⁷⁹

⁷⁵ Viljam Engström, ‘Deference and the Human Rights Committee’ (2016) 34(2) *Nordic Journal of Human Rights* 73, 81. This view has come to be accepted by the Committee. See GC 34, para 36.

⁷⁶ Michael O’Flaherty, ‘Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee’s General Comment No 34’ (2012) 12(4) *Human Rights Law Review* 627, 647.

⁷⁷ *ibid.*

⁷⁸ *ibid.*

⁷⁹ Communication No 458/1991 (CCPR views adopted 21 July 1994), CCPR/C/51/D/458/1991.

Ballantyne and others v Canada (1993),⁸⁰ *Gauthier v Canada* (1999),⁸¹ *Bikramjit Singh v France* (2012),⁸² and *Ross v Canada* (2000).⁸³

In *Mukong*, the author – a journalist – was arrested and detained in 1988 for criticising the president and government of Cameroon, and was allegedly subjected to cruel and inhuman treatment during incarceration.⁸⁴ He also claimed that he was arrested for his advocacy of multi-party democracy in Cameroon.⁸⁵ The author was subsequently charged with the offence of ‘intoxication of national and international public opinion’, an offence that was later abrogated in 1990.⁸⁶ He eventually submitted a communication to the Committee complaining that his freedom of expression had been violated. The state argued that the author’s arrest for his activities and expressions were covered by article 19(3) of the Covenant. It contended that the exercise of the right to freedom of expression ‘must take into account the political context and situation prevailing in a country at any point in time’.⁸⁷ It then pointed to the need to ‘strengthen national unity’ in Cameroon in this context.

The Committee’s application of the three primary criteria in this case reflects the use of a *flexible* permissibility test. The Committee did not insist that the state fulfil the second

⁸⁰ Communications Nos. 359/1989 and 385/1989 (views adopted on 31 March 1993), CCPR/C/47/D/359/1989 and 385/1989/Rev.1.

⁸¹ Communication No 633/1995 (CCPR views adopted on 7 April 1999), CCPR/C/65/D/633/1995.

⁸² Communication No 1852/2008 (CCPR views adopted on 1 November 2012), CCPR/C/106/D/1852/2008.

⁸³ Communication No 736/1997 (CCPR views adopted on 18 October 2000), CCPR/C/70/D/736/1997.

⁸⁴ Communication No 458/1991, paras 2.2-2.4.

⁸⁵ *ibid*, para 2.3.

⁸⁶ *ibid*, para 4.1.

⁸⁷ *ibid*, para 6.7.

criterion – the specific invocation of one of the limitation grounds contained in article 19(3). It instead presumed that the state had ‘indirectly justified its actions on grounds of national security and/or public order’ due to the reference to the ‘country’s political context and continued struggle for unity’.⁸⁸ The Committee therefore neglected to assess in precise terms whether a country’s ‘political context and continued struggle for unity’ related to ‘national security’ or ‘public order’. The Committee described the objective of ‘safeguarding and strengthening national unity under difficult political circumstances’ as a ‘legitimate’ purpose for which freedom of expression could be restricted.⁸⁹ Therefore, it accepted a purpose that was not, strictly speaking, listed in article 19(3). In effect, the Committee deferred to the state in its interpretation of what constituted ‘national security’ or ‘public order’, and presumed that the state had invoked these limitation grounds.

Despite this flexible view of limitation grounds found in article 19(3) of the ICCPR, the Committee in *Mukong* decided that the state had failed to meet the third criterion, i.e. that the limitation met the standard of necessity. It opined that restricting advocacy of ‘multi-party democracy, democratic tenets and human rights’ was not necessary to safeguard and strengthen national unity in the first place.⁹⁰ By implication, it found that the state’s actions were not necessary to protect interests in ‘national security’ or ‘public order’. The Committee accordingly found that a violation of article 19 of the Covenant had taken place. The outcome of the case was no doubt salutary, as the limitation fell well outside the bounds of the criteria set out in article 19(3). As noted by Elizabeth Cassidy, the Committee’s views amounted to a dismissal of the state’s ‘reliance on *ordre public* to justify the imprisonment and abuse of an

⁸⁸ *ibid.*

⁸⁹ *ibid.*

⁹⁰ *ibid.*

opposition activist'.⁹¹ Yet the state did not clearly rely on this limitation ground. The Committee instead presumed that the state's vague references to 'political context' and 'national unity' were allusions to the limitation grounds of 'national security' and 'public order'. By doing so, it appeared to defer to the state's implicit claim that 'national security' and 'public order' were equivalent to notions such as 'political context' and 'national unity'.

The Committee's deference to states in interpreting the scope of limitation grounds in *Mukong* appears to be consistent with other decisions of that period. In *Ballantyne*, the state sought to restrict outdoor advertising in English for the purpose of protecting the linguistic rights of French speakers of Quebec.⁹² The authors claimed that the state had violated their freedom of expression guaranteed by article 19(2) of the ICCPR. The Committee first rejected the state's assertion that expressions of a commercial nature were not within the scope of article 19.⁹³ It also opined that various forms of expression could not be subjected to 'varying degrees of limitation, with the result that some forms of expression may suffer broader restrictions than others'.⁹⁴

Similar to *Mukong*, the state in *Ballantyne* did not invoke any specific limitation ground to justify the Bill that restricted outdoor advertising. Yet the Committee proceeded to inquire into the possible justifications for such restrictions. It asked whether the restrictions were necessary for the respect of the rights of others – specifically the Francophone minority within

⁹¹ Elizabeth K Cassidy, 'Restricting Rights? The Public Order and Public Morality Limitations on Free Speech and Religious Liberty in UN Human Rights Institutions' (2015) 13(1) *The Review of Faith & International Affairs* 5, 8-9.

⁹² Communications Nos. 359/1989 and 385/1989, para 8.10.

⁹³ *ibid*, para 11.3.

⁹⁴ *ibid*.

Canada. It then opined that this minority's right to use their own language was not jeopardised by the authors' freedom to advertise in a language other than the French language. The Committee accordingly concluded that prohibiting commercial advertising in English was not necessary in order to protect the vulnerable position of the Francophone group in Canada, and found that a violation of article 19(2) had taken place. The Committee presumed that the state's actions were related to a specific limitation ground enumerated in article 19(3) – respect of the rights of others; it did not insist that the state explicitly invoke such a ground to justify the limitation. Much like in *Mukong*, the Committee accepted the ground on which the limitation was being imposed, i.e. the linguistic security of a group. It accepted such ground without questioning whether it was actually listed in article 19(3). For instance, article 27 of the Covenant only affords minorities the right 'to use their own language'. It does not appear to grant any minority group a right to 'linguistic security' that impedes the rights of others to use a language of their choice.⁹⁵ In any event, the outcome of the case hinged on whether restricting advertising in a language of one's choice was necessary to meet the purpose of protecting the linguistic rights of the Francophone minority. The Committee found that the specific limitation was not necessary, and accordingly found that a violation of the author's freedom of expression had taken place.

In *Gauthier*, the author complained that his rights under article 19 were violated due to the denial of equal access to press facilities in parliament. The Committee once again applied a *flexible* permissibility test, as it viewed the media accreditation system in parliament as 'arguably' flowing from parliamentary privilege.⁹⁶ It then accepted the state's claim that a

⁹⁵ See Human Rights Committee, *General Comment No 23(50) (art. 27)*, 26 April 1994, CCPR/C/21/Rev.1/Add.5.

⁹⁶ Communication No 633/1995, para 13.5.

limitation on the freedom of expression could be justified to ensure ‘the effective and dignified operation of Parliament and the safety and security of its members’.⁹⁷ It further opined that the state party was ‘in the best position to assess the risks and needs involved’.⁹⁸ The Committee accordingly found that the protection of parliamentary procedure could be seen as ‘a legitimate goal of public order’. Yet it did not elaborate or clarify how parliamentary procedure actually related to public order. It instead proceeded to the third criterion in the test, and found that the accreditation system was not a necessary and proportionate limitation on the freedom of expression for the ‘effective operation of Parliament and the safety of its members’.⁹⁹ Therefore, despite adopting a *flexible* test on permissibility, it reached the conclusion that a violation of article 19(2) had taken place.¹⁰⁰

In *Bikramjit Singh*, the author was prohibited from wearing a *keski* (a type of mini turban worn by Sikh boys) in a state school, and was eventually expelled for refusing to comply with the prohibition. The state cited a French statute that prohibited wearing clothing that conveyed a religious affiliation in a conspicuous manner in a public school. It justified the limitation on the freedom to manifest religion or belief based on the ‘constitutional principle of secularism (*laïcité*)’,¹⁰¹ and related the restriction to the prescribed purposes of protecting ‘the rights and freedoms of others’ and ‘public order and safety’.¹⁰²

⁹⁷ *ibid.*, para 13.6.

⁹⁸ *ibid.*

⁹⁹ *ibid.*

¹⁰⁰ *ibid.*

¹⁰¹ Some scholars critique the current application of this principle as being contrary to its ‘republican’ roots, and have suggested that such current application is ‘illiberal’. See Stéphanie Hennette Vauchez, ‘Is French *laïcité* Still Liberal? The Republican Project under Pressure (2004–15)’ (2017) 17(2) *Human Rights Law Review* 285.

¹⁰² Communication No 1852/2008, para 5.8. The Committee has also dealt with similar limitations on the Sikh community’s freedom to manifest religion or belief in *Ranjit Singh v France*, Communication No 1876/2009 (CCPR views adopted on 22 July 2011), CCPR/C/102/D/1876/2009. In the earlier case of *Karnel Singh Binder v Canada*, however, the Committee found no violation of the freedom to manifest religion or belief where the

The Committee once again applied a relatively *flexible* test on permissibility; it opined that the limitation in question needed to be necessary and proportionate to the end that is sought, ‘as defined by the state party’.¹⁰³ It then recognised that the principle of secularism (*laïcité*) was itself a means by which a state party may seek to protect the religious freedom of all its population.¹⁰⁴ The Committee deferred to the state on the scope of the specific limitation ground invoked for the purpose of limiting the freedom to manifest religion or belief under article 18(3) of the Covenant. Similar to its approach in *Gauthier* (where it considered the protection of parliamentary procedure), the Committee accepted without much elaboration the idea that secularism in fact related to the protection of the rights and freedoms of others, and to ‘public order’ and ‘public safety’. The Committee did, however, imply that secularism could not be a basis on its own for restricting the freedom to manifest religion or belief.¹⁰⁵ Secularism still needed to be a means through which an explicitly prescribed purpose in article 18(3) was

author, a Sikh, was required to wear a hard hat for his own safety. See Communication No 208/186 (CCPR views adopted on 9 November 1989), CCPR/C/37/D/208/1986.

¹⁰³ Communication No 1852/2008, para 8.5.

¹⁰⁴ *ibid*, para 8.6. This view appears to be endorsed by scholars such as Dominic McGoldrick and Stephanie Berry. See Dominic McGoldrick, ‘A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee’ (2016) 65(1) *International and Comparative Law Quarterly* 21, 52; Stephanie E Berry, ‘A “Good Faith” Interpretation of the Right to Manifest Religion? The Diverging approaches of the European Court of Human Rights and the UN Human Rights Committee’ (2017) 37(4) *Legal Studies* 672, 687-88.

¹⁰⁵ Berry 685-688. The meaning of secularism is often contested. Rex Adhar for instance, distinguishes between ‘benevolent secularism’ and ‘hostile secularism’. The former refers to a policy of refraining from adopting and imposing any established religion or beliefs on citizens. By contrast, the latter refers to the active pursuit of a policy of ‘unbelief’, and the elimination of religion from the public sphere. Berry contends that ‘hostile secularism’ is incompatible with a good faith interpretation of the freedom of religion or belief, as it is akin to the pursuit of a political ideology. This form of secularism ultimately privileges beliefs such as atheism, rather than remaining truly neutral. Moreover, Berry notes that, at least in the European context, the pursuit of hostile secularism disproportionately impacts religious minorities. Also see Rex Adhar, ‘Is Secularism Neutral?’ (2013) 25 *Ratio Juris* 404; Russell Sandberg and Norman Doe, ‘Church-state relations in Europe’ (2007) 1 *Religion Compass* 561; Jeroen Temperman, *State-Religion Relationships and Human Rights Law: Towards a Right to Religiously Neutral Governance* (Martinus Nijhoff 2010); Malcolm Evans and Peter Petkoff, ‘A Separation of Convenience? The Concept of Neutrality in the Jurisprudence of the European Court of Human Rights’ (2008) 36 *Religion, State & Society* 205.

served. The Committee found that the state party had not furnished compelling evidence that the author posed a threat to the rights and freedoms of other pupils or to ‘public order’ at the school by wearing his *keski*.¹⁰⁶ It also found that the penalty of expulsion was disproportionate.¹⁰⁷ Therefore, despite applying a relatively *flexible* test, the Committee reached the conclusion that a violation of the freedom to manifest religion or belief had taken place.

In *Ross*, the author – a teacher – was subjected to disciplinary action by the School Board for the public expression of controversial religious views concerning the Jewish faith. The author complained that the decision violated his Two Freedoms. He argued that his actions outside class had no bearing on his teaching, and that in fact there were no Jewish students in his class. The state asserted that the limitation was justified under the grounds set out in articles 18(3) and 19(3) of the Covenant: the protection of the rights of others, and the protection of ‘morals’.¹⁰⁸ With regard to the first ground, it argued that the limitation was imposed on the author for ‘the purposes of protecting the freedom of religion and expression and the right to equality of the Jewish community’.¹⁰⁹ With regard to the second, it asserted that the limitation was ‘necessary to protect...Canadian values of respect for equality and diversity (public morals)’.¹¹⁰ It claimed that ‘Canadian society is multicultural’ and that ‘it is fundamental to the moral fabric that all Canadians are entitled to equality without discrimination on the basis of race, religion or nationality’.¹¹¹

¹⁰⁶ Communication No 1852/2008, para 8.7.

¹⁰⁷ *ibid.* Also see *Lydia Cacho Ribeiro v Mexico*, Communication No 2767/2016 (CCPR views adopted on 17 July 2018), CCPR/C/123/D/2767/2016, para 10.8.

¹⁰⁸ Communication No 736/1997, para 6.11.

¹⁰⁹ *ibid.*

¹¹⁰ *ibid.*, para 6.12.

¹¹¹ *ibid.*, para 6.11.

The Committee applied a *flexible* test in this case insofar as the first criterion was concerned. It acknowledged that the provisions of the New Brunswick Human Rights Act that the state relied upon – which made the School Board vicariously liable for discriminatory actions of its employees – were vague in terms of justifying the disciplinary action against the author.¹¹² Yet the Committee ultimately accepted the state’s claim that the limitation was provided by law. It deferred to the findings of the Supreme Court, which considered the author’s appeal and found the limitation to be lawful.¹¹³ The Committee then chose to consider only the first limitation ground cited by the state – i.e. the rights of others – and did not make any findings on the state’s invocation of ‘morals’. It found that there was no violation of article 18, as the author’s freedom to manifest religion or belief was subject to limitations on the basis of protecting the rights of others.¹¹⁴ It also concluded that the facts did not disclose a violation of the freedom of expression, as the disciplinary action was ‘necessary to protect the rights or reputations of persons of the Jewish faith’.¹¹⁵ The Committee opined that members of the Jewish community had ‘a right to be protected from religious hatred’ under article 20 of the Covenant.¹¹⁶

The Committee’s assessment in terms of the third criterion, i.e. the necessity of the limitation, was confined to the limitation on the freedom of expression, as it opined that the

¹¹² *ibid*, para 11.3.

¹¹³ *ibid*, para 11.4.

¹¹⁴ *ibid*, para 11.8.

¹¹⁵ *ibid*, para 11.6.

¹¹⁶ *ibid*, para 11.5. Also see Jeroen Temperman, *Religious Hatred and International Law: The Prohibition of Incitement to Violence or Discrimination* (Cambridge University Press 2015) 100.

issues under articles 18(3) and 19(3) were ‘substantially the same’.¹¹⁷ It noted that the removal of the author from a teaching position was necessary to protect ‘the right and freedom of Jewish children to have a school system free from bias, prejudice and intolerance’.¹¹⁸ Furthermore, it observed that the author was appointed to a non-teaching position after ‘only a minimal period on leave without pay and that the restriction thus did not go any further than that which was necessary to achieve its protective functions’.¹¹⁹ The Committee concluded that the limitation on the Two Freedoms was justified, and that no violations of articles 18 and 19 had taken place.

These five cases illustrate the Committee’s application of a *flexible* permissibility test to assess whether a particular limitation satisfies the Covenant’s criteria. The Committee has often glossed over the specifics of the first and second criteria, and has accepted the state’s asserted grounds for limiting the Two Freedoms. It has instead paid greater attention to the third criterion, i.e. that the limitation must be necessary and proportionate. The Committee appears to have concerned itself more with the *outcome* of the permissibility assessment rather than with the *process* of rigorously applying each criterion – an observation I return to in the concluding section of this chapter.

b. Rigorous permissibility test

Prior to delving into the cases in which the Committee applied a *rigorous* test, it is worth mentioning that some cases do not fit neatly within the flexible-rigorous dichotomy. *Faurisson*

¹¹⁷ Communication No 736/1997, para 11.8.

¹¹⁸ *ibid*, para 11.6.

¹¹⁹ *ibid*.

v France (1996)¹²⁰ is perhaps one such case. I locate *Faurisson* under this subsection because it is probably closer to reflecting the application of a rigorous test than a flexible test.

The author in *Faurisson* publicly expressed doubts as to the existence of gas chambers in Nazi concentration camps. The French authorities had passed the ‘Gayssot Act’, which made it an offence to publicly contest crimes against humanity for which Nazi leaders were convicted through the Nuremberg Trials. The author was accordingly convicted under the Act following a private criminal action brought by eleven plaintiff associations.¹²¹

The majority of the Committee examined the limitation of the author’s freedom of expression in light of the criteria set out in article 19(3) of the ICCPR. They first found that the Gayssot Act, as applied and interpreted by the French courts, did not violate the Covenant.¹²² They also found that the limitation was ostensibly related to a prescribed purpose – respect for the rights and reputations of others.¹²³ They in fact cited General Comment No. 10 (subsequently replaced by GC 34), which stipulated: ‘the rights for the protection of which restrictions on freedom of expression are permitted under article 19(3) may relate to the interests of other persons or to those of the community as a whole.’¹²⁴ Therefore, the majority opined that ‘the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-Semitism’.¹²⁵ The Committee could have bolstered its opinion through a

¹²⁰ Communication No 550/93 (CCPR views adopted on 8 November 1996), CCPR/C/58/D/550/1993.

¹²¹ Communication No 550/93, para 2.7.

¹²² *ibid*, para 9.5.

¹²³ *ibid*.

¹²⁴ *ibid*, para 9.6.

¹²⁵ *ibid*.

clearer analysis of the specific right or freedom that was being protected. For instance, it could have considered whether the limitation was justified in terms of the state's obligations under article 20(2) of the Covenant, which requires the prohibition of the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. It could have then determined whether the author's freedom of expression can be limited on the basis of preventing incitement to discrimination or hostility against the Jewish community. Yet, as pointed out by Nazila Ghanea, the majority of the Committee confined their reasoning to article 19(3) of the Covenant and did not explore the relevance of article 20(2).¹²⁶ Instead, the majority of the Committee proceeded to assess the necessity of the limitation, i.e. the third criterion. However, their assessment of whether the limitation satisfied the third criterion appears to be weak. They accepted the state's contention that the Gayssot Act was 'intended to serve the struggle against racism and anti-Semitism',¹²⁷ and proceeded to reach a peculiar conclusion. They opined that, in the absence of any argument undermining the validity of the state's contention, they were satisfied that the limitation was in fact necessary.¹²⁸ This view ran contrary to the notion that the state bore the justificatory burden of demonstrating the necessity of a limitation. By contrast, committee members Elizabeth Evatt and David Kretzmer offered a more robust analysis of the rights claim behind the limitation on the freedom of expression, and the necessity of the measures adopted. In their concurring opinion, they found that the limitation was necessary to protect 'the right to be free from incitement to racism or anti-Semitism', and that 'protecting that value could not have been achieved in the circumstances by less drastic

¹²⁶ Nazila Ghanea, 'Expression and Hate Speech in the ICCPR: Compatible or Clashing?' (2010) 5 *Religion and Human Rights* 171, 184. Also see Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred (Rabat Plan of Action)*, 11 January 2013, A/HRC/22/17/Add.4, para 14.

¹²⁷ Communication No 550/93, para 9.7.

¹²⁸ *ibid.*

means'.¹²⁹ Prior to concluding that no violation of freedom of expression had taken place, these committee members took great care to assess whether the second and third criteria in article 19(3) were met.

The concurring opinion of committee members Evatt and Kretzmer attempted to grapple with the question of necessity in a more robust manner. They carefully considered the state's reasoning for the limitation, i.e. 'the necessity of securing respect for the judgment of the International Military Tribunal at Nuremburg, and through it the memory of the survivors and the descendants of the victims of Nazism'.¹³⁰ These committee members observed that the question before the Committee was whether a limitation on the freedom of expression in order to advance this aim may be regarded '*necessary* for the respect of the *rights* of others' (emphasis in original).¹³¹ They contended that individuals have not only a right to be free from discrimination, but also from incitement to discrimination; this latter right is implicit in article 20(2) of the Covenant.¹³² They further opined that even though the author's statement did not fall within the ambit of 'incitement', it could nevertheless be restricted when it is 'part of a pattern of incitement' against a particular group.¹³³ In this context, the committee members concluded that 'in the conditions of present-day France, Holocaust denial may constitute a form of incitement to anti-Semitism'.¹³⁴ They accordingly took greater care to ensure that the second permissibility criterion, i.e. that the limitation related to one of the limitation grounds in article

¹²⁹ Individual opinion by Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein (concurring), para 10.

¹³⁰ *ibid*, para 3.

¹³¹ *ibid*.

¹³² *ibid*, para 4.

¹³³ *ibid*.

¹³⁴ *ibid*, para 6.

19(3), was met. These committee members then explained that merely citing one of the limitation grounds listed in article 19(3) was not a sufficient basis for limiting the freedom of expression.¹³⁵ The limitation must be necessary to protect the value behind the ground in question, and the scope of the limitation must be ‘proportional to the value which the restriction serves to protect’.¹³⁶ Ultimately, however, these members agreed with the decision of the majority. They acknowledged that the Gayssot Act is couched too broadly to meet the proportionality test, as it could ‘prohibit publication of *bona fide* research connected with matters decided by the Nuremburg Tribunal’.¹³⁷ However, they clarified that the Committee is not concerned with the Gayssot Act *in abstracto*, but only with its specific application to the author.¹³⁸ They found that his specific statement singled out Jewish historians and implied that the Jewish community ‘concocted the story of gas chambers for their own purposes’.¹³⁹ These committee members concurred with the majority in holding that the limitation was necessary to protect ‘the right to be free from incitement to racism or anti-Semitism’ and that ‘protecting that value could not have been achieved in the circumstances by less drastic means’.¹⁴⁰ Therefore, they were of the view that no violation of article 19(2) had taken place.

Faurisson remains an important case in terms of understanding how committee members comprehend and apply the permissibility criteria with respect to limitations on the Two Freedoms. It is one of the cases in which greater care was shown (at least by some

¹³⁵ *ibid*, para 8.

¹³⁶ *ibid*.

¹³⁷ *ibid*, para 9.

¹³⁸ *ibid*.

¹³⁹ *ibid*, para 10.

¹⁴⁰ *ibid*.

committee members) in systematically interrogating whether a limitation meets each of the criteria set out in article 19(3) of the ICCPR. Therefore, the test applied by the Committee was not entirely *flexible*; yet the test was not entirely *rigorous* either. The majority opinion did not adequately explain which rights were being protected through the limitation, even though the ‘rights of others’ was invoked as the relevant limitation ground. Meanwhile, the Committee appeared to pay inadequate attention to the criterion of necessity. As explained in GC 34, the only material difference between articles 19(3) and 20(2) of the ICCPR is that the former *authorises* states to limit the freedom of expression on certain grounds while the latter *obliges* states to prohibit certain types of speech.¹⁴¹ A limitation under article 20(2) cannot be outside the scope of article 19(3).¹⁴² Moreover, unlike article 20(2), article 19(3) does not require the limitation to take the form of criminal sanctions. Under article 19(3), states could very well limit the freedom of expression through less restrictive means than the criminal sanctions contemplated by article 20(2).¹⁴³ In this context, a doubt may be raised as to whether Faurisson’s conviction under the Gayssot Act met the criterion of proportionality *stricto sensu*.¹⁴⁴ The case serves to illustrate the occasional inconsistency in the Committee’s application of the permissibility criteria.

We now turn to cases in which the Committee clearly applied a *rigorous* test to assess the permissibility of a limitation. Such a *rigorous* test is exemplified in five illustrative cases:

¹⁴¹ GC 34, para 51.

¹⁴² *ibid*, para 52.

¹⁴³ *ibid*, para 9.

¹⁴⁴ Michael O’Flaherty argues that the Committee has overruled *Faurisson* through GC 34. GC 34 states that laws ‘that penalise the expression of opinions about historical facts are incompatible with the obligations [of] the Covenant’. O’Flaherty, however, doubts whether such overruling ‘can be demonstrated to derive from Committee practice’. See O’Flaherty 653; GC 34, para 49.

Kivenmaa v Finland (1994),¹⁴⁵ *Aduayom and others v Togo* (1996),¹⁴⁶ *Sohn v Republic of Korea* (1995),¹⁴⁷ *Zalesskaya v Belarus* (2011),¹⁴⁸ and *Sister Immaculate Joseph and others v Sri Lanka* (2005).¹⁴⁹

In *Kivenmaa v Finland* (1994), the author had organised a protest that featured a banner criticising the human rights record of a visiting head of state.¹⁵⁰ The protest was held outside the presidential palace, and the author was prosecuted for holding a ‘public meeting’ without prior authorisation. The author claimed that the law on public meetings did not apply to her, as she was expressing an opinion rather than conducting a public meeting.¹⁵¹ The state referred to the grounds on which the freedom of expression may be limited under article 19(3) of the ICCPR, and justified the limitation in generalised terms.¹⁵² However, the Committee rejected the state’s claims, and found that a violation of article 19(2) had taken place.

The Committee applied a reasonably rigorous permissibility test in this case. It strictly assessed whether the state had satisfied the first criterion, and found that the state party had ‘not referred to a law’ authorising a limitation on the freedom of expression. The Committee also

¹⁴⁵ Communication No 412/1990 (CCPR views adopted on 31 March 1994), CCPR/C/50/D/412/1990.

¹⁴⁶ Communications Nos 422/1990, 423/1990 and 424/1990 (CCPR views adopted on 12 July 1996), CCPR/C/51/D/422/1990, 423/1990 and 424/1990.

¹⁴⁷ Communication No 518/1992 (CCPR views adopted on 19 July 1995), CCPR/C/54/D/518/1992.

¹⁴⁸ Communication No 1604/2007 (CCPR views adopted on 28 March 2011), CCPR/C/101/D/1604/2007.

¹⁴⁹ *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingeren of Sri Lanka v Sri Lanka*, Communication No 1249/2004 (CCPR views adopted on 21 October 2005), CCPR/C/85/D/1249/2004.

¹⁵⁰ Communication No 412/1990, para 2.1.

¹⁵¹ *ibid*, para 3.

¹⁵² *ibid*, para 7.2.

found that the state had not satisfied the second criterion, as it failed to establish that the limitation ‘was necessary to safeguard the rights and national imperatives’ enumerated in article 19(3) of the Covenant. The state neither demonstrated that the limitation was provided by law, nor established the nexus between the limitation and any of the limitation grounds listed in article 19(3). On this occasion, the Committee refrained from deferring to the state on whether the first two criteria of its legal test had been met.

A similarly strict application of the primary criteria may be observed in *Aduayom*. In this case, the authors were charged with *lèse-majesté* for having carried, read or disseminated documents that were critical of the Togolese government.¹⁵³ The charges were eventually dropped as unfounded. However, each of the authors was unable to return to their previous employment. They claimed that their rights under article 19 had been violated. The state party merely described the authors’ actions as ‘political offences’, and did not seek to specifically justify any limitation on the freedom of expression in terms of article 19(3).¹⁵⁴ The Committee found that there was no indication that the authors’ activities represented a threat to any of the interests contained in article 19(3).¹⁵⁵ It concluded that the second criterion of the permissibility test had not been met, and that a violation of article 19 of the ICCPR had taken place.

The Committee’s approach in *Sohn* also reflected a rigorous test to determine the permissibility of a limitation on the freedom of expression. The author in the case was arrested and imprisoned for issuing a statement in support of a trade union strike.¹⁵⁶ The state claimed

¹⁵³ Communications Nos. 422/1990, 423/1990 and 424/1990, paras 2.1-3.1, and 7.4.

¹⁵⁴ *ibid*, para 7.4.

¹⁵⁵ *ibid*.

¹⁵⁶ Communication No 518/1992, para 2.2.

that the limitation was provided by law, i.e. the Labour Dispute Adjustment Act of the Republic of Korea, and justified its actions on the basis of ‘national security’ and ‘public order’.¹⁵⁷ The author pointed out that he was not charged with breaching any existing national security law, and that this omission indicated that the state did not in fact consider his actions a threat to ‘national security’.¹⁵⁸

The Committee acknowledged the state’s invocation of the limitation grounds of ‘national security’ and ‘public order’ due to the state’s reference to the ‘general nature of the labour movement’, and the argument that the author was inciting a national strike.¹⁵⁹ Yet the Committee did not venture as far as to call such invocations ‘legitimate’ as it had done in *Mukong*. Instead, it found that the state party ‘failed to specify the precise nature of the threat’ posed by the author’s exercise of the freedom of expression. It accordingly found that the state’s arguments were unsatisfactory in terms of justifying a limitation on the freedom of expression.¹⁶⁰

In *Zalesskaya*, the author was arrested for distributing leaflets in public, and was subsequently fined for violating the administrative procedures for organising and conducting street marches.¹⁶¹ The Committee considered the fact that the domestic courts had characterised the author’s activities as participating in an unauthorised street march as opposed to imparting

¹⁵⁷ *ibid*, para 7.4.

¹⁵⁸ *ibid*, para 8.4.

¹⁵⁹ *ibid*, para 10.4.

¹⁶⁰ *ibid*.

¹⁶¹ Communication No 1604/2007, para 2.1.

information.¹⁶² Yet the Committee opined that the state party's actions amounted to 'a *de facto* limitation' of the author's rights under article 19(2) of the Covenant.¹⁶³

The Committee in this case applied a *rigorous* permissibility test. It first observed that the state party had merely asserted that the limitation was provided by law *vis-à-vis* the Belarussian Constitution.¹⁶⁴ Implicit in this observation was the fact that a mere assertion of legality was insufficient to satisfy the first criterion, i.e. that the limitation must be provided by law. The Committee further observed that the state had not contested the author's assertion that the impugned leaflets neither harmed the rights or reputation of others, nor infringed upon national security, public order, public health or morals.¹⁶⁵ It accordingly found that the state had failed to invoke any ground on which the limitation could be imposed.¹⁶⁶ It concluded that the fine imposed on the author was not justified under any of the criteria set out in article 19(3), and that the author's rights under article 19(2) of the Covenant had been violated.

In *Sister Immaculate Joseph*, the authors were denied permission to incorporate an institution with an ostensible aim of spreading knowledge about the Catholic religion. The Supreme Court of Sri Lanka had struck down the incorporation bill submitted by the authors

¹⁶² *ibid*, para 10.4.

¹⁶³ *ibid*.

¹⁶⁴ *ibid*, para 10.5.

¹⁶⁵ *ibid*.

¹⁶⁶ *ibid*. The Committee has recently dealt with a number of cases concerning the freedom of expression and the right to peaceful assembly, and has reached similar conclusions. See *Yan Melnikov v Belarus*, Communication No 2147/2012 (CCPR views adopted on 14 July 2017), CCPR/C/120/D/2147/2012; *Zinaida Shumilina et al v Belarus*, Communication No 2142/2012 (CCPR views adopted on 28 Jul 2017), CCPR/C/120/D/2142/2012; *Adelaida Kim v Uzbekistan*, Communication No 2175/2012 (CCPR views adopted on 4 April 2018), CCPR/C/122/D/2175/2012; *Tatyana Severinets v Belarus*, Communication No 2230/2012, (CCPR views adopted on 19 July 2018), CCPR/C/123/D/2230/2012; and *Valery Rybchenko v Belarus*, Communication No 2266/2013, (CCPR views adopted on 17 October 2018), CCPR/C/124/D/2266/2013.

on the basis that the proposed institution impaired the constitutional protection afforded to Buddhism in Sri Lanka.¹⁶⁷ The Committee applied a *rigorous* permissibility test in this case. It first observed that spreading knowledge about one's beliefs was an aspect of an individual's manifestation of religion and free expression protected under the Covenant.¹⁶⁸ It then considered the first criterion in the permissibility test, and observed that the Court's determination amounted to a limitation imposed by law. However, the Committee found that the state had not satisfied the second criterion, as it offered no specific ground for limiting the freedom to manifest religion or belief, other than 'reliance on the reasons set out in the decision of the Supreme Court itself'.¹⁶⁹ The Committee found that the Supreme Court's decision failed to provide any evidence for the conclusion that the impugned institution's proposed activities would 'coercively or otherwise improperly propagate religion'.¹⁷⁰ Therefore, the state had also failed to satisfy the third criterion, i.e. that the limitation must be necessary and proportionate. The Committee accordingly found that the state had violated the authors' freedom to manifest religion or belief.

These five cases illustrate the Committee's application of a *rigorous* test to determine the permissibility of limitations on the Two Freedoms. In each case, the Committee carefully and systematically assessed whether the three primary criteria for the permissibility of a limitation were met, and placed a substantial burden on the state to justify the limitation in question.

¹⁶⁷ Communication No 1249/2004, para 2.3.

¹⁶⁸ *ibid*, para 7.2.

¹⁶⁹ *ibid*, para 7.3.

¹⁷⁰ *ibid*.

B. The application of additional constraints

The Human Rights Committee has shown some willingness in its jurisprudential practice to apply certain additional normative constraints on the authority of states to limit the Two Freedoms. This willingness has been largely confined to the domain of non-discrimination. Its recent jurisprudence on the limitation ground relating to the protection of ‘morals’ is particularly relevant in this regard.

In *Fedotova v The Russian Federation* (2012),¹⁷¹ the author displayed posters that read ‘homosexuality is normal’ and ‘I am proud of my homosexuality’. The posters were displayed near a secondary school. The author claimed that the purpose of the expression was to promote tolerance towards gay and lesbian individuals. She was convicted of public actions aimed at ‘propaganda of homosexuality’ among minors. The state asserted that the conviction was necessary in the interests of children ‘to protect them from the factors that could negatively impact their...moral development’.¹⁷²

The Committee applied a *rigorous* permissibility test in this case. It systematically considered whether the limitation in question was provided by law, related to one of the limitation grounds in article 19(3) of the ICCPR, and was necessary and proportionate. The Committee observed that the limitation was indeed provided by law, and related to one of the limitation grounds in article 19(3), i.e. the protection of ‘morals’. Yet it further scrutinised the law in question – the Ryazan Region Law – with respect to its compatibility with the Covenant’s object and purpose, and provisions. The Committee accordingly applied an additional

¹⁷¹ Communication No 1932/2010 (CCPR views adopted on 31 October 2012), CCPR/C/106/D/1932/2010.

¹⁷² *ibid*, para 5.6.

normative constraint pertaining to covenant compatibility in its assessment. It concluded that laws limiting the freedom of expression must not only comply with the strict requirements of article 19(3), but ‘*must also themselves be compatible with the provisions, aims and objectives of the Covenant*, including the non-discrimination provisions of the Covenant’ (emphasis added).¹⁷³ The Committee accordingly opined that limitations on the freedom of expression are permissible only if they are compatible with the ‘provisions, aims and objectives’ of the Covenant – a direct reference to the object and purpose, and other provisions, of the ICCPR. In this particular context, the Committee posited that a limitation on the freedom of expression must be compatible with the principle of non-discrimination. It based its opinion on the understanding that article 26 of the Covenant prohibited discrimination on the basis of sexual orientation.¹⁷⁴ In addition to applying this normative constraint, the Committee found that the state party had failed to fulfil the third criterion; the state had failed to demonstrate why limiting the author’s freedom of expression was necessary in terms of a limitation ground found in article 19(3).¹⁷⁵ The Committee concluded that a violation of article 19(2) read in conjunction with article 26 had taken place.

Fedotova is an example of the Committee venturing beyond the primary criteria found in article 19(3) of the ICCPR to assess a limitation’s compatibility with the rest of the Covenant. The reference to the fact that limitations must be compatible with the ‘provisions, aims and objectives of the Covenant’ is indicative of a willingness on the part of the Committee to apply additional normative constraints on the state’s authority to limit the Two Freedoms.

¹⁷³ *ibid.*

¹⁷⁴ *ibid.*, para 10.5.

¹⁷⁵ *ibid.*, para 10.8.

The notion that limitations must be ‘non-discriminatory’ features in other recent cases of the Committee. For example, in the cases of *Miriana Hebbadj* (2018)¹⁷⁶ and *Sonia Yaker* (2018),¹⁷⁷ which involved the French ban on the niqāb (a full-face veil), the Committee stated that, in order for a limitation to be permissible, it must be ‘non-discriminatory’, in addition to meeting the usual primary criteria.¹⁷⁸ The state in both cases sought to justify the limitation on the freedom to manifest religion or belief on the grounds of ‘public order’ and ‘living together’, which is couched in reference to protecting the fundamental rights and freedoms of others.¹⁷⁹ The majority of the Committee in both cases found that the ban was not necessary to protect ‘public order’, and that the ban was a disproportionate means of protecting interests in public order.¹⁸⁰ The majority also found that the concept of ‘living together’ is too vague, and that the state party had not identified ‘any specific fundamental rights or freedoms of others that are affected by the fact that some people present in the public space have their face covered, including fully veiled women’.¹⁸¹ The majority in both cases accordingly found that the ban

¹⁷⁶ *Miriana Hebbadj v France*, Communication No 2807/2016 (CCPR views adopted on 17 July 2018), CCPR/C/123/D/2807/2016.

¹⁷⁷ *Sonia Yaker v France*, Communication No 2747/2016 (CCPR views adopted on 17 July 2018), CCPR/C/123/D/2747/2016.

¹⁷⁸ Communication No 2807/2016, para 7.5, and Communication No 2747/2016, para 8.5.

¹⁷⁹ ‘Living together’ was defined by the French government as ‘the observance of the minimum requirements of life in society’. See Communication No 2807/2016, para 5.7, and Communication No 2747/2016, para 7.7; *S.A.S v France*, Application No 43835/11 (ECtHR judgment [GC] of 1 July 2014). Also see *F.A v France*, Communication No 2662/2015 (CCPR views adopted on 16 July 2018), CCPR/C/123/D/2662/2015, para 8.2-8.13. In *F.A v France*, the Committee evaluated the state’s representation of the ECtHR opinion that the Islamic veil is identified as a ‘powerful external symbol’. The Committee, however, noted that ‘the criteria used to arrive at this conclusion’ was not substantiated. Accordingly, the Committee found that the author’s dismissal from a childcare centre for refusing to remove her Islamic headscarf violated her freedom to manifest religion or belief. It specifically relied on the principle of non-discrimination, and found that the differential treatment of the author did not meet the criteria of reasonableness and objectivity.

¹⁸⁰ Communication No 2807/2016, para 7.8, and Communication No 2747/2016, para 8.8.

¹⁸¹ Communication No 2807/2016, para 7.10, and Communication No 2747/2016, para 8.10.

violated the author's freedom to manifest religion or belief, and amounted to 'intersectional discrimination based on gender and religion, in violation of article 26 of the Covenant'.¹⁸²

In *Fedotova*, *Miriana Hebbadj*, and *Sonia Yaker*, the relevant additional normative constraint concerned the principle of non-discrimination. It is possible to extend this approach to require that a limitation be compatible with other rights and freedoms recognised in the Covenant. For instance, in *Raihon Hudoyberganova v Uzbekistan* (2004),¹⁸³ the Committee found that the author's exclusion from studies on account of her religious manifestation violated her right to be free from coercion in matters of religion. The Committee applied an additional constraint on the state's authority to limit the freedom to manifest religion or belief: the limitation must not amount to or facilitate a violation of the author's unconditional right to be free from coercion when having or adopting a religion of her choice. These recent cases reflect an important development in the Committee's overall approach to determining the permissibility of limitations. They represent a clear indication that the Committee is willing to go beyond the text of articles 18(3) and 19(3) and consider other treaty provisions to constrain the authority of states to limit the Two Freedoms. Accordingly, the weight attached to the limitation grounds in these articles is counterbalanced by other principles and norms found in the Covenant, such as the principle of non-discrimination. Such an adjudicative approach is promising, and may be important to imposing on the state a substantial justificatory burden when it limits the Two Freedoms.

¹⁸² Communication No 2807/2016, para 7.17, and Communication No 2747/2016, para 8.17. The Committee's views in these two cases raise an interesting question with respect to the consistency between its jurisprudence and the jurisprudence of the European Court of Human Rights in cases such as *S.A.S v France* (2014) – where the Court has upheld a similar ban on the niqāb. See Christophe Deprez, 'The Admissibility of Multiple Human Rights Complaints: Strasbourg and Geneva Compared' (2019) 19(3) *Human Rights Law Review* 517. Delving into the implications of such an inconsistency may be beyond the scope of this thesis.

¹⁸³ *Raihon Hudoyberganova v Uzbekistan*, Communication No 931/2000 2016 (CCPR views adopted on 5 November 2004), CCPR/C/82/D/931/2000.

C. Observations on the jurisprudence

Four principal observations may be made with respect to the Committee's approach to determining the permissibility of limitations on the Two Freedoms. First, the Committee has, through its jurisprudence, generally reinforced the primary permissibility criteria and additional normative constraints applicable to limitations on the Two Freedoms under articles 18(3) and 19(3) of the ICCPR.

Second, the Committee's jurisprudence on the Two Freedoms has not always displayed a consistent application of the primary criteria for the permissibility of limitations. On the one hand, in a number of cases, the Committee has adopted a *flexible* test on permissibility, whereby the first two criteria of the test are virtually glossed over. On numerous occasions, vague aims have been accepted as relating to or falling within one of the specific limitation grounds found in articles 18(3) or 19(3) of the ICCPR. In effect, the Committee has often failed to strictly interrogate the relevance of the state's asserted reasons for the limitation in question. For example, it has interpreted the aim of 'national unity' to fall within the limitation grounds of protecting 'national security' and 'public order' without much explanation. In these cases, the Committee has tended to focus on the third criterion of the test: whether the limitation is necessary and proportionate. On the other hand, the Committee has occasionally adopted a *rigorous* test on permissibility. In such cases, it has applied all three permissibility criteria in a more robust manner.

Third, if one were to holistically characterise the Committee's approach to assessing limitations on the Two Freedoms, it appears that the Committee has adopted an outcome-oriented approach as opposed to a process-oriented approach. The Committee has tended to

focus on arriving at a particular outcome in a given case, rather than on rigorously applying a permissibility test. It is perhaps for this reason that the Committee routinely focuses on the third criterion in its permissibility test. This outcome-oriented approach is evident in *Mukong, Ballantyne*, and *Gauthier*. Such an approach is also evident in a number of other cases where the Committee found that a violation of the Covenant had taken place. For instance, in the case of *Bodrozic v Serbia and Montenegro* (2005),¹⁸⁴ which involved criminal libel proceedings against a journalist who criticised a well-known public figure, the Committee reaffirmed the responsibility of the state to justify the limitation in question. In the case of *de Moraes v Angola* (2005),¹⁸⁵ which involved the imprisonment of a journalist for criticising the head of state, the Committee found that imprisonment was a disproportionate means of protecting the interests of public order or the reputation of a public figure. In *Coleman v Australia* (2006),¹⁸⁶ the Committee found that fining and imprisoning a person who failed to get the required permit before delivering a speech at a shopping mall was a disproportionate means of regulating speech in public places. In such cases, the Committee appears to have concerned itself more with the outcome of the case than with the strict application of permissibility criteria. This focus can be promising in terms of the salutary aim of protecting the Two Freedoms. But it can also be problematic, as a purely outcome-oriented approach may afford states unwarranted space to impose limitations for reasons that are not strictly permitted under the Covenant. In addition to paying attention to the outcome of the assessment, a process-oriented approach compels states to more rigorously meet each of the permissibility criteria when justifying a limitation. Such

¹⁸⁴ *Zeljko Bodrožić v Serbia and Montenegro*, Communication No 1180/2003 (CCPR views adopted on 31 October 2005), CCPR/C/85/D/1180/2003.

¹⁸⁵ *Rafael Marques de Morais v Angola*, Communication No 1128/2002 (CCPR views adopted on 29 March 2005), CCPR/C/83/D/1128/2002.

¹⁸⁶ *Patrick Coleman v Australia*, Communication No 1157/2003 (CCPR views adopted on 17 July 2006), CCPR/C/87/D/1157/2003.

rigour enhances the state's justificatory burden. By rigorously insisting that the state meet each of the primary permissibility criteria, a heavier justificatory burden could be imposed on the state when it seeks to limit the Two Freedoms. Cases such as *Kivenmaa*, *Sohn*, *Zalesskaya*, and *Sister Immaculate Joseph* suggest that a rigorous permissibility test is one method through which the Committee can ensure that a substantial justificatory burden is imposed on states.

Finally, the Committee's jurisprudence displays a willingness to place certain additional normative constraints on the state's authority to limit the Two Freedoms. These constraints appear to be based on the idea of covenant compatibility, i.e. that limitations must be compatible with the 'provisions, aims and objectives' of the Covenant. The Committee has in its recent jurisprudence considered the relevance of the principle of non-discrimination, and has found that limitations on the Two Freedoms that fail to comply with the principle are impermissible. This additional constraint has come to be part of the Committee's assessment of the permissibility of a limitation. Therefore, even where a particular limitation facially meets the three primary criteria found in articles 18(3) or 19(3) of the ICCPR, it can still be impermissible if it has a discriminatory purpose or is applied in a discriminatory manner. The Committee's jurisprudence indicates that the application of such normative constraints has gained some traction in practice. This jurisprudential development is one of the most promising indications of the Committee's willingness to grapple with the ICCPR's *vulnerability* in terms of how it sets out the state's burden to justify limitations on the Two Freedoms.

This chapter presented an analytical account of the Human Rights Committee's jurisprudence with respect to limitations on the Two Freedoms. The Committee's pronouncements are not

legally binding, and states have generally been reticent with regard to the authoritative status of the Committee's interpretation of the ICCPR. Yet the Committee's work is still widely accepted as constituting valuable guidance on how to interpret articles 18(3) and 19(3) of the ICCPR. In this context, I have explored how the Committee has interpreted articles 18(3) and 19(3) in actual cases involving alleged violations of the Two Freedoms. I concluded that the Committee's jurisprudence reflects a positive development wherein a fairly robust justificatory burden is imposed on states when they seek to limit the Two Freedoms.

The Committee's focus on the *outcome* of cases can be juxtaposed against the justificatory approaches explored in the preceding chapters of this thesis. The current guided reading of articles 18(3) and 19(3) of the ICCPR, at best, contemplates an unconstrained interest-based justificatory approach. An orthodox guided reading – though sounder than what a literal reading of the two limitation clauses offers – still contains some weaknesses. The Committee appears to be grappling with these weaknesses, albeit in a slightly inconsistent way. The nature of the permissibility test it applies in actual cases has mattered less compared to the *outcome* of its reasoning. Even in certain cases where a *flexible* permissibility test was applied, the Committee appears to be guided by a normative instinct that prioritises the Two Freedoms over the various interests listed in the two limitation clauses. In such cases, the Committee appears to be intent on securing outcomes that are, in a manner of speaking, more consistent with a fundamental liberal principle, i.e. that freedom is the norm, and any limitations on it must be justified by those seeking to impose such limitations.

In the remaining chapters of this thesis, I explore what this pattern of reasoning signals. I ask whether the Committee can be a potential vehicle for advancing a more conceptually coherent, normatively compelling, and politically appealing approach to justifying limitations

on the Two Freedoms. I argue that the Committee could potentially advance a more robust justificatory approach, which places duties of justice at the centre of the state's burden to justify limitations on the Two Freedoms.

Chapter 6

A Return to Good Faith

The preceding chapters of this thesis explained the prevailing or ‘orthodox’ interpretation of articles 18(3) and 19(3) of the International Covenant on Civil and Political Rights (ICCPR).¹ They also presented the current work of the United Nations (UN) Human Rights Committee in guiding the interpretation of these two limitation clauses. These discussions reveal that the Committee has operated on the basis of a normative instinct to maximise the protection of the freedom to manifest religion or belief and the freedom of expression (the ‘Two Freedoms’). In the remaining two chapters of this thesis, I venture beyond the orthodoxy and attempt to present a doctrinal framework that can perhaps provide scaffolding for the Committee’s apparent normative instinct. In the first part of this thesis, I made the conceptual, normative, and political case for a ‘duty-based’ approach to justifying limitations on the Two Freedoms. In the final two chapters of this thesis, I ask whether a doctrinal framework based on a good faith interpretation of articles 18(3) and 19(3) of the ICCPR can accommodate such a duty-based approach. I will attempt to show that such a doctrinal framework can support the Committee’s normative work with respect to limitations on the Two Freedoms.

In the present chapter, I explore the parameters of international legal rules of treaty interpretation. Such an exploration is not meant to be exhaustive, but instead serves to explain how such rules can provide a doctrinal framework for the duty-based justificatory approach that I will discuss in the final chapter of this thesis. I chose to discuss these legal rules at this stage

¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (‘ICCPR’).

of the thesis (and not earlier) because I wish to argue that ordinary rules of treaty interpretation can actually form the basis for a more robust justificatory approach to limiting the Two Freedoms.

This chapter is presented in two sections. In the first section, I discuss two approaches to treaty interpretation: a ‘good faith’ approach to interpretation, and an ‘evolutive’ approach to interpretation. A good faith approach is simply based on the rules of treaty interpretation set out in the Vienna Convention on the Law of Treaties (VCLT),² whereas the evolutive approach involves treating an international human rights treaty as a ‘living instrument’ that can be given new meaning to respond to new contexts. I also explore the question of whether or not human rights treaties are ‘special’ in some way, owing to the nature of the subject matter they deal with: human rights. Based on the answer to this question, I conclude that the two interpretative approaches are not necessarily distinct from one another. In the second section of this chapter, I re-examine the work of the Human Rights Committee, and attempt to locate such work within the two interpretative approaches. I explain that the Committee has played a vital role in advancing a good faith interpretation of articles 18(3) and 19(3) of the ICCPR. I accordingly conclude that the Committee is well-placed to build on its recent jurisprudence to promote a more conceptually coherent, normatively compelling, and politically appealing approach to justifying limitations on the Two Freedoms.

I. TWO APPROACHES TO TREATY INTERPRETATION

An international treaty is a compact between states. Yet obligations under human rights treaties such as the ICCPR are not merely owed reciprocally between states; they are also obligations

² Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

owed by states to persons within their jurisdiction.³ The distinct nature of human rights obligations presents two interpretative paths. On the one hand, as suggested by the Human Rights Committee, such obligations may be of a special nature because ‘human rights norms are the legal expression of the essential rights that every person is entitled to as a human being’.⁴ Human rights treaties are then interpreted in a ‘specialised’ manner⁵ because they deal with a subject matter that is somehow ‘special’: human rights. On the other hand, a human rights treaty may not be special in any way due to some factor external to the text of the treaty – such as the fact that it involves human rights. Instead, interpretation of the treaty would be governed by internal factors such as the object and purpose of the treaty. This latter approach simply draws from a ‘good faith’ interpretation of a treaty.

A. A good faith approach

Article 31(1) of the VCLT stipulates the ‘general rule’ of treaty interpretation.⁶ It stipulates that a treaty ‘shall be interpreted in good faith’. It requires those who interpret a treaty to pay attention to: (1) the ordinary meaning of treaty provisions, (2) the context of those treaty provisions, and (3) ‘the object and purpose’ of the treaty. As noted by Richard Gardiner, the VCLT ‘does not privilege any one of these three aspects of the interpretation method’.⁷ They

³ See Human Rights Committee, *General Comment No 24(52) – Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, 11 November 1994, CCPR/C/21/Rev.1/Add.6 (‘GC 24’), para 8.

⁴ *ibid*, para 4. Also see Catherine J Redgwell, ‘Reservations to Treaties and Human Rights Committee General Comment No 24(52)’ (1997) 46(2) *International and Comparative Law Quarterly* 390, 404.

⁵ Başak Çali, ‘Specialized Rules of Treaty Interpretation: Human Rights’ in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press 2012) 525.

⁶ The rule is considered to be part of customary international law, and ‘not open to challenge’. See Richard Gardiner, ‘The Vienna Convention Rules on Treaty Interpretation’ in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press 2012) 476.

⁷ Richard Gardiner, *Treaty Interpretation* (2nd edn, Oxford University Press 2015) 161 and 174.

must be understood in a holistic manner.⁸ For instance, ‘ordinary meaning is not an element in treaty interpretation to be taken separately when the general rule is being applied to a particular issue involving treaty interpretation’.⁹ As observed by the International Court of Justice (ICJ) in its judgment in *South West Africa, Preliminary Objections*, an interpretative rule based on the ‘ordinary meaning’ of the terms of a treaty ‘is not an absolute one’.¹⁰ The ICJ opines that ‘[w]here such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it’.¹¹ Meanwhile, the reference to ‘context’, has at least two points of significance. First, it is a reference to an ‘immediate qualifier of the ordinary meaning’ of any provision so as to ‘avoid any over-literal approach to interpretation’.¹² Second, it is a reference to certain specific features of a treaty, including its whole text, its preamble and any annexes. Article 31(2) of the VCLT in fact provides:

The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

⁸ See Isabelle Van Damme, ‘Treaty Interpretation by the WTO Appellate Body’ (2010) 21 *European Journal of International Law* 605, 619–20; *Golder v United Kingdom*, Application No 4451/70 (1975) 1 EHRR 524, para 30.

⁹ Gardiner, *Treaty Interpretation*, 181. Also see Humphrey Waldock, ‘United Nations Conference on the Law of Treaties, First Session’ (26 March–24 May 1968), Official Records: Summary Records, 184, para 70. It was observed: ‘With regard to the expression ‘ordinary meaning’, nothing could have been further from the [International Law] Commission’s intention than to suggest that words had a ‘dictionary’ or intrinsic meaning in themselves. The provisions of [article 31(1)] clearly indicated that a treaty must be interpreted ‘in good faith’ in accordance with the ordinary meaning of the words ‘in their context’.

¹⁰ *South West Africa, Preliminary Objections, Judgment* [1962] ICJ Reports 336.

¹¹ *ibid.*

¹² Gardiner, *Treaty Interpretation*, 197.

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

Therefore, it makes sense to look to the entire text of the treaty, including its preamble, when interpreting specific provisions in their context. Meanwhile, the broader circumstances in which the treaty was drafted, i.e. what article 32 of the VCLT refers to in the phrase ‘the circumstances of [a treaty’s] conclusion’ – is certainly relevant to interpretation, but only as a supplementary means of interpretation. Such circumstances cannot be equated with the term ‘context’ in article 31, and is not part of the general rule of treaty interpretation.

An interpretation in good faith is an interpretation that is faithful to the ‘fundamental importance’ of the treaty.¹³ There are some substantive features of the notion of good faith worth mentioning. First, this notion is often understood as relating to the principle of effectiveness. Gardiner observes that, on the one hand, the notion of good faith aims to give effect to treaty provisions.¹⁴ On the other hand, it seeks to give effect to a treaty’s object and purpose.¹⁵ The latter sense of effectiveness is teleological, as it focuses more on giving effect

¹³ *ibid* 167. Also see John F O’Connor, *Good Faith in International Law* (Aldershot 1991).

¹⁴ Gardiner, *Treaty Interpretation*, 169. This idea is linked to the maxim *ut res magis valeat quam pereat*, which generally means that ‘an interpretation of a term should be preferred which gives it some meaning and role rather than one which does not’. This equation of the notion of good faith to the principle of effectiveness is evident in the preparatory work pertaining to the VCLT. See Humphrey Waldock, ‘Third Report of Special Rapporteur’ (1964) 2 *Yearbook of the ILC* 60, para 27, and 61 para 29; M Yasseen, ‘Chairman of International Law Commission (Yasseen, speaking as a member of the Commission)’ (1964) 2 *Yearbook of the ILC* 290, para 106.

¹⁵ Gardiner, *Treaty Interpretation*, 169 and 210. Gardiner notes that the principle of effectiveness also entails ‘preferring an interpretation which fulfils the aims of the treaty’. There is meanwhile some jurisprudence that suggests the need to interpret a provision in light of the *provision’s* object and purpose. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Reports 43, 227. Gardiner correctly observes that such a prescription is not strictly found in the general rule on treaty interpretation, but may be considered as relevant to that rule. He suggests that interpreting a provision in its context would require giving effect to *its* object and purpose (in addition to the treaty’s object and purpose).

to the broader aims of the treaty in question.¹⁶ This dual notion of the principle of effectiveness is also evident in the ICJ's jurisprudence.¹⁷ A good faith approach would accordingly require an interpretation that gives effect to both the treaty provision in question, and more generally, the object and purpose of the treaty. Second, good faith is associated with the principle of reasonableness.¹⁸ It thus equates to something more than merely the opposite of bad faith. It reflects 'an element of reasonableness qualifying the dogmatism that can result from purely verbal analysis'.¹⁹

Adopting a good faith approach to interpreting the ICCPR would then depend on a proper understanding of its object and purpose; in essence, the object and purpose of a treaty guides a good faith interpretation of the treaty.²⁰ I treat the terms 'object' and 'purpose' as part of one singular concept, and will therefore use the two terms together.

We might turn to several sources to ascertain the object and purpose of a treaty. Two such sources are suggested by the ICJ in its opinion on *Reservations to the Genocide Convention*. These are the preamble to the treaty, and the preceding work of the United Nations

¹⁶ Çali 539.

¹⁷ See for example, *Territorial Dispute (Libyan Arab Jamahiriya/Chad) (Merits)* [1994] ICJ Reports 6.

¹⁸ See Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law Volume 1: Peace* (9th edn, Oxford University Press 2008) 1272. Also see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Jurisdiction and Admissibility)* [1984] ICJ Reports 420, para 63. Much has been written about what the principle of 'reasonableness' entails. I take the principle to be a reflection of public objectivity, which is akin to certain judicial conceptions of 'the legal convictions of the community'. See Christof Heyns, 'Reasonableness in a Divided Society' (1990) 107 *South African Law Journal* 279, 280.

¹⁹ Gardiner, *Treaty Interpretation*, 171.

²⁰ See James Crawford 'Sovereignty as a legal value' in James Crawford and Martti Koskenniemi, *The Cambridge Companion to International Law* (Cambridge University Press 2012) 123; Isabelle Buffard and Karl Zemanek, 'The "Object and Purpose" of a Treaty: An Enigma?' (1998) 3 *Austrian Review of International and European Law* 311.

(UN) General Assembly as reflected in its resolutions on the relevant subject.²¹ I add to this list the ICCPR's *travaux préparatoires* and the views of the Human Rights Committee. Meanwhile, in attempting to ascertain what the drafters of a treaty had in mind, George Letsas recommends that some attention is paid to both the 'concrete' and the 'abstract' intentions of the drafters.²² Letsas makes his recommendation with respect to the European Convention on Human Rights. Yet it is equally applicable to the interpretation of any other multilateral treaty, including the ICCPR. He suggests that while the concrete intentions of the drafters might reflect the types of societies they represented at the time the treaty was drafted, their abstract intentions might better reveal the object and purpose of a treaty.²³ I will accordingly discuss these various sources with a view to ascertaining what the drafters wanted to achieve through the ICCPR. But in doing so, I will subscribe to an underlying assumption without which this exercise is unlikely to be of much use; I will assume that the drafters of the ICCPR consistently acted in good faith, and intended for future interpreters of and parties to the treaty to act in good faith.²⁴ Article 26 of the VCLT stipulates compliance with the principle of *pacta sunt servanda*, which recognises: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.' When articles 26 and 31 of the VCLT are read together, the full extent of why the notion of 'good faith' is so fundamental to the interpretation and application of treaties becomes apparent.

²¹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion* [1951] ICJ Reports 15, 23; Also see *Oil Platforms* [1996–II] ICJ Reports 803; Jan Klabbers, 'Some Problems Regarding the Object and Purpose of Treaties' (1997) 8 *Finnish Yearbook of International Law* 138, 156.

²² George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007) 72-79.

²³ *ibid* 72.

²⁴ *Oppenheim's International Law Volume 1*, 1272.

The first source relevant to ascertaining the object and purpose of the ICCPR is its preamble. Article 31(2) of the VCLT stipulates that ‘context’ for the purpose of interpreting a treaty comprises *inter alia* its preamble. Gardiner observes that a preamble contains ‘recitals [that] commonly include motivation, aims, and considerations which are stated as having played a part in drawing up the treaty’.²⁵ He also warns, however, that ‘preambles are not always drafted with care and a preamble itself may need interpreting’.²⁶ I will accordingly tread with caution in equating the preamble of the ICCPR to its object and purpose, and will instead rely on the entirety of the Covenant’s text to ascertain its object and purpose. Nevertheless, the preamble of the ICCPR contains several important clauses that provide us with an impression of the Covenant’s overall object and purpose. First, the preamble recognises that the rights in the Covenant ‘derive from the inherent dignity of the human person’. Second, it recognises ‘the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms’. Third, it acknowledges that ‘the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant’. The three clauses set out certain broad principles that underlie the Covenant: that equal and inalienable rights derive from human dignity, that states have obligations to promote respect for and observance of ‘human rights and freedoms’, and that individuals have duties to others in terms of promoting and observing their rights. As far as its preamble is concerned, the object and purpose of the ICCPR appears to be to recognise human dignity as the source of equal and inalienable rights of all individuals, and to impose obligations on states to ensure that rights and freedoms are respected and observed both by the states themselves, and by

²⁵ Gardiner, *Treaty Interpretation*, 205. Also see *Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)*, Dissenting Opinion of Judge Weeramantry [1991] ICJ Reports 53, 142.

²⁶ Gardiner, *Treaty Interpretation*, 217.

individuals within their jurisdictions. A good faith approach would then require that each provision of the ICCPR be interpreted in a manner that is faithful to this broad object and purpose.

Two elements of the ICCPR's preamble should be noted in particular. The first is that the obligations of states under the ICCPR essentially concern *individual* rights and freedoms. As noted by the Inter-American Court of Human Rights, under human rights treaties, states 'submit themselves to a legal order within which they, for the common good, assume obligations not in relation to other States, but towards all individuals'.²⁷ It seems fairly clear that the ICCPR expects states to be *primarily* concerned about individual rights and freedoms, rather than any other societal interest or value. For instance, there is no mention of societal interests and values such as democracy, economic efficiency, or governmental stability in the preamble. There appears to be a very deliberate emphasis on *the individual*, as opposed to the state. This emphasis signals the intention of the drafters to avoid the now obsolete norm of interpreting inter-state treaties, i.e. the rule *in dubio mitius*, which stipulated that the best interpretation of a treaty provision is that which is least restrictive of the sovereignty of the States Parties.²⁸ Rudolf Bernhardt observes that this principle of treaty interpretation is no longer relevant, as it is neither mentioned in the VCLT 'nor has it ever been invoked in the recent jurisprudence of international courts and tribunals'.²⁹ It is fairly clear from the preamble

²⁷ See *Effect of Reservations on the Entry into Force of the American Convention* (OC-2/82) (Inter-American Court of Human Rights, Advisory Opinion of 24 September 198) 67 ILR 559, 568, para 29.

²⁸ See Lassa Oppenheim, *International Law: A Treatise* (Longmans, Green & Co 1905) 561. Also see Nahuel Maisley, 'The International Right of Rights? Article 25(a) of the ICCPR as a Human Right to Take Part in International Law-Making' (2017) 28(1) *European Journal of International Law* 89, 102. This idea was advanced in the *Lotus case*, where it was opined that international obligations were binding on states when they 'emanate from their own free will'. See *S.S Lotus Case* [1927] PCIJ Series A, No 10, 18.

²⁹ Rudolf Bernhardt, 'Evolutive Treaty Interpretation, Especially of the ECHR' (1999) 42 *German Year Book of International Law* 11, 14.

of the ICCPR that the drafters contemplated a framework of obligations that was not meant to be interpreted through the lens of state sovereignty. The focus appears to be on the dignity of *the individual*, and the obligations of states to promote and observe the rights and freedoms of the individual. As noted by Hersch Lauterpacht in 1950, the object and purpose of an international bill of human rights is not to protect the sovereignty of states, but to give an ‘imprimatur to the indestructible sovereignty of man’.³⁰ This same principle appears to be accepted in terms of treaties such as the European Convention on Human Rights. Accordingly, judges of the European Convention on Human Rights are, when in doubt, expected to ‘err on the side of [individual] liberty, certainly not against liberty’.³¹

The other element to note is the preamble’s clear reference to individual duties. This reference is often a neglected part of the ICCPR’s preamble. It is a reference that is actually quite important, as it signals a conceptual awareness among drafters that individual rights and freedoms are always shaped by individual duties – both to other individuals and to the community. In the next chapter of this thesis, I argue that this reference to duties presents an opportunity for treaty interpreters to advance a duty-based approach to justifying limitations on the Two Freedoms.

I next turn to ‘the preceding work’ of the General Assembly in the form of resolutions on the subject of civil and political rights. As noted by Nahuel Maisley, such resolutions have made reference to ‘the fundamental freedoms for all without distinction’³² and to the fact that

³⁰ Hersch Lauterpacht, *An International Bill of the Rights of Man* (Oxford University Press 2013) 49.

³¹ Eirik Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees* (Oxford University Press 2015) 149 citing Jean-Paul Costa, *La Cour européenne des droits de l’homme: Des juges pour la liberté* (Daloz, 2013) 41.

³² UN General Assembly, Resolution 2200 (XXI), 16 December 1966, preamble.

‘all human beings are born free and equal in dignity and rights’.³³ Maisley correctly notes that ‘two elements seem to be common to all of these references: on the one hand, the purpose of ensuring the freedom of the individual and, on the other, the purpose of ensuring it in an egalitarian manner’.³⁴ Therefore, at least from the preceding work of the General Assembly it seems clear that ‘the protection of the equal freedom of all individuals’ is integral to the object and purpose of the ICCPR.³⁵

Meanwhile, the ICCPR’s *travaux préparatoires* can be surveyed for further clues on its object and purpose. According to article 32 of the VCLT, a treaty’s preparatory work can be relied upon to ‘confirm the meaning resulting from the application of article 31’. Such preparatory work can also be particularly useful when the general rule of interpretation ‘leaves the meaning ambiguous or obscure’ or ‘leads to a result which is manifestly absurd or unreasonable’.³⁶ Although a treaty’s preparatory work cannot substitute its text, or be on par with the general rule of treaty interpretation found in article 31 of the VCLT, its importance to a good faith interpretation is unmistakable. Gardiner accordingly suggests that the ‘classification of preparatory work in a separate and supplementary category of rules appears to have produced little by way of diminution of their interpretative effect’.³⁷

³³ UN General Assembly, Resolution 217 A (III), 10 December 1948; Universal Declaration of Human Rights, 10 December 1948, A/RES/3/217 A, art 1.

³⁴ Maisley 104.

³⁵ *ibid.*

³⁶ Gardiner, ‘The Vienna Convention Rules on Treaty Interpretation’, 491. Gardiner notes: ‘The Vienna rules accept the interpretative role of well-defined ancillary material in the general rule and, with due caution, a limited role for the less well-defined preparatory work that can be elevated to a higher role only in controlled situations (ambiguity or obscurity, or manifest absurdity or unreasonableness).’

³⁷ *ibid* 502.

We have already examined the *travaux préparatoires* relevant to articles 18 and 19 of the ICCPR in a previous chapter. The aim of revisiting the ICCPR's preparatory work in this chapter is quite different. My aim in this chapter is to explore the Covenant's object and purpose, as it is relevant to interpreting articles 18(3) and 19(3) in good faith. It then makes sense to cautiously examine³⁸ the relevant preparatory work – particularly on the Covenant's preamble – to better understand what the Covenant's object and purpose might be. Letsas and others in fact correctly observe that the 'abstract intentions' of the drafters can be identified through the *travaux préparatoires*; these intentions often point to the object and purpose of the treaty.³⁹

Early drafts of the ICCPR's preamble⁴⁰ referred to the states' intention to recognise the 'principles' set forth in the Covenant as part of the 'human rights and fundamental freedoms founded on the general principles of law recognised by civilized nations'.⁴¹ This reference to

³⁸ I am cautious about relying too heavily on the *travaux préparatoires* of the ICCPR to ascertain its object and purpose. *Travaux préparatoires* are only supplementary means of interpretation. In fact, the ICJ in the *Reservations to the Genocide Convention* case does not make specific reference to them as a source for ascertaining the object and purpose of a treaty. See Klabbers 156.

³⁹ Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, 72. Also see Stephanie E Berry, 'A "Good Faith" Interpretation of the Right to Manifest Religion? The Diverging approaches of the European Court of Human Rights and the UN Human Rights Committee' (2017) 37(4) *Legal Studies* 672, 675.

⁴⁰ It is noted that the first paragraph of the preamble was initially considered article 1 of the draft international covenant on human rights. This idea was later abandoned, and the text was brought into the preamble of the ICCPR. See Commission on Human Rights, *Summary Record of the Hundred and Thirty-Eighth Meeting*, 6th Session, 6 April 1950, E/CN.4/SR.138.

⁴¹ Commission on Human Rights, Working Group on Convention on Human Rights, *Summary Record of the Eighth Meeting*, 2nd Session, 10 December 1947, E/CN.4/AC.3/SR.8, 7. Incidentally, the representative of China reminded the Commission on Human Rights that references to 'civilised nations' had been removed in the Universal Declaration of Human Rights, and so should also be removed from the preamble of the treaty. It was suggested that such words were too difficult to define. See Commission on Human Rights, *Summary Record of the Hundred and Twenty-Fourth Meeting*, 5th Session, 14 June 1949, E/CN.4/SR.124, 15. Yugoslavia later endorsed this view, and the language was eventually replaced with a reference to human rights deriving from the inherent dignity of human beings, rather than from positive law. See Commission on Human Rights, E/CN.4/SR.138, paras 4-5.

‘principles’ was later replaced with ‘rights and freedoms’.⁴² Moreover, the phrase ‘general principles of law recognised by civilised nations’ was abandoned and replaced with a reference to rights deriving from the inherent dignity of human beings.⁴³ It was opined such rights ‘could not be alienated and that they constituted a law anterior and superior to the positive law of civil society’.⁴⁴ Therefore, it was proposed that the preamble should recognise that the rights set forth in the ICCPR are ‘inalienable and derive from the inherent dignity of the human person’.⁴⁵ By 1955, the Commission on Human Rights had agreed on the final text of the preamble. It observed that the preamble of the ICCPR:

[S]ets forth the general principles relating to the inherent dignity of the human person, portrays the ideal of the free man in accordance with the Universal Declaration of Human Rights, reiterates the obligation of States under the Charter of the United Nations to promote human rights and reminds the individual of his responsibility to strive for the observance of human rights.⁴⁶

This observation captures the essential aims of the Covenant as articulated in its preamble. Two aspects of this observation are worth mentioning. First, the reference to the UN Charter is in fact a reference to article 56 (read with article 55) of the UN Charter under which states parties are bound to ‘take joint and separate action in co-operation with the [UN]’ for the purposes of promoting ‘universal respect for, and observance of, human rights and fundamental freedoms

⁴² Commission on Human Rights, *Drafting Committee, Summary Record of the Thirty Fourth Meeting, 2nd Session*, 20 May 1948, E/CN.4/AC.1/SR.34, 7.

⁴³ See Commission on Human Rights, E/CN.4/SR.138, paras 10-11.

⁴⁴ UN General Assembly, *Draft International Covenants on Human Rights – Annotation prepared by the Secretary General*, 10th Session, 1 July 1955, A/2929, 34.

⁴⁵ *ibid.*

⁴⁶ *ibid.* 33.

for all without distinction as to race, sex, language or religion'.⁴⁷ Second, the reference to the duties of the individual appears to be quite specific and deliberate. The Commission observed that it was 'generally agreed that rights and duties were correlative and every right carried with it a corresponding duty'.⁴⁸

The Human Rights Committee has sought to clarify the object and purpose of the ICCPR in its general comments. Although the Committee's pronouncements are not legally-binding, the opinion of the Committee is persuasive; after all, the body specifically mandated to supervise the implementation of the ICCPR ought to be taken seriously when it presents a view on the object and purpose of the treaty it is supervising. In General Comment No. 24, the Committee opines that the object and purpose of the Covenant is to:

[C]reate legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.⁴⁹

This articulation of the object and purpose of the ICCPR does not appear to be based on any specific clause in the preamble, the preceding work of the General Assembly, or the ICCPR's *travaux préparatoires*. It is instead the Committee's own view of what the drafters of the ICCPR sought to achieve through the Covenant. The three elements of this articulation have some textual basis, as they can be easily grounded in the text of the ICCPR. First, the intention to be

⁴⁷ *ibid* 35.

⁴⁸ *ibid* 36.

⁴⁹ GC 24, para 7.

legally bound is clearly understood by states that are party to the Covenant. It is a well-recognised principle found in article 26 of the VCLT. This understanding is made explicit in article 51 of the ICCPR, which refers to the process of amending the Covenant. It states that such amendments shall be binding on states that accept them, and that other states parties will remain ‘*bound by the provisions of the present Covenant and any earlier amendment which they have accepted*’ (emphasis added). Second, civil and political rights are indeed defined in the specific articles of the ICCPR. For instance, articles 18 and 19 define the contours of the Two Freedoms. Finally, the text of the Covenant does provide for a supervisory machinery through which the implementation of the Covenant can be promoted. While the ‘efficacious’ nature of this machinery is a matter of opinion, there is little doubt that the drafters of the ICCPR intended for states parties to be held accountable for their failure to fulfil their obligations. Apart from the reporting mechanism contemplated by article 40 of the ICCPR, article 41 contemplates a process of inter-state interaction via the Committee to discuss a perceived failure of a state party in fulfilling its obligations.⁵⁰ There is accordingly some textual basis to agree with the Committee’s view on the ICCPR’s object and purpose.

The Committee’s take on the ICCPR’s object and purpose, however, does not offer specific guidance on how to interpret the provisions of the Covenant. It is very much a descriptive articulation based on the text of the treaty. It does not, for example, tell us much about how to frame the state’s justificatory burden when limiting the Two Freedoms. Such guidance, I think, comes from the more abstract articulation of the ICCPR’s object and purpose

⁵⁰ The Human Rights Committee, in General Comment No 31, elaborates on the nature of the obligations of states parties under the Covenant, and the complaints procedure under article 41. It observes that ‘the article 41 procedure should be seen as supplementary to, not diminishing of, States Parties’ interest in each other’s discharge of their obligations’. See Human Rights Committee *General Comment No 31 [80] – The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 29 March 2004, CCPR/C/21/Rev.1/Add.13, para 2.

based on its preamble. In this context – and because a preamble is more readily accepted as shedding light on a treaty’s object and purpose – it is sensible to look to the preamble of the ICCPR when seeking guidance on how to interpret limitation clauses in good faith.

What then does it actually mean to interpret a treaty in ‘good faith’? Gardiner correctly notes that the idea of ‘good faith’ is usually ‘an accompaniment to an activity’, and this feature could explain why ‘it is difficult to extract from judgments a clear dividing line between interpretation and application’.⁵¹ Thus, good faith is a matter to be illustrated, rather than defined *a priori*.⁵² This emphasis on application, however, is not a disadvantage when it comes to the question of limitations, as such questions ultimately relate to the activity of states when they limit rights. In effect, the notion of good faith may be used to both interpret the limitation clause in question, and to assess the actions of the state in applying the limitation clause.

While the ordinary meaning of specific provisions cannot be deviated from, a provision is often capable of having multiple meanings. In this context, a good faith approach dictates that the meaning that is most closely in keeping with the object and purpose of the treaty should always be given to the provision. A good faith approach, to this extent, is not an interpretative approach that draws on some external factor to interpret a treaty. It instead draws on the treaty itself; it is inspired by the object and purpose of the treaty.

⁵¹ Gardiner, *Treaty Interpretation*, 168.

⁵² Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Stevens and Sons 1953) 105.

B. The evolutive approach

Some scholars suggest that human rights treaties are ‘exceptional’ and fall outside the VCLT’s rules of treaty interpretation.⁵³ By contrast, others posit that the VCLT is applicable to human rights treaties, but that such treaties are ‘special’ because of the subject matter they deal with.⁵⁴ This latter idea is endorsed by the Human Rights Committee,⁵⁵ and by international legal experts including Rosalyn Higgins, who comments: ‘human rights treaties are not just an exchange of obligations between states where they can agree at will’; they ‘reflect rights inherent in human beings, not dependent upon grant by the state’.⁵⁶ Gardiner observes that ‘a different interpretative approach’ may apply to certain treaties that ‘do not regulate fine detail but set out broad principles intended to apply in a wide range of circumstances and over a period long enough to expect social changes’.⁵⁷ The evolutive approach to treaty interpretation tends to build on this idea.

⁵³ See for example, Detlev F Vagt, ‘Treaty Interpretation and the New Ways of Law Reading’ (1993) 4 *European Journal of International Law* 499.

⁵⁴ See for example, John Tobin, ‘Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation’ (2010) 23 *Harvard Human Rights Journal* 1.

⁵⁵ GC 24, para 8.

⁵⁶ Rosalyn Higgins, ‘Human Rights: Some Questions of Integrity’ (1989) 15 *Commonwealth Law Bulletin* 598, 607. Also see Maisley 103. Also see Matthew Craven, ‘Legal Differentiation and the Concept of the Human Rights Treaty in International Law’ (2000) 11(3) *European Journal of International Law* 489.

⁵⁷ Gardiner, *Treaty Interpretation*, 166.

Bernhardt observes that ‘evolutive treaty interpretation’⁵⁸ entails a dynamic reading of treaty provisions in light of changing contexts.⁵⁹ Proponents of this interpretative approach have pointed to the ICJ as a source of authority. The ICJ has suggested that when certain generic terms are used in a treaty, they ‘must be understood to have the meaning they bear on each occasion on which the treaty is to be applied, and not necessarily their original meaning’.⁶⁰ Bernhardt argues that the evolutive approach is particularly relevant to human rights treaties, as they are multilateral treaties intended to endure for a long period of time.⁶¹ Accordingly, human rights treaties, such as the ICCPR and the European Convention on Human Rights,⁶² are regarded as ‘living instruments’ capable of being dynamically interpreted.⁶³

A further distinction may need to be made with respect to the type of evolutive interpretation human rights treaties inspire. Bernhardt argues that the relevance of an evolutive interpretative approach depends on the *object and purpose* of the treaty. If the purpose of a treaty is ‘to create longer lasting and solid relations between the parties or to guarantee personal freedoms...it is hardly compatible with this purpose to eliminate new developments in the

⁵⁸ The European Court of Human Rights (ECtHR) has referred to the evolutive approach to treaty interpretation on a number of occasions. See *Goodwin v United Kingdom*, Application No 28957/95 (judgment [GC] of 11 July 2002), para 74; *Stafford v United Kingdom*, Application No 46295/99 (judgment [GC] of 28 May 2002), para 68.

⁵⁹ Bernhardt 11. See also Malgosia Fitzmaurice, ‘Dynamic (Evolutive) Interpretation of Treaties’ (2008) 21 *Hague Year Book of International Law* 101; Malgosia Fitzmaurice, ‘Dynamic (Evolutive) Interpretation of Treaties’ (2009) 22 *Hague Year Book of International Law* 3.

⁶⁰ *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, Judgment, 13 July 2009 [2009] ICJ Reports 213, para 70.

⁶¹ Bernhardt 12.

⁶² In *Tyrer v United Kingdom*, the European Court of Human Rights observed that ‘the Convention is a living instrument which...must be interpreted in the light of present-day conditions’. *Tyrer v United Kingdom*, Application No 5856/72 (judgment of 25 April 1978), para 31.

⁶³ *ibid* 18.

process of treaty interpretation'.⁶⁴ Letsas meanwhile argues that an evolutive interpretation must ultimately allow 'evolution towards the moral truth of [treaty] rights, not... evolution towards some commonly accepted standard, regardless of its content'.⁶⁵ It is then important to remain faithful to the idea that human rights treaties, such as the ICCPR, are ultimately meant to 'protect individuals from the power of the state and the tyranny of the majority'.⁶⁶ If indeed the object and purpose of the ICCPR is to frame universal standards and to protect the individual from the whims of the collective, an interpretative approach that 'unquestioningly ratif[ies] societal change and interpret[s] rights on the basis of present day conditions'⁶⁷ must be avoided. As noted by Eyal Benvenisti, prioritising majority preferences over the freedom of the individual would compromise the 'universality' of human rights standards.⁶⁸ An evolutive approach to interpreting the ICCPR should remain conscious of and faithful to the treaty's object and purpose of promoting 'universal respect for, and observance of, human rights and freedoms'. Therefore, when I refer to an evolutive approach to treaty interpretation, I contemplate an evolutive approach that is still tethered to the object and purpose of the treaty.

I next turn to the question of how to ascertain whether or not a context has changed. This question remains fairly central to the implementation of an evolutive approach. For

⁶⁴ Bernhardt 16-17.

⁶⁵ Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, 79. Also see Rosalyn Higgins, 'Some Observations on the Inter-Temporal Rule in International Law' in Jerzy Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Kluwer 1996) 181.

⁶⁶ Berry 692. Also see article 27 of the ICCPR, which provides: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'

⁶⁷ *ibid.*

⁶⁸ Eyal Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards' (1998-1999) 31 *New York University Journal of International Law and Politics* 843, 844.

instance, the subsequent practice of states could evince a changed context, which in turn justifies the evolution of a particular interpretation. The International Law Commission (ILC) observes that ‘subsequent practice under articles 31 and 32 of the [VCLT] may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term [with] a meaning which is capable of evolving over time’.⁶⁹ The ILC refers to two types of subsequent practice.

First, article 31(3)(b) of the VCLT refers to subsequent practice in the narrow sense. This article provides that the interpretation of a treaty can take into account ‘any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’.⁷⁰ It is possible to contemplate an evolutive approach that is contingent on such subsequent practice. However, subsequent practice that establishes *agreement* of states parties regarding an interpretation of a treaty appears to be a reference to practice of a very particular kind.⁷¹ In the case of the ICCPR, such practice cannot be construed merely from general trends observed in the behaviour of states. The practice must be directly linked to the interpretation or application of the ICCPR, and must establish ‘agreement’ among states parties with respect to the interpretation of a treaty provision.

Second, article 32 of the VCLT contemplates a broader notion of subsequent practice. Under this notion, there may be some state practice that ‘does not establish the agreement of

⁶⁹ See International Law Commission, *Report of the International Law Commission, Seventieth Session (30 April–1 June and 2 July–10 August 2018)*, General Assembly Official Records, 73rd Session, Supplement No 10 (A/73/10) (‘ILC Report 2018’) 64. See the ILC’s draft conclusion 8 on interpretation of treaty terms as capable of evolving over time, and draft conclusion 4 on the definition of subsequent agreement and subsequent practice.

⁷⁰ *ibid* 31.

⁷¹ *ibid* 32. According to the ILC, such practice includes (but is not limited to) official statements regarding the interpretation of a treaty, such as statements at a diplomatic conference, statements in the course of a legal dispute, or judgments of domestic courts.

the parties, but which may nevertheless be relevant as a subsidiary means of interpretation’ of the treaty in question.⁷² Such practice does need to be relevant to the application of the treaty,⁷³ although it need not establish actual agreement with respect to the interpretation of the treaty. The ILC observes that ‘subsequent practice under article 32 has since the adoption of the 1969 Vienna Convention been recognised and applied by international courts and other adjudicatory bodies as a means of interpretation’.⁷⁴ It noted that the jurisprudence of the ICJ and international courts, including the European Court of Human Rights (ECtHR) ‘demonstrates that subsequent practice which fulfils all the conditions of [article 31(3)(b) of the VCLT] is not the only form of subsequent practice by parties in the application of a treaty that may be relevant for the purpose of treaty interpretation’.⁷⁵ Yet the ILC also notes that ‘the distinction between agreed subsequent practice [under article 31(3)(b)], as an authentic means of interpretation, and other subsequent practice (in a broad sense) under article 32, implies that a greater interpretative value should be attributed to the former’.⁷⁶

Interestingly, the ILC refers to the Human Rights Committee’s views in *Jong-Cheol v The Republic of Korea*⁷⁷ when substantiating the claim that a broader notion of subsequent practice may be relevant to treaty interpretation. In this case, the Committee observed that a ‘law restricting the publication of opinion polls for a limited period in advance of an election

⁷² *ibid* 31.

⁷³ *ibid* 36 and 50. Also see Anthony Aust, *Modern Treaty Law and Practice* (3rd edn, Cambridge University Press 2013) 239.

⁷⁴ ILC Report 2018, 33.

⁷⁵ *ibid* 33-34. See *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment [1999] ICJ Reports 1045, 1078; *Loizidou v Turkey (preliminary objections)* Application No 15318/89 (ECtHR judgment of 23 March 1995) ECHR Series A No 310, para 79.

⁷⁶ *ibid* 36.

⁷⁷ Communication No 968/2001(CCPR Views adopted on 27 July 2005), CCPR/C/84/D/968/2001.

does not seem *ipso facto* to fall outside the aims contemplated in [article 19(3) of the ICCPR]’.⁷⁸ The Committee opined that ‘similar restrictions can be found in many jurisdictions’⁷⁹ – a view that the ILC later appears to treat as evidence of the treaty body’s consideration of a broader notion of subsequent practice when interpreting the ICCPR. It is clear that the Committee is not confining itself to subsequent practice of states that meets the conditions of article 31(3)(b) of the VCLT. The fact that similar restrictions can be found in many jurisdictions does not necessarily establish states parties’ agreement on the interpretation of the ICCPR. Therefore, the ILC’s observation appears to be correct insofar as the Committee is indeed relying on state practice in a much more general sense to aid the interpretation of article 19(3) of the ICCPR. I return to the Committee’s jurisprudence in the next section of this chapter.

Article 31(3)(c) of the VCLT may also lead to changes in how a treaty ought to be interpreted. This article implies that advances in the ‘relevant rules of international law applicable in the relations between the parties’ might shape how a particular treaty provision ought to be interpreted. The ILC suggests that article 31(3)(c) reflects a principle of ‘systemic integration’, which requires that international obligations be interpreted ‘by reference to their normative environment’.⁸⁰ Therefore, a treaty provision ought to be interpreted in light of the broader normative system of which it is a part. It also observes: ‘Article 31(3)(c)...requires the interpreter to consider other treaty-based rules so as to arrive at a consistent meaning’.⁸¹

⁷⁸ *ibid.*, para 8.3.

⁷⁹ *ibid.* Also see ILC Report 2018, 34.

⁸⁰ See International Law Commission, *Report of the Study Group on Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, finalized by Martti Koskenniemi (13 April 2006), ILC 58th Session, A/CN.4/L.682 (‘Fragmentation Report’) 208; Also see Adamantia Rachovitsa, ‘The Principle of Systemic Integration In Human Rights Law’ (2019) 66(3) *International & Comparative Law Quarterly* 557.

⁸¹ International Law Commission, *Report of the International Law Commission, Fifty-eighth Session (1 May-9 June and 3 July-11 August 2006)*, General Assembly Official Records, 61st Session, Supplement No 10 (A/61/10) (‘ILC Report 2006’) 414. Also see Çali 542. Çali comments that this approach is ‘in line with a more

However, according to the Commission, article 31(3)(c) is particularly relevant under certain specific circumstances. It is relevant when the parties to the treaty under interpretation are also parties to the other treaty or treaties being considered. For example, the article is particularly relevant when a treaty rule found in the International Convention for the Protection of All Persons from Enforced Disappearance⁸² is being relied upon to interpret a provision of the ICCPR, and parties to the ICCPR are also parties to the Enforced Disappearance Convention. The article is also particularly relevant when the treaty rule has ‘passed into or expresses customary international law’ or where the rule provides ‘evidence of the common understanding of the parties as to the object and purpose of the treaty under interpretation or as to the meaning of a particular term’.⁸³

We can certainly conceive of an evolutive approach that goes beyond the parameters of article 31(3)(b) and (c) of the VCLT. The notion of an evolutive approach as articulated by human rights courts such as the ECtHR, appears not to be dependent on the rule on subsequent state practice in the narrow sense, or on other relevant rules of international law. Therefore, the evolutive approach may rely on subsequent practice in the broader sense i.e. the type of practice that may under article 32 of the VCLT serve as supplementary means of interpretation. For instance, Arnold D McNair, the first president of the ECtHR, commented that the Convention ‘is not stereotyped as at the date of the treaty but must be understood in the light of the *progress of events and changes in habits of life*’ (emphasis added).⁸⁴ Assertions of an evolved context

general duty to attempt to reach coherence amongst different bodies of international law, even though this may not be possible in each concrete instance’.

⁸² UN General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006.

⁸³ ILC Report 2006, 414-15.

⁸⁴ See Eirik Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees* (Oxford University Press 2015) 131 citing Arnold D McNair, *The Law of Treaties* (2nd edn, Oxford University Press 1961) 467-8.

then appear to take into account much more general changes in ‘present day conditions’ in society, i.e. ‘social practice’ or ‘social acceptance’.⁸⁵ Therefore, the evolutive approach to treaty interpretation, as commonly understood, ventures beyond the conditions of the general rule of treaty interpretation that is stipulated in article 31 of the VCLT.

C. Comparing the two approaches

Some salient factors appear to define the good faith and evolutive approaches to treaty interpretation. First, factors that are internal to and external to a treaty may shape the interpretative approach. On the one hand, an internal factor, such as the object and purpose of the treaty in question, could determine how the treaty should be interpreted. A good faith approach to interpreting the ICCPR is based on the object and purpose of the treaty itself. On the other hand, some factor external to the text of the treaty may be relied upon to shape its interpretation. For instance, the nature of the treaty itself might be relied upon to describe it as a ‘living instrument’ requiring dynamic interpretation according to changing contexts. The evolutive interpretative approach can – though not necessarily – be based on such thinking. Second, even the evolutive approach must be tethered to the object and purpose of the treaty, and not be untethered or open-ended in its dynamism. To this extent, the requirement to be bound by the object and purpose of a treaty applies even when stretching a treaty’s interpretation to fit changed contexts.

⁸⁵ See *Goodwin v United Kingdom*, Application No 28957/95 (ECtHR judgment [GC] of 11 July 2002) para 85; *I v United Kingdom*, Application No 25680/94 (ECtHR judgment [GC] of 11 July 2002), para 65; *Burden and Burden v the United Kingdom*, Application No 13378/05 (ECtHR judgment of 12 December 2006) para 57; *Shackell v the United Kingdom*, Application No 45851/99 (ECtHR judgment of 27 April 2000) para 1.

I tend to agree with Başak Çali, who concludes that ‘human rights treaty law does not constitute an exceptional regime’ nor does it have ‘specialised rules of treaty interpretation’.⁸⁶ Çali observes that ‘[i]n the case of most human rights treaty provisions...the vague wording of rights, and the blanket provisions of duties, logically necessitates visiting the object and purpose of the treaty and its fit with the wording and context’.⁸⁷ However, this recourse to the object and purpose is not because the subject matter under consideration happens to be ‘human rights’, but because the wording of the treaty itself warrants such recourse.⁸⁸ The idea that human rights treaties are indeed special does not appear to be firmly grounded in international law. In any event, taking a firm position with regard to this debate is unwarranted for the purposes of this thesis. The reason to opt for the more straightforward claim that all treaties – including the ICCPR – must be interpreted in good faith in accordance with the general rule of treaty interpretation may be the more sensible route to take. The approach is, after all, one that focuses on what Çali calls ‘the effectiveness approach’, which is in many ways synonymous with a good faith approach to treaty interpretation.⁸⁹ As explained in the next chapter of this thesis, this route can lead us to our desired destination – a more conceptually coherent, normatively compelling, and politically appealing approach to justifying limitations on the Two Freedoms.

⁸⁶ Çali 526.

⁸⁷ *ibid* 533.

⁸⁸ *ibid*.

⁸⁹ *ibid* 537-38. Çali suggests that those who adopt this approach view ‘the interaction between wording, context, and object and purpose as requiring an “effective, real, and concrete” protection of human rights provisions.’

II. THE COMMITTEE'S WORK

I next turn to the Human Rights Committee's work, and ask how it might be located in relation to the two interpretative approaches discussed in the previous section. The jurisprudence examined in some detail in the fifth chapter of this thesis may help us answer this question.

The Committee's work may be divided into three categories. It should be borne in mind, however, that categorising the work of the Committee this way is unlikely to be neat. It is more appropriate to think of a spectrum, and of the cases as falling somewhere along this spectrum. At one end of the spectrum, a conservative interpretative approach can be observed. At the other end, a more dynamic, evolutive, approach can be observed.

In the first category of cases, the Committee appears to be focusing very specifically on the text of limitation clauses; it appears to be offering a state-centric interpretation of these clauses. A good example of such a case is *Leo Hertzberg v Finland* (1985), where the state invoked the limitation ground of protecting 'morals' to justify a limitation on the freedom of expression.⁹⁰ The Committee focuses on the text of article 19(3) of the ICCPR, and specifically on the term 'morals', and opines that conceptions of morals 'differ widely' and that '[t]here is no universally applicable common standard'.⁹¹ The Committee observes that states should be afforded a 'margin of discretion' to determine what constitutes a threat to 'morals', given that the Committee is in no position to ascertain what moral standards prevailed in Finland.⁹² It concludes that '[a]ccording to article 19(3), the exercise of the rights provided for in article

⁹⁰ Communication No 61/1979 (CCPR views adopted on 2 April 1982), CCPR/C/OP/1, para 2.1.

⁹¹ *ibid*, para 10.3.

⁹² *ibid*.

19(2) carries with it special duties and responsibilities for those organs'; since the audience of radio and TV programmes cannot be controlled, 'harmful effects on minors cannot be excluded'.⁹³ The Committee's ultimate decision to find that no violation of article 19(2) had taken place appears to rest on its deference to the state on the scope of article 19(3).

On a spectrum from conservatism to dynamism, *Hertzberg* can be placed at the conservative end. The Committee focuses almost exclusively on the text of article 19(3) of the ICCPR with no reference to the broader object and purpose of the Covenant. While it would not be fair to suggest that the Committee deliberately opted out of a good faith interpretation of article 19(3), it is possible to surmise that some elements typical to a good faith interpretation were notably missing in the Committee's views. For example, the Committee noted that there is no universally accepted common standard for 'morals'. This ambiguity could have certainly prompted it to consult the object and purpose of the Covenant as a source of guidance on how to interpret article 19(3). Instead, it opted to defer to the state on what constituted 'morals', and what was required to protect 'morals'.

The Committee's views in *Hertzberg* on the 'margin of discretion' were not unanimous. In fact, in a concurring opinion, Committee member Torkel Opsahl differs with the majority. He observes that the 'relative and changing' nature of morals warrants caution when they are invoked to limit freedom of expression.⁹⁴ Notably, he observes that a limitation must not be applied 'so as to perpetuate prejudice or promote intolerance. It is of special importance to protect freedom of expression as regards minority views, including those that offend, shock or

⁹³ *ibid*, para 10.4.

⁹⁴ *ibid*. Concurring opinion of Torkel Opsahl.

disturb the majority.’⁹⁵ This counter-majoritarian idea appears to be drawn from outside the text of article 19 of the ICCPR. Nowhere in article 19 is it mentioned that the views of minorities deserve special protection. This view appears to be drawn from the broader object and purpose of the treaty – the idea that every *individual* deserves the protection of their rights and freedoms. For instance, it could be argued that article 19 protects minorities from the tyranny of the majority because that is part of the object and purpose of the ICCPR. The object and purpose of the Covenant includes the commitments to recognise the ‘equal and inalienable rights of all members of the human family’. Moreover, article 26 of the ICCPR articulates a clear commitment to the principle of non-discrimination,⁹⁶ albeit not explicitly with respect to non-discrimination on the basis of sexual orientation. How, one might ask, can views advocating for the equal rights of a sexual minority be justifiably restricted under a treaty, if members of that sexual minority group were entitled to *equal* and inalienable rights under the same treaty? Where some ambiguity in the text of article 19(3) – as duly noted by the Committee – is detected, a good faith approach would have warranted recourse to the object and purpose, and other provisions of the ICCPR.

I next turn to the second category of cases. It is possible to identify some cases in which the Committee has paid closer attention to the object and purpose of the ICCPR; it has more rigorously adopted a good faith approach to treaty interpretation in these cases. On a spectrum ranging from conservatism to dynamism, these cases may be placed somewhere in the middle; the Committee has engaged in some interpretative creativity, but has still remained within the four corners of the Covenant. A preference for such an approach can be traced to the

⁹⁵ *ibid.*

⁹⁶ Also see Human Rights Committee, *General Comment No 18 (Non-discrimination)*, 10 November 1989 (‘GC 18’).

Committee's eventual abandonment of the margin of discretion doctrine. This doctrine does not sit comfortably with the object and purpose of the ICCPR, as it appears to emphasise state sovereignty as opposed to state obligations to respect and observe individual rights and freedoms. A deferential view towards the authority of states to define the content and scope of a limitation ground strikes a dissonant chord with the object and purpose of the Covenant. In this context, the Committee's adoption of a good faith interpretative approach has coincided with its abandonment of this doctrine. Viljam Engström observes that the margin of discretion afforded in *Hertzberg* has come to be regarded as an 'anomaly' in light of the Committee's subsequent jurisprudence.⁹⁷ For instance, in *Toonen v Australia* (1994), which concerned Tasmania's criminalisation of same-sex conduct, the Committee rejected the 'margin of discretion' doctrine, and observed that it 'cannot accept that...moral issues are exclusively a matter of domestic concern'.⁹⁸ As pointed out by Sarah Joseph, *Toonen* reflected the Committee's revised position on the 'margin of discretion'.⁹⁹ The Committee was no longer prepared to let states exclusively determine what constituted 'morals', and when the protection of 'morals' was an appropriate ground for restricting Covenant rights.

The Committee's jurisprudence on covenant compatibility offers examples of a good faith approach to treaty interpretation. The view that all limitations must not only be compatible with the limitation clause in question, but also with the Covenant in general, was clearly

⁹⁷ Viljam Engström, 'Deference and the Human Rights Committee' (2016) 34(2) *Nordic Journal of Human Rights* 73, 81. This view has come to be accepted by the Committee. See Human Rights Committee, *General Comment No 34 – Article 19 (Freedom of opinion and expression)*, 12 September 2011, CCPR/C/GC/34 (GC 34), para 36; *Ilmari Lämsmäki v Finland*, Communication No 511/1992 (CCPR views adopted on 14 October 1993), CCPR/C/52/D/511/1992, para 9.4; *Sohn v Republic of Korea*, Communication No 518/1992 (CCPR views adopted on 19 July 1995), CCPR/C/54/D/518/1992.

⁹⁸ Communication No 488/1992 (CCPR views adopted on 31 March 1994), CCPR/C/50/D/488/1992, para 8.6.

⁹⁹ Sarah Joseph, 'Gay Rights under the ICCPR – Commentary on *Toonen v Australia*' (1994) 13(2) *University of Tasmania Law Review* 392, 406.

articulated in *Toonen*.¹⁰⁰ This view then found its way into the Committee’s general comment on freedom of expression. It opined that ‘laws restricting the rights enumerated in article 19, paragraph 2...must not only comply with the strict requirements of article 19, paragraph 3 of the Covenant but must also themselves be *compatible with the provisions, aims and objectives of the Covenant* (emphasis added).¹⁰¹ A limitation cannot have a discriminatory purpose or be applied in a discriminatory manner, as such a limitation would be inconsistent with the object and purpose of the Covenant to recognise *equal* and inalienable rights. It would also be inconsistent with article 26 of the Covenant, which provides that ‘[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law’, and prohibits discrimination on ‘any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.¹⁰² In this context, the two recent cases of *Miriana Hebbadj v France* (2018)¹⁰³ and *Sonia Yaker v France* (2018)¹⁰⁴ may be recalled. The Committee observed that a limitation that is discriminatory cannot be justified under article 18(3) of the ICCPR.¹⁰⁵ The state in both cases sought to justify the limitation on the freedom to manifest religion or belief on the grounds of ‘public order’, and ‘living together’ – an aim couched in terms of protecting ‘the fundamental rights and freedoms

¹⁰⁰ Communication No 488/1992, para 8.3.

¹⁰¹ GC 34, para 26.

¹⁰² The idea that limitations must comply with the principle of non-discrimination is clearly articulated by the Committee in General Comment No 22. See Human Rights Committee, *General Comment No 22 – Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4, para 8. Also see GC 18, para 12.

¹⁰³ *Miriana Hebbadj v France*, Communication No 2807/2016 (CCPR views adopted on 17 July 2018), CCPR/C/123/D/2807/2016.

¹⁰⁴ *Sonia Yaker v France*, Communication No 2747/2016 (CCPR views adopted on 17 July 2018), CCPR/C/123/D/2747/2016.

¹⁰⁵ Communication No 2807/2016, para 7.5, and Communication No 2747/2016, para 8.5.

of others'.¹⁰⁶ The majority of the Committee in both cases found that the limitation amounted to discrimination based on gender and religion, and violated articles 18 and 26 of the Covenant.¹⁰⁷

A prohibition on discrimination is certainly not explicitly found in the text of article 18(3) of the ICCPR. The Committee appears to be drawing from other provisions in the Covenant, and specifically from article 26 of the ICCPR, to conclude that limitations on the freedom to manifest religion or belief must not be discriminatory. To do so, it has ventured beyond the text of the limitation clause in question, and has examined the broader contours of the Covenant. This type of broader fidelity to the Covenant is precisely what is required of the Committee if it were to adopt a good faith approach to treaty interpretation. States are not authorised to limit Covenant rights in a manner that falls foul of the object and purpose of the Covenant. That object and purpose clearly includes a commitment to recognise the equal and inalienable rights of individuals, and the state's obligation to promote universal respect for, and observance of, human rights and freedoms. Therefore, the object and purpose clearly reinforces the principles of equality and non-discrimination, which are explicitly articulated in articles 2(1) and 26 of the Covenant.

Whenever the Committee applies additional normative constraints on state authority to limit the Two Freedoms, it appears to be aligning its interpretation of articles 18(3) and 19(3) of the ICCPR with the Covenant's broader object and purpose. This insistence on covenant compatibility is a movement towards a good faith approach to interpreting the ICCPR. Although

¹⁰⁶ 'Living together' was defined by the French government as 'the observance of the minimum requirements of life in society'. See Communication No 2807/2016, para 5.7, and Communication No 2747/2016, para 7.7. Also see *S.A.S v France*, Application No 43835/11 [2014] ECHR 695.

¹⁰⁷ Communication No 2807/2016, para 7.17, and Communication No 2747/2016, para 8.17.

the notion of covenant compatibility is creative, and has some elements of dynamism, it is still very much within the parameters of the ICCPR. The Committee is not doing much more than remaining cognisant of the ICCPR's object and purpose, and the Covenant's provisions in general, and then interpreting specific limitation clauses in light of that object and purpose, and those provisions.

I finally turn to a category of cases where the Committee may have adopted an evolutive approach to treaty interpretation. The ILC in fact observes that the Committee has occasionally adopted an 'evolutive approach that is based on developments of State practice'.¹⁰⁸ The ILC specifically refers to the case of *Yoon and Choi v The Republic of Korea* (2006), where the Committee adopted an evolutive approach with respect to the scope of the rights under article 18(3) of the ICCPR. The Committee concluded that article 18(3) provided protection against being compelled to act against 'genuinely held' religious beliefs.¹⁰⁹ It based its conclusion on the claim that 'an increasing number of those states parties to the Covenant which have retained compulsory military service have introduced alternatives to compulsory military service'.¹¹⁰

¹⁰⁸ ILC Report 2018, 69. The ILC specifically refers to: *Kindler v Canada*, Communication No 470/1991 (CCPR views adopted on 30 July 1993), CCPR/C/48/D/470/1991; *Judge v Canada*, Communication No 829/1998 (CCPR views adopted on 5 August 2002), CCPR/C/78/D/829/1998; and *Yoon and Choi v the Republic of Korea*, Communication Nos 1321/2004 and 1322/2004 (CCPR views adopted on 3 November 2006), CCPR/C/88/D/1321-1322/2004.

¹⁰⁹ Communication Nos 1321/2004 and 1322/2004, para 8.2. Also see Christof Heyns and Magnus Killander, 'Universality and the Growth of Regional Systems' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 689. The authors observe: 'Sometimes a change in approach spreads from one system to the other, both vertically (from the global to the regional) and horizontally (between the regional systems). The UN Human Rights Committee and European Court initially did not recognize conscientious objection to military service as protected under the right to freedom of conscience. The Human Rights Committee changed its stance on this issue in 1993, and the Grand Chamber of the European Court followed suit in 2011.' Also see Human Rights Committee, *General Comment No 22 – Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4, para 11; *Bayatyan v Armenia*, Application No 23459/03 (ECtHR judgment of 7 July 2011).

¹¹⁰ Communication Nos 1321/2004 and 1322/2004, para 8.4.

The Committee in *Fedotova v The Russian Federation* (2012)¹¹¹ adopted an evolutive approach with respect to the principle of non-discrimination to find that the impugned limitation on the freedom of expression was impermissible. Unlike in the *Hebbadj* and *Yaker* cases, it needed to include a ground of discrimination that is not explicitly prohibited in the ICCPR: sexual orientation. The impugned measure under scrutiny was the penalising of ‘public actions aimed at propaganda of homosexuality’.¹¹² The Committee took three interpretive steps to find that the measure amounted to an impermissible limitation on the freedom of expression. First, it observed that all limitations must themselves be compatible with the object and purpose of the ICCPR.¹¹³ It based this observation on a number of sources including its two previous general comments (nos. 22 and 34), and its views in *Toonen*. Second, it observed that the principle of non-discrimination was very much part of the ‘provisions, aims and objectives of the Covenant’.¹¹⁴ This observation did not require much elaboration, as the claim that the ICCPR promoted the principle of non-discrimination is uncontroversial, given the text of the preamble, and specifically, article 26 of the Covenant. Third, it observed that this principle of non-discrimination included a prohibition on discrimination on the grounds of sexual orientation. It is in this respect that the Committee appears to be relying on an evolutive interpretation of the Covenant. Article 26 of the ICCPR mentions a list of prohibited grounds: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. It does not explicitly mention sexual orientation. The words ‘other status’ can certainly capture grounds not included in the list of prohibited grounds.

¹¹¹ Communication No 1932/2010 (CCPR views adopted on 31 October 2012), CCPR/C/106/D/1932/2010.

¹¹² *ibid*, para 2.3. Also see *Kirill Nepomnyashchiy v Russian Federation*, Communication No 2318/2013 (CCPR views adopted on 17 July 2018), CCPR/C/123/D/2318/2013.

¹¹³ Communication No 1932/2010, para 10.4.

¹¹⁴ *ibid*.

Moreover, the main prohibition relates to discrimination ‘on any ground *such as* race, colour... (emphasis added)’. This general prohibition, alongside the catchall ground, leaves room to include other grounds not explicitly mentioned in the text of the clause. In this context, it would not be peculiar to consider sexual orientation – being a status or identity marker – as a ground on which discrimination would be prohibited. However, it is highly improbable that the drafters of the ICCPR had this ground in mind. Therefore, including the ground within the scope of article 26 would require some dynamism.

The Committee cited its own jurisprudence to suggest that ‘the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation’.¹¹⁵ It relied on three previous cases: *Toonen*,¹¹⁶ *Young v Australia* (2003),¹¹⁷ and *X v Colombia* (2007).¹¹⁸ Incidentally, the state party in *Toonen* requested the Committee’s guidance on whether the words ‘other status’ in article 26 included sexual orientation. The Committee in that case did not directly answer this query, but instead confined itself to noting that, in its view, the reference to ‘sex’ in article 26 and article 2(1) ‘is to be taken as including sexual orientation’.¹¹⁹ The Committee did not engage in any further elaboration on why it had concluded that sexual orientation was a prohibited ground of discrimination under the ICCPR. Yet in *Fedotova* it did make some broad references to a legal opinion by the International

¹¹⁵ *ibid*, para 10.5.

¹¹⁶ Communication No 488/1992, para 8.7.

¹¹⁷ Communication No 941/2000 (CCPR views adopted on 6 August 2003), CCPR/C/78/D/941/2000, para 10.4.

¹¹⁸ Communication No 1361/2005 (CCPR views adopted on 30 March 2007), CCPR/C/89/D/1361/2005, para 7.2.

¹¹⁹ Communication No 488/1992, para 8.7. Article 2(1) of the ICCPR provides: ‘1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’

Commission of Jurists. Some salient elements of that legal opinion are worth recalling, as the Committee restated these elements prior to elaborating on its own views.

First, it was suggested that ‘equality law, in the jurisprudence of the Committee...has developed significantly since April 1982 when the Views in *Hertzberg*...were adopted’.¹²⁰ This initial observation points to how an interpretation of a treaty provision can develop over time. The International Commission of Jurists referred to two developments in this regard. The first was that the Committee and other institutions have over time recognised sexual orientation as a prohibited ground of discrimination.¹²¹ The second development was that the Committee and other institutions have recognised that ‘public morals’ are subject to change. The International Commission of Jurists specifically argued that ‘the Committee’s jurisprudence reflects the *evolution* of the “public morals” conceptions, as does the case law of the European Court of Human Rights’ (emphasis added).¹²²

Second, the International Commission of Jurists observed that ‘a law that differentiates on the basis of sexual orientation is...discriminatory, in violation of the Covenant, unless it has a reasonable and objective justification’;¹²³ it opined that ‘public morality is not a reasonable and objective justification’ in this regard.¹²⁴ To substantiate this view, it presented the case law

¹²⁰ Communication No 1932/2010, para 5.9.

¹²¹ *ibid.*

¹²² *ibid.* See *Open Door and Dublin Well Woman v Ireland*, Applications Nos 14234/88 and 14235/88, (ECtHR judgment of 29 October 1992), paras 65-66.

¹²³ Communication No 1932/2010, para 5.10. It may be noted that the notion of ‘good faith’ is sometimes equated to what is ‘reasonable’. See Gardiner, *Treaty Interpretation*, 168.

¹²⁴ *ibid.*

of the United States Supreme Court, the Constitutional Court of South Africa,¹²⁵ and the Philippines Supreme Court.¹²⁶ It accordingly argued that ‘courts around the world have held that...concerns about public morality cannot serve to defend disparate treatment based on sexual orientation’.¹²⁷ The International Commission of Jurists thus concluded that ‘*even the proportionate use of a permissible aim*, such as public morality, cannot be the basis for a restriction on freedom of expression if it is applied in a discriminatory manner’.¹²⁸ This conclusion invited the Committee to apply a normative constraint on the state’s authority to impose even seemingly proportionate limitations vis-à-vis one of the grounds found in a limitation clause. Even if the limitation was, strictly speaking, necessary and proportionate in terms of the protection of ‘morals’, it would be impermissible if it was discriminatory.

Although the Committee does not directly endorse any of the observations or conclusions of the International Commission of Jurists, it is telling that it restated these observations and conclusions in some detail. In endorsing both the view that the limitation must be non-discriminatory, and that sexual orientation is not a justified ground of differentiation, the Committee certainly reached the conclusion recommended by the International Commission of Jurists. Therefore, there is some sense that it may have also agreed with the underlying

¹²⁵ The South African Constitution in fact specifically lists ‘sexual orientation’ as a ground of non-discrimination. Section 9(3) provides: ‘The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.’ See Constitution of the Republic of South Africa, 10 December 1996. Also see Kate O’Regan, ‘Undoing Humiliation, Fostering Equal Citizenship: Human Dignity in South Africa’s Sexual Orientation Equality Jurisprudence’ (2013) 37 *New York University Review of Law & Social Change* 307.

¹²⁶ Communication No 1932/2010, para 5.12.

¹²⁷ *ibid.*

¹²⁸ *ibid.*, para 5.11.

reasoning that developments – or ‘evolution’ – had taken place with respect to the modern understanding of the principle of non-discrimination and ‘public morals’.

The Committee in *Fedotova* is clearly drawing from the object and purpose of the ICCPR and other treaty provisions, including article 26, to place a normative constraint on state authority to limit the freedom of expression. In this sense, it appears to be engaging in an evolutive approach to interpretation. Yet it is not doing so by explicitly referring to the ICCPR as a ‘living instrument’ that needs to be interpreted according to changing times. Instead, it is implicitly acknowledging the need for a more progressive reading of the treaty compared to its own conservative reading in *Hertzberg*. Is this dynamism indicative of an evolutive approach? For instance, the opinion that ‘public morals’ cannot be deployed to differentiate on the grounds of sexual orientation may actually depend on the idea that there can be an *evolution* in how the treaty ought to be interpreted. If we were to assume that the Committee agreed with this opinion, it might be the case that the Committee genuinely recognised that societal views on homosexuality and public morals have evolved. It could then be the case that the Committee – without being too explicit about its intentions – engaged in an evolutive approach to interpreting the ICCPR. Relying on such an approach, the Committee would then have read into article 26 a prohibited ground of discrimination that is not explicitly found in the text of article 26. Admittedly, it did not go further than reinterpret the prohibited ground of ‘sex’ to include ‘sexual orientation’. Still, it would seem that the Committee was venturing beyond the textual confines of the treaty to draw from an external development, i.e. discernible changes in how modern societies viewed homosexuality and ‘public morals’, to interpret the ICCPR as prohibiting discrimination on the grounds of sexual orientation. This type of dynamism does not appear to be relying on subsequent practice in the narrow sense contemplated by article 31(3)(b) of the VCLT. The observed societal changes do not relate to the specific application

of the ICCPR, nor does it establish any agreement among states with respect to the interpretation of article 26 of the ICCPR. In this context, the Committee appears to be relying on broader societal changes when engaging in an evolutive interpretation of the Covenant.

If we were to assume the contrary – that the Committee was not really relying on the legal opinion of the International Commission of Jurists – a slightly different explanation for the outcome of the case emerges. The Committee would then only have been interpreting article 26 in light of the object and purpose of the ICCPR. According to the crucial distinction Letsas draws between the drafters' concrete intentions and abstract intentions, it is possible to conceive of an abstract intention to prohibit forms of discrimination that are not explicitly listed in article 26. It is possible to argue that such an intention is reflected in article 26 itself, as the article includes the catchall ground 'other status'. Moreover, an intention to promote equal and inalienable rights may warrant a broader reading of the principle of non-discrimination than what is explicitly specified in the text of the treaty. It would seem contrary to this intention to permit discrimination against an individual solely on the basis of their sexual orientation. This conclusion may simply be what a good faith interpretation of the ICCPR would require.

Within the spectrum from conservatism to dynamism, it may be appropriate to place *Fedotova* towards the evolutive end of the spectrum. Yet, given that the Committee does not explicitly reveal much of its thinking, it may be difficult to definitively classify the case as one that involves an evolutive approach to treaty interpretation. I am inclined to think that we should not be preoccupied with a neat classification of the case. What is important rather is that we recognise what the Committee is attempting to do. It is, in essence, appealing to the principle of covenant compatibility to constrain the state's authority to limit the Two Freedoms; it is thereby enhancing the state's burden to justify limitations on the Two Freedoms.

This chapter explored two specific approaches to interpreting human rights treaties: a good faith approach and an evolutive approach. The object and purpose of the ICCPR and the Covenant's other provisions remain central to interpreting any treaty provision in good faith. Therefore, limitation clauses such as articles 18(3) and 19(3) of the ICCPR ought to be interpreted in light of the Covenant's overall object and purpose. Next, I explored the work of the Human Rights Committee and examined how the Committee has advanced a good faith interpretation of articles 18(3) and 19(3). It has also occasionally engaged in an evolutive interpretation of these clauses, albeit its approach has always been tethered to the object and purpose of the Covenant. Such a tethered evolutive approach has for instance been adopted to accommodate grounds of non-discrimination that are not explicitly found in the ICCPR. The Committee has accordingly succeeded in advancing a good faith approach to interpreting articles 18(3) and 19(3) by appealing to the principle of covenant compatibility.

The ability of the Committee to meaningfully advance a good faith approach to interpreting the ICCPR may depend on how states accept its interpretative authority. I have already discussed this challenge in the fifth chapter of this thesis, and have explained that the Committee's interpretation of the Covenant is not legally binding, and its jurisprudence cannot legally alter the meaning of the ICCPR's provisions. Yet the Committee's interpretation of the ICCPR should be taken seriously when interpreting and applying the Covenant in good faith. As correctly noted by Geir Ulfstein, several states have indeed accepted that the Committee's views have 'legal weight', and have acknowledged their obligation to cooperate with the

Committee.¹²⁹ He adds that such an approach not only ‘makes good legal sense’, but also ‘lays the basis for further refinements of the good faith obligations of states parties’.¹³⁰ Even if the Committee cannot advance legally binding interpretations of the ICCPR, we might still acknowledge its role in advancing a good faith interpretation of the Covenant and its specific provisions, including articles 18(3) and 19(3). The final chapter of this thesis asks whether such a good faith approach to interpretation can place a more conceptually coherent, normatively compelling, and politically appealing justificatory burden on states when they seek to limit the Two Freedoms.

¹²⁹ Geir Ulfstein, ‘The Legal Status of Views Adopted by the Human Rights Committee – From Genesis to Adoption of General Comment No 33’ in Asbjørn Eide, Jakob Th Möller and Ineta Ziemele (eds), *Making Peoples Heard: Essays on Human Rights in Honour of Gudmundur Alfredsson* (Brill – Nijhoff 2011) 166.

¹³⁰ *ibid.*

Chapter 7

A Duty-based Approach

A good faith approach to interpreting the International Covenant on Civil and Political Rights (ICCPR) requires a substantial justificatory burden to be placed on states when they limit individual rights and freedoms. The previous chapter of this thesis examined the work of the United Nations (UN) Human Rights Committee in advancing a good faith approach to interpreting articles 18(3) and 19(3) of the ICCPR – the two limitation clauses that deal with the freedom to manifest religion or belief, and the freedom of expression (the ‘Two Freedoms’). In this final chapter, I examine whether a good faith interpretation of articles 18(3) and 19(3) can accommodate a duty-based justificatory burden on states when they limit the Two Freedoms.

I ask two questions in this chapter. First, I ask whether a justificatory approach based on duties of justice is compatible with the object and purpose of the ICCPR. Second, I ask what point is actually served by advancing such an approach. My focus will initially be to demonstrate that such an approach is indeed possible if a good faith approach to interpreting the ICCPR is adopted. I will then turn to how such an approach adds value beyond notions of conceptual coherence and normative significance; such an approach will introduce a hitherto missing counter-majoritarian check on the state’s authority to limit the Two Freedoms under the ICCPR. Imposing a burden on the state to demonstrate that the competing interests – whatever they may be – are sufficiently weighty to impose a duty of justice on the individual concerned may help reduce the scope for abuse. Justifying a limitation on the Two Freedoms will ultimately depend on the state’s ability to present good, publicly justifiable reasons for imposing a limitation on the individual’s Two Freedoms.

The point of the final chapter of this thesis is not to invite the Committee to deviate from the salutary trajectory of its recent work. I have attempted to demonstrate in the preceding three chapters of this thesis that the Committee has in fact displayed a promising normative instinct to place a substantial justificatory burden on states when they limit the Two Freedoms. Therefore, what I hope to achieve in this final chapter is to present a doctrinal framework that offers some scaffolding to the Committee's normative work. My intention is to suggest that a duty-based justificatory approach can offer a more robust doctrinal framework for the Committee in its quest to constrain the state's authority to limit two of our most cherished freedoms. Of course, my use of the phrase 'duty-based justificatory approach' reflects a very specific idea. Under this approach, the state must present *good, publicly justifiable reasons* for why the competing interests at stake are sufficient to impose on the individual concerned a *duty of justice* to refrain from the impugned conduct.

If indeed a duty-based approach can offer such a framework, it makes sense for the Committee to advance such an approach in its future jurisprudence. Although the Committee's pronouncements are not legally binding on states, these pronouncements no doubt play a vital role in advancing a good faith interpretation of the Covenant. In this context, the Committee may be well-placed to advance an approach that places duties of justice at the centre of the state's burden to justify limitations on the Two Freedoms.

I. THE COMPATIBILITY OF A DUTY-BASED APPROACH

Treaty interpretation does not merely involve the mechanical application of interpretative rules to a particular treaty. It is an exercise in reasoning, and may, as observed by Humphrey Waldock (the International Law Commission's Special Rapporteur with respect to the draft articles of

the Vienna Convention on the Law of Treaties¹) involve ‘giving a meaning to a text’.² Accordingly, my aim in this chapter is to offer an interpretation that I think can serve the object and purpose of the ICCPR through a process of *reasoning* rather than mechanical rule application.

First and foremost, it may be useful to reiterate that the object and purpose of a treaty ultimately governs its interpretation.³ An evolutive approach that is untethered to the object and purpose of a treaty has no real basis in international law. Meanwhile, an evolutive approach tethered to the object and purpose of a treaty might be justified where the treaty deals with a subject matter that is uniquely prone to contextual change.⁴ For instance, the principle of non-discrimination may be subject to socio-political realities that change over time. Classes of individuals not envisaged by the drafters of the treaty may turn out to be in need of protection due to some new context or socio-political acceptance of a norm, such as the acceptance of the norm against discrimination on the grounds of sexual orientation. In the case of the ICCPR, a tethered evolutive approach may in fact be deployed to include sexual minorities within the scope of the Covenant’s protection in terms of non-discrimination.⁵ Doing so, arguably, remains

¹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (‘VCLT’).

² Humphrey Waldock, ‘Third Report of Special Rapporteur’ (1964) 2 *Yearbook of the ILC* 53.

³ See James Crawford ‘Sovereignty as a Legal Value’ in James Crawford and Martti Koskenniemi, *The Cambridge Companion to International Law* (Cambridge University Press 2012) 123.

⁴ See Richard Gardiner, *Treaty Interpretation* (2nd edn, Oxford University Press 2015) 166; Rudolf Bernhardt, ‘Evolutive Treaty Interpretation, Especially of the ECHR’ (1999) 42 *German Year Book of International Law* 11, 11.

⁵ See *Toonen v Australia* Communication No 488/1992 (CCPR views adopted on 31 March 1994), CCPR/C/50/D/488/1992, para 8.7; *Young v Australia* (2003) Communication No 941/2000 (CCPR views adopted on 6 August 2003), CCPR/C/78/D/941/2000, para 10.4; *X v Colombia* Communication No 1361/2005 (CCPR views adopted on 30 March 2007), CCPR/C/89/D/1361/2005, para 7.2.

consistent with the object and purpose of the ICCPR, and is not far from (and may in fact collapse into) a simple good faith reading of the Covenant.

I accordingly suggest that we focus on the object and purpose of the ICCPR, and rely on a good faith approach to interpreting the treaty to discover whether a duty-based justificatory burden might be imposed on states that seek to limit the Two Freedoms. The terminology of an ‘evolutive approach’ may not fit this interpretative endeavour for two reasons. First, I am not entirely convinced that an evolutive approach, termed as such, and advanced by a treaty-body with limited acceptance as *the* authoritative interpreter of the Covenant, will be accepted by states. Second, the claim that duties of justice should be placed at the centre of the state’s burden to justify limitations on the Two Freedoms is not a claim that is contingent on evolving contexts. It is a doctrinal claim that I think can be advanced by a simple good faith reading of articles 18(3) and 19(3) of the ICCPR.

Prior to examining whether a duty-based approach is compatible with the object and purpose of the ICCPR, it may be useful to briefly return to the question of teleological effectiveness, which I explored in the previous chapter of this thesis. The principle of effectiveness – which a good faith approach often embodies – reflects an interpretative commitment to advancing a treaty’s overarching object and purpose. The object and purpose of the ICCPR is essentially to recognise human dignity as the source of equal and inalienable rights of all individuals, and to impose obligations on states to ensure that individual rights and freedoms are respected and observed by states and by other individuals.⁶ This object and purpose suggests that the burden of proof is always on the state to justify its actions (rather than

⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (‘ICCPR’), preamble.

on the individual). I have already explained why such a justificatory burden makes conceptual and normative sense when dealing with the Two Freedoms. Additionally, it seems that this burden makes some doctrinal sense if we fully accept that a good faith approach to interpreting human rights treaties entails ensuring its teleological effectiveness. Başak Çali accordingly observes that ‘[t]he function of the teleological aspect of effectiveness in the case of human rights treaties is better understood as shifting the burden of proof from the individual to the State in justifying the infringement of, or lack of measures for protecting, rights’.⁷

Can the ICCPR’s object and purpose be interpreted to envisage a duty-based approach to justifying limitations on the Two Freedoms? Three points of reflection may be presented in this regard. The first concerns the background thinking of the drafters. The second concerns the preamble of the ICCPR. The third focuses on the actual text of the limitation clauses, with a special emphasis on article 19(3).

A. Background thinking of drafters

The Commission on Human Rights, the members of which were among the drafters of the ICCPR, clearly understood rights and duties as ‘correlative’.⁸ This conception is distinctly Hohfeldian.⁹ Of course, this conception may be contested if one agrees with Joseph Raz when

⁷ Başak Çali, ‘Specialized Rules of Treaty Interpretation: Human Rights’ in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press 2012) 541.

⁸ UN General Assembly, *Draft International Covenants on Human Rights – Annotation prepared by the Secretary General*, 10th Session, 1 July 1955, A/2929, 36.

⁹ Wesley Hohfeld explains that a person’s ‘claim right’ simply corresponds to another’s duty to do or refrain from doing something, Wesley N Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, (W W Cook ed Yale University Press 1919) 39.

he claims that rights are grounds for duties, but not every duty has a corresponding right.¹⁰ Where there is a right, there is most certainly a duty. Yet not all duties correlate to rights. For instance, imperfect moral duties do not correlate to rights.¹¹ However, if the focus is purely on ‘duties of justice’,¹² it is correct to say these duties correlate to rights. These are the kind of duties that are grounded in claim rights, and the state has a role in enforcing them. Therefore, it is conceptually correct to say that rights and duties of justice are correlative.

We are aware of the general context in which the Commission proclaimed that rights and duties are correlative. When they suggested that ‘every right carried with it a corresponding duty’, they surely meant duties that were of the kind the state had a role in enforcing through law. After all, this observation comes in the context of framing state obligations to promote universal respect for, and observation of, *rights*. Therefore, the kind of duties that correspond to such rights would naturally be duties that states have a role in enforcing. It could be argued that the drafters of the Covenant had in mind a type of duties we, for our purposes, call ‘duties of justice’. The corollary to this understanding is that, whenever the Covenant refers to ‘duties’, it means ‘duties of justice’. Such a view is important to maintaining the conceptual integrity of the Covenant. We cannot assume the same term ‘duty’ was used by the drafters to mean different things. Richard Gardiner correctly notes that ‘[i]t is a general principle in interpretation of a well-drafted document to expect the same term to have the same meaning throughout a single instrument’.¹³ Therefore, when interpreting the only two references to individual ‘duties’

¹⁰ Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 77 and 212.

¹¹ John Stuart Mill, *The Collected Works, Volume 10* (Toronto: University of Toronto Press, 1974 [Utilitarianism 1861]) 247.

¹² Alan E. Fuchs, ‘Mill’s Theory of Morally Correct Action’ in Henry R West (ed), *The Blackwell Guide to Mill’s ‘Utilitarianism’* (Blackwell 2006) 147-51; Robert E Goodin, ‘Duties of Charity, Duties of Justice’ (2017) 65(2) *Political Studies* 268, 268.

¹³ Gardiner, *Treaty Interpretation*, 209.

in the Covenant, we ought to bear in mind that the drafters had duties of justice (and not any other type of duty) in mind.

B. The preamble

I next turn to the text of the ICCPR's preamble. The fifth paragraph of the preamble states that the individual has 'duties to other individuals and to the community to which he belongs'. It then stipulates that the individual has a 'responsibility to strive for the promotion and observance of the rights recognised in [the] Covenant'. If the duties referred to in this paragraph are in fact duties of justice, we might see some conceptual consonance between the first and second elements of the paragraph. The individual's duties of justice to other individuals, and to the community, invariably correlate to the rights that such other individuals and the community hold. The individual owes duties that correlate to the claim rights of others. This implied correlation is reinforced in the second element of the paragraph, which frames the individual's responsibility to strive for the promotion and observance of the rights of others. Admittedly, the idea that these particular individual duties correlate to rights is only implicit in the text of the preamble. However, as long as we recall how the drafters generally conceived of rights and duties as correlative, the term 'duties' in the preamble, according to a good faith interpretation, would be a reference to duties of justice.

Apart from recognising the correlative nature of rights and duties, the Commission on Human Rights (at the time the ICCPR was being drafted) understood the conceptual role individual duties play in determining the limits of rights and freedoms. Interestingly, as part of the very same discussion on individual duties, the Commission observed that article 29 of the

Universal Declaration on Human Rights refers to an individual's duties 'to the community'¹⁴ when setting out the principle that 'exercise of...rights and freedoms shall be subject to limitations determined by law for the purpose of securing due recognition and respect for the rights and freedoms of others...'.¹⁵ The drafters of the ICCPR accordingly understood individual duties as integral to the business of placing limitations on rights and freedoms. This passage in the *travaux préparatoires* pertaining to the ICCPR gives credence to the idea that the drafters were conscious of how individual duties were connected to the question of limitations. It then makes sense to interpret the reference to individual duties in the ICCPR's preamble as connected to and part of the broader treaty aim of defining the limits of individual rights and freedoms.

C. The limitation clauses

I finally turn to the actual limitation clauses in the operative text of the Covenant. The term 'duties' does not appear in any of the clauses except for article 19(3) of the ICCPR. In fact, the inclusion of the terms 'duties and responsibilities' in article 19(3) attracted heated debate among the drafters. On the one hand, countries including the United Kingdom, Australia, and France

¹⁴ Such duties must be distinguished from so-called 'duties to the state'. David Petrasek recalls that the drafters of the Universal Declaration of Human Rights were quite deliberate in abandoning previous references to 'duties to the state', and clarified in article 29(1) that duties are owed 'to the community', and not to the state. David Petrasek, *Taking Duties Seriously: Individual Duties in International Human Rights Law – A Commentary* (International Council on Human Rights Policy 1999) 25.

¹⁵ UN General Assembly, A/2929, 36; UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), art 29. Other international instruments have similar references to duties in their preambles. For example, the 1948 American Declaration of the Rights and Duties of Man, states: 'Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty. Duties of a juridical nature presuppose others of a moral nature which support them in principle and constitute their basis.' Meanwhile, the preamble to the 1981 African Charter on Human and Peoples' Rights provides: 'Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone.' See Inter-American Commission on Human Rights (IACHR), American Declaration of the Rights and Duties of Man, 2 May 1948; Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ('Banjul Charter'), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

supported the inclusion of this phrase on the basis that there was a special need to remind states of the duties and responsibilities associated with the exercise of the freedom of expression.¹⁶ They claimed that such a reminder might be needed given that the freedom of expression ‘was a precious heritage as well as a dangerous instrument’.¹⁷ On the other, the United States and a few other states objected to the inclusion of any reference to ‘duties and responsibilities’. The objection had two elements to it. First, it was argued that other provisions in the Covenant also entailed duties and it was both ‘unnecessary and dangerous to refer to duties in one article only, when they were *implicit in other articles*’ (emphasis added).¹⁸ Second, there appeared to be some hesitance about mentioning the term ‘duties’ when the Covenant essentially concerns rights. This anxiety appears to be a general one, which I imagine will continue to prevail whenever the language of ‘duties’ is used. I will return to this anxiety in the concluding section of this chapter. In any event, some drafters felt ‘emphasis should be placed upon rights rather than upon duties’, and pointed to the fact that the Universal Declaration on Human Rights (UDHR) only referred to duties in one clause.¹⁹ Yet the UDHR, unlike the ICCPR, has a single limitation clause, which covers all rights and freedoms, and duties are mentioned in that clause.

¹⁶ The phrase was included based on a proposal by the United Kingdom. See Commission on Human Rights, *Summary Record of the Hundred and Sixty-Second Meeting*, 6th Session, 28 April 1950, E/CN.4/SR.162, para 31. This proposal gained the support of other representatives, including the representative from Australia. See Commission on Human Rights, *Summary Record of the Hundred and Sixty-Third Meeting*, 6th Session, 28 April 1950, E/CN.4/SR.163, para 4.

¹⁷ UN General Assembly, A/2929, 148. Also see observations of the representative of Lebanon in Commission on Human Rights, *Summary Record of the Hundred and Sixty-Fifth Meeting*, 6th Session, 28 April 1950, E/CN.4/SR.165, para 95.

¹⁸ Also see the views of Uruguay in Commission on Human Rights, E/CN.4/SR.165, paras 80 and 85.

¹⁹ *ibid*, para 87. There was some disagreement during the drafting of the UDHR as to whether it should include references to human duties throughout. An earlier draft by John Humphrey made such references, but these were omitted in the revised draft submitted by French delegate René Cassin. Mary Ann Glendon recalls that Cassin omitted references to duties to avoid ‘metaphysical controversies, notably the conflict among spiritual, rationalist, and materialist doctrines on the origin of human rights’. See Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House 2001) 68. Also see Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press 2000).

Therefore, it may not have been fair to compare the two instruments to insist that the term ‘duties’ be excluded from article 19(3) of the ICCPR. Of course, the broader point about inconsistency between specific treaty provisions needs to be accepted. The overall consistency of the treaty may be slightly undermined when only one limitation clause makes explicit reference to ‘duties and responsibilities’ and others are taken to only implicitly include them. The proposal to include the reference to ‘duties and responsibilities’ in article 19(3) was, in the end, adopted with eight votes in favour, five against, and two abstentions.²⁰

The text of article 19(3) first refers to ‘special duties and responsibilities’, and then goes on to provide that the ‘exercise’ of the freedom of expression ‘may therefore’ be subject to limitations. This sequence in the text suggests that the limitation clause explicitly acknowledges how duties shape limitations on the freedom of expression. What is explicit in article 19(3) of the ICCPR is implicit in article 18(3). Although no specific justification relating to individual duties is articulated as a basis for limiting the freedom of religion or belief, such a justification is implicit.²¹ This implicit justification was contemplated by some drafters, including the United States, when it suggested that ‘other provisions’ in the Covenant also contemplated individual duties. Even if no such observation were made by the drafters, a holistic reading of limitation clauses in the Covenant might require us to presume that, like the freedom of expression, the exercise of the freedom of religion or belief too carries with it certain duties. What is crucial for our purposes is to maintain, very clearly, that these duties are duties of justice corresponding to the claim rights of others.

²⁰ Commission on Human Rights, E/CN.4/SR.165, para 105.

²¹ Petrasek 17, 40. Petrasek observes that limitation clauses feature individual legal duties. He suggests that, by ‘setting out the limits on rights, limitation clauses provide a guide to individuals concerning the point at which their right...may be overruled by other rights or values...The duty arises indirectly – the limits on the right set the boundaries within which the right can be exercised.’

The ICCPR's references to individual duties are references to duties of justice. This conclusion follows, as the drafters proclaimed that rights and duties were correlative. Therefore, the references to individual duties in both the preamble and article 19(3) of the ICCPR are references to duties of justice, as these are the types of duties that correlate to claim rights, and the state has a proper role in enforcing. Article 19(3) then goes on to suggest that these duties supply the justification for limiting the freedom of expression. Although some states objected to the explicit reference to duties in article 19(3), all states accepted that individual duties shape the limits of other rights and freedoms as well. This acceptance would certainly extend to the freedom of religion or belief. Therefore, the idea that states, when limiting the Two Freedoms, must demonstrate that the individual concerned owes a duty of justice (to others) to refrain from the impugned conduct is not alien to the ICCPR. In fact, the drafters appear to have intended for individual duties to play some part in the justification for limitations. Moreover, the ICCPR's object and purpose, which includes the recognition that individuals owe duties to others and have responsibilities with respect to the promotion and observance of rights, can certainly accommodate a duty-based justificatory approach to limiting the Two Freedoms. Therefore, the scheme of the ICCPR can accommodate a duty-based approach. I would not go so far as to suggest that the object and purpose of the Covenant explicitly *requires* such an approach without delving further into the value of such an approach.

II. THE VALUE OF A DUTY-BASED APPROACH

There is a sentiment that the justificatory burden that the ICCPR imposes on states when they seek to limit the Two Freedoms is adequate. This sentiment can seem reasonable, particularly when valuable sources of guidance, such as the Human Rights Committee's general comments and jurisprudence, advance a good faith interpretation of the Covenant. It should also be noted

that this sentiment is often expressed in the context of moves by states to further broaden the scope of limitation clauses *beyond* the current dictates of international human rights law. For example, UN Special Rapporteur on Freedom of Religion or Belief, Ahmed Shaheed suggests that there are attempts to widen the scope of limitations on the Two Freedoms beyond articles 18(3), 19(3) and 20(2) of the ICCPR; he points out that such attempts attract criticism due to the tendency of states to impose vague and draconian limitations.²² He also notes that such broader notions of limitations stand ‘in stark contrast to the narrow confines for limits on the freedoms of expression and religion or belief stipulated by international human rights law’.²³ This type of defence of international human rights norms is understandable, and should be welcomed in a context of contemporary attempts to erode even the justificatory burden contemplated under an orthodox reading of limitation clauses. However, the salutary defence of prevailing norms under threat ought not to preclude further critical reflection. In the concluding section of this chapter, I attempt to engage in such critical reflection. I argue that a duty-based approach to justifying limitations on the Two Freedoms can add value to the important work undertaken by the Human Rights Committee. Prior to proceeding further, however, it may be important to confront the obvious apprehension that may arise when the language of ‘duties’ is used to frame the state’s justificatory burden.

²² Human Rights Council, ‘Freedom of religion or belief: Report of the Special Rapporteur on freedom of religion or belief’ (5 March 2019) A/HRC/40/58, para 15.

²³ *ibid.*

A. Is the language of ‘duties’ dangerous?²⁴

The language of ‘duties’ can be hijacked for the purpose of undermining human rights. For example, the ‘Asian values’ project advanced by political actors such as former Singaporean Prime Minister Lee Kuan Yew relied on a language of ‘duties’ (among other terms such as ‘obedience’ and ‘loyalty’) as a means of deflecting concern for human rights.²⁵ Moreover, in 2007 and thereafter, the United Kingdom witnessed a surge in interest among political actors to frame a new bill of ‘rights and *duties*’. The discourse enabled some political actors to call for the replacement of the United Kingdom’s Human Rights Act²⁶ with a new bill that focuses *both* on individual rights and responsibilities.²⁷ It is therefore natural for the language of duties to attract scepticism and suspicion. But as pointed out by Samuel Moyn, ‘the need to guard against destructive ideas of duty is a poor excuse for ignoring beneficial liberal ones’.²⁸ He adds: ‘The anxious sense that to legitimate talk of duty is to flirt with disaster – that, all things considered, it is best to stick exclusively to the vindication of hard-won rights – is understandable but indefensible.’²⁹

²⁴ I am particularly thankful to Prof Liora Lazarus, Dr Stefan Theil, Dr Shreya Atrey, and others who participated in a seminar at the Bonavero Institute for Human Rights, University of Oxford, at which I presented excerpts of this thesis. Their generous feedback shaped my thinking in this section.

²⁵ See Amartya Sen, *Human Rights and Asian Values*, Sixteenth Morgenthau Memorial Lecture on Ethics & Foreign Policy (Carnegie Council on Ethics and International Affairs 1997) 10; also see Amartya Sen, ‘Human Rights and Asian Values: What Lee Kuan Yew and Li Peng don’t understand about Asia’ (1997) 217(2-3) *The New Republic* 33.

²⁶ United Kingdom: Human Rights Act, 1998 Chapter 42 (enacted 9 November 1998).

²⁷ See ‘Rights, Responsibilities and the Repeal of the Human Rights Act’, *UK Supreme Court Blog*, 29 November 2009, <http://ukscblog.com/rights-responsibilities-and-the-repeal-of-the-human-rights-act/> [last accessed 19 May 2020].

²⁸ Samuel Moyn, ‘Rights vs. Duties: Reclaiming Civic Balance’ (2016) 41(3) *Boston Review* 1, 11.

²⁹ *ibid.* Also see Fernando Berdion Del Valle and Kathryn Sikkink, ‘(Re)discovering Duties: Individual Responsibilities in the Age of Rights’ (2017) 26(1) *Minnesota Journal of International Law* 189.

Despite the risks associated with relying on the language of duties, adopting such language is valuable when framing the state's burden to justify limitations on the Two Freedoms under the ICCPR. The duties I speak of are 'duties of justice'. I have attempted to clarify that such duties are distinct from a range of other duties, including the imperfect moral duties individuals owe others.³⁰ Duties of justice are owed to others because they have claim rights that specifically require the fulfilment of those duties. It is therefore a mistake to equate duties of justice with all types of duties. The duty-based justificatory approach is confined to considering duties of justice alone. By contrast, the 'duties' that political actors deploy to undermine human rights typically concern the presumed 'duties' an individual owes the state – for example, the duty to obey the laws of the state. John Knox calls these duties 'converse duties', and correctly points out that they 'have the potential to undermine human rights because the government may rely on them to offset the duties it owes to the individual under rights law'.³¹ It is crucial that the duty-based justificatory approach is not infiltrated by such state centric duty-talk; the approach must be methodologically grounded in the requirement for states to present good, publicly justifiable reasons for why certain interests are sufficient reason to impose on the individual concerned a duty of justice to refrain from engaging in the impugned conduct. Such methodological exactitude is quite crucial, and it is my contention that the Human Rights Committee, as a body of experts dealing with complex cases on limitations, may be well-placed to maintain such exactitude.

³⁰ John Stuart Mill, *The Collected Works, Volume 10* (University of Toronto Press, 1974 [*Utilitarianism* 1861]) 247; Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Mary J Gregor tr Cambridge University Press 1998).

³¹ John H Knox, 'Horizontal Human Rights Law' (2008) 102(1) *The American Journal of International Law* 1, 2.

I was initially tempted to call the alternative justificatory approach I had in mind a ‘rights-based’ approach, as opposed to a ‘duty-based’ approach. This usage would not have been conceptually or normatively problematic, as after all duties of justice are correlative to claim rights. Yet I settled on the terminology of ‘duties’ for the specific purpose of discussing limitations on the Two Freedoms for two reasons. The first is a methodological reason, and the second is a reason best described as ‘ethical’.

First, claim rights against individual conduct cannot always be articulated in terms of the well-recognised ‘rights’ to which we are accustomed. For example, *A*’s claim right that *B* refrain from doing something may not easily be articulated as one of the abstract rights or freedoms *A* possesses under human rights law. One individual’s claim right that another individual refrain from causing public unrest, for instance, is still very much a claim right, but is not easily framed as a specific human right under the ICCPR. It can, of course, be framed as an interest that the ICCPR recognises, i.e. ‘public order’. *A*’s interest in public order, in very specific circumstances, may be sufficient reason to impose on *B* a duty to refrain from doing anything that might harm that interest. In such circumstances, *A* would have a claim right that *B* refrain from such conduct. Yet framing the limitation in terms of ‘rights’, i.e. calling the approach ‘rights-based’, might be confusing, as it may prompt us to look for a clearly articulated human right, when in fact the claim right we speak of is entirely contingent on the outcome of a reasoning process pertaining to the importance of the competing interest at stake. I think a ‘duty of justice’ better signals the outcome of that reasoning process.

Second, there is a wider ethical benefit to reclaiming the language of duties. The language of duties can infuse a sense of a ‘global ethic’, which is sometimes missing in modern human rights discourse.³² Moyn poignantly notes:

Our age of rights, lacking a public language of duties, is a historical outlier...Human rights themselves wither when their advocates fail to cross the border into the language of duty; insofar as compliance with norms on paper is sought, the bearers of duties have to be identified and compelled to assume their burden.³³

The language of duties certainly has value in the context of imposing concrete obligations on the state to respect, protect, and fulfil human rights. Yet the language of individual duties reminds us that the state, in fulfilling the positive obligation to protect rights, should enforce the horizontal duties individuals owe others. The language of duties of justice may be crucial when important basic liberties such as the Two Freedoms are concerned. Such language can help individuals make ethical sense of how their conduct – even where such conduct is presumably protected due to an association with the abstract notion of the Two Freedoms – actually impacts the lives of others. A limitation that appeals to such an ethical sense reinforces the interconnectivity of human conduct. Moyn accordingly notes that nineteenth century liberal philosophers ‘nestled their liberal political commitments within historical and sociological frameworks that made individual freedom a collective achievement that depended on ongoing collective commitments and necessarily common action’.³⁴ This ‘common action’ is what, I

³² See InterAction Council, *Universal Declaration of Human Responsibilities* (1 September 1997), art 3. According to Petrusek, one of the main criticisms against the Universal Declaration of Human Responsibilities is ‘that it confuses ethical and legal duties...that it is wrong to set out ethical principles in language reminiscent of an international treaty’. See Petrusek 13.

³³ Moyn 10.

³⁴ *ibid* 4. See Samuel Moyn, ‘Giuseppe Mazzini in (and beyond) the History of Human Rights’ in Pamela Slotte and Miia Halme-Tuomisaari (ed), *Revisiting the Origins of Human Rights* (Cambridge University Press 2015);

believe, scholars such as David Petrasek appeal to when they argue that the language of duties introduces a much-needed ‘global ethic’ to modern human rights discourse.³⁵ He notes that this idea of a ‘global ethic’ creates ‘a sense of civic obligation – to instil in individuals the idea that they should act in ways that support basic shared values’.³⁶ He also argues that ‘an ethical obligation is strongest when it is felt personally by the individual, who is self-motivated to accept it’.³⁷ A discourse that frames limitations on the basis of ‘duties of justice’ may benefit from this value of motivating individuals to be more aware of their ethical obligations to others. Framing a limitation merely as a means of advancing important interests (such as ‘public order’ or ‘public morals’) may lack that ethical dimension.

While there are some risks associated with the language of duties, I think these risks are outweighed by the methodological and ethical benefits that the language brings. I now return to the more specific conceptual, normative, and political value that a duty-based justificatory approach can offer in the context of assessing limitations on the Two Freedoms.

B. Illustrating the value of a duty-based approach

A good faith interpretation of limitation clauses of the ICCPR requires that all limitations be compatible with the object and purpose of the Covenant. As discussed in the first section of this

Giuseppe Mazzini, ‘On the Duties of Man’ in Stefano Recchia and Nadia Urbinati (eds), *A Cosmopolitanism of Nations: Giuseppe Mazzini’s Writings on Democracy, Nation Building, and International Relations* (Princeton University Press 2009); Samuel Pufendorf, *Pufendorf: On the Duty of Man and Citizen according to Natural Law* (James Tully ed Michael Silverthorne tr Cambridge University Press 1991); Marcus Tullius Cicero, *Ethical Writings I (On Moral Duties)* (Andrew P Peabody tr Little, Brown and Company 1887).

³⁵ Petrasek 7.

³⁶ *ibid* 48

³⁷ *ibid* 14.

chapter, a duty-based approach to justifying limitations can be accommodated within the scheme of the Covenant. The next question to ask is whether there is an added value in adopting this approach.

The second chapter of this thesis has already presented the conceptual case for adopting a duty-based justificatory approach. Requiring a state to demonstrate that the competing interests at stake are sufficient reason to impose a duty of justice on the individual concerned is conceptually coherent when one recalls what a basic liberty is. According to the Hohfeldian conception of a liberty, a liberty corresponds to the absence of any competing claim rights held by others.³⁸ One has a liberty to act in some way if one has no horizontal duty to refrain from such action. Such duties arise from the claim rights of others; they are duties of justice. Conceptual coherence requires that a state's burden to justify a limitation on a basic liberty must be based on the demonstration of such duties of justice. Demonstrating a duty of justice means demonstrating that the competing interests at stake are sufficiently weighty to constitute a claim right, thereby imposing on the individual concerned this duty of justice. When it comes to the Two Freedoms, the state would then need to show how the interests that are being advanced through the proposed limitation are actually weighty enough to constitute a claim right. Such a claim right corresponds to (and is a ground for) the individual's duty of justice to refrain from engaging in the impugned conduct.

How should articles 18(3) and 19(3) of the ICCPR be interpreted to ensure such conceptual coherence? The 'fundamental rights and freedoms of others', and the 'rights...of others' are grounds on which the freedom of religion or belief, and the freedom of expression

³⁸ Hohfeld, *Fundamental Legal Conceptions*, 36-39.

may respectively be limited. It seems peculiar to suggest that the remaining limitation grounds in articles 18(3) and 19(3) relate to ‘rights’. These clauses have a range of interests that do not immediately strike us as constituting individual ‘rights’. It may seem odd to frame interests in national security, public safety, public order, public health, and public morals as individual ‘rights’ per se. Yet the interests in these things can, in certain circumstances, be sufficient reason to impose on an individual a duty of justice to refrain from conduct that harms those interests. In such circumstances, there would be a claim right (held by others) that the individual concerned refrain from the impugned conduct. The state would, however, need to present publicly justifiable reasons,³⁹ and not mere subjective preferences,⁴⁰ for why the competing interests are, in those circumstances, sufficient reason to ground a duty of justice in the individual. It suffices to say that interests in national security, public safety, public order, public health, and public morals, can very well be presented within the framework of public reason, and ought not to be excluded from the justificatory equation. So a conceptually coherent approach to interpreting articles 18(3) and 19(3) of the ICCPR does not require the exclusion of the various interests listed in these clauses. They may be considered, and may form the basis of a limitation, provided their concrete importance in the specific circumstances under consideration is sufficient to impose a duty of justice on the individual concerned. To this extent, a claim right does arise. For example, the underlying interest in public order may be sufficient to ground in a particular individual the duty to refrain from engaging in expressions that incite public unrest. Others may then have a claim right that the individual refrain from incitement. Such a claim right justifies a limitation on the scope of the individual’s freedom of

³⁹ John Rawls generally conceptualised ‘public reason’ as those standards and values that are publicly available and acceptable. See John Rawls, *Political Liberalism: Expanded Edition* (Columbia University Press 2005) 213.

⁴⁰ *ibid* 220. According to Rawls, non-public reasons include reasons based on religious doctrine, or on cultural values shared by only part of the population. Also see Robert Audi, ‘Religious Values, Political Action, and Civic Discourse’ (2000) 75 *Industrial Law Journal* 273. For a critique of this view, see Jeremy Waldron, ‘Public Reason and “Justification” in the Courtroom’ (2007) 1 *Journal of Legal Philosophy & Culture* 107, 118.

expression, i.e. such incitement would be excluded from the scope of the individual's freedom of expression.

The idea that limitations on rights and freedoms must be grounded in individual duties of justice (which correspond to the claim rights of others) is reflected to some extent in article 17 of the 1998 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms.⁴¹ The article provides that limitations must be 'for the purpose of securing due recognition and respect for the rights and freedoms of others *and* of meeting the just requirements of morality, public order and the general welfare in a democratic society' (emphasis added). Interestingly, the requirement that the limitation be for the purpose of securing the due recognition and respect for the rights and freedoms of others is a necessary condition, and not optional. The term 'and' (instead of 'or') signals that a limitation must satisfy two conditions: it must serve the rights and freedoms of others, and it must serve some other interest, such as public order. While this Declaration does not directly articulate the Two Freedoms in the form found in the ICCPR, it refers to certain elements of these Freedoms. For example, article 5 recognises the right '[f]or the purpose of promoting and protecting human rights and fundamental freedoms...[t]o form, join and participate in...groups', which may include faith-based groups. Article 6 of the 1998 Declaration includes a right to 'know, seek, obtain, receive and hold information about all human rights and fundamental freedoms', which appears to be an aspect of the broader right to freedom of expression. Therefore, the idea that we can conceptualise limitations on the Two Freedoms in terms of the claim rights of others has found its way into international instruments adopted by the UN General Assembly. Such

⁴¹ UN General Assembly, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms: Resolution adopted by the UN General Assembly, 9 December 1998, A/RES/53/144.

instruments do not reflect subsequent practice that establishes an agreement of the parties with respect to the interpretation of the ICCPR; they do not constitute subsequent practice in the narrow sense as set out in article 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT). However, they may constitute supplementary means of interpreting the ICCPR, as they reflect subsequent practice in the broader sense as set out in article 32 of the VCLT.⁴² Accordingly, instruments such as the 1998 Declaration can serve to confirm a good faith interpretation of articles 18(3) and 19(3) of the ICCPR. In this context, the fact that such instruments seem to support a duty-based approach to justifying limitations is important, and strengthens the suggestion that a duty-based approach is consistent with a good faith interpretation of articles 18(3) and 19(3).

Apart from the conceptual value of a duty-based approach, I have argued that this approach has normative value. It helps retain the presumption in favour of individual liberties such as the Two Freedoms. The duty-based approach I have in mind places on the state a burden to justify the limitation, rather than placing on the individual a burden to justify the liberty. This structure of reasoning places a strong presumption in favour of liberty. Where this presumption cannot be displaced through the presentation of good reasons, the liberty of the individual stands, and the limitation is not justified. By placing on the state a burden to demonstrate that the individual concerned owes a duty of justice to refrain from the impugned conduct, the protection of the Two Freedoms might be enhanced. Therefore, a duty-based approach has distinct normative value.

⁴² See the discussion on the evolutive approach to treaty interpretation in chapter six of this thesis.

At a political level, a duty-based approach can place a counter-majoritarian check on the authority of states to limit the Two Freedoms. The second chapter of this thesis discussed two political risks associated with granting the state the authority to limit the Two Freedoms. First, the state can use various limitation grounds to advance its own interests. Often those interests relate to the appeasement of majority communities. Minority groups, and those with dissenting or unpopular opinions, can be subjected to unwarranted restrictions on their conduct. Limitation grounds such as national security, public safety, public order, public health, and public morals can be exploited for majoritarian purposes. Second, the state can offload its own positive obligations to protect the rights and freedoms of those in society⁴³ by targeting an individual's manifestation of religion or belief, or an expression, which 'causes' certain others to *react* in a manner that harms those in society. The state owes a positive obligation to protect those third parties from harm, and therefore, to regulate the conduct of others who unreasonably react to the individual's conduct. Yet the state may choose to restrict the individual's conduct rather than focus on the wrongdoers who react unreasonably. Such an evasion of obligations can take place when the wrongdoers happen to be from the majority community, and the individual concerned happens to be a member of a minority community, or happens to hold an unpopular view. A literal reading of articles 18(3) and 19(3) of the ICCPR would not offer a good response to this political problem. A guided reading of these limitation clauses can to some extent address this problem – particularly if the principle of covenant compatibility can be employed to constrain the state from imposing limitations that discriminate against a minority group. A duty-based approach can enhance the state's justificatory burden even

⁴³ For a useful discussion of the state's positive obligations under international human rights law, see Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004). Also see Dimitris Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (Routledge 2011).

further, thereby constraining the state from advancing its own interests or offloading its own positive obligations in the course of imposing limitations on the Two Freedoms.

Let us consider a typical case in which the state may attempt to offload its positive obligations under article 18(3) of the ICCPR. We may come across situations in which certain minority religious practices, such as the public manifestation of the religious beliefs of Ahmadis in Pakistan, incense members of the majority religious community.⁴⁴ If members of this majority community decide to cause public disorder in retaliation to the state's tolerance of Ahmadi religious practices, the question arises as to whether the state would be justified in limiting the public manifestation of religion by Ahmadis. The state may articulate its reasons for limiting such manifestation in the following manner: others have an interest in public order, and so long as such manifestation directly 'causes' some individuals to engage in acts of public disorder, the state may legitimately limit such manifestation. This challenge can be approached in different ways under the ICCPR.

On the one hand, a normative constraint such as the principle of non-discrimination may be relied on to argue that a limitation that has a discriminatory effect on a religious minority is impermissible under the ICCPR; therefore, the limitation would not be permissible. This type of reasoning would be broadly similar to the Human Rights Committee's reasoning in cases

⁴⁴ Let us assume, for the purpose of the illustration, that Pakistan was party to the First Optional Protocol to the ICCPR.

such as *Fedotova v The Russian Federation* (2012),⁴⁵ *Miriana Hebbadj v France* (2018)⁴⁶ and *Sonia Yaker v France* (2018).⁴⁷

On the other hand, there is a conceptual reason for determining that the limitation is impermissible. An interest in public order is no doubt important. This interest may, in certain circumstances, be sufficient to ground duties in the state and in individuals. For instance, the interest may be sufficient reason to impose on the state a general positive obligation to protect individuals from the lawless actions of others. It may also be sufficient reason to impose horizontal duties on individuals to refrain from engaging in lawless action. But this process of reasoning does not point to a duty in the members of the Ahmadiyya community to refrain from publicly manifesting their religion – even where such manifestation appears to ‘cause’ certain individuals to react in ways that harm others’ interests in public order. A brief illustration may clarify the point further. I have discussed a similar illustration in the second chapter of this thesis. I now return to this type of illustration to explore, more specifically, how it plays out under the ICCPR.

Let us say, *A*, an Ahmadi (a member of the Ahmadiyya minority community in the country), decides to publicly display the *kalimah*⁴⁸ on his attire. Such a display incenses *B*, a member of the Sunni majority community.⁴⁹ *B* initially organises a protest march, which

⁴⁵ Communication No 1932/2010 (CCPR views adopted on 31 October 2012), CCPR/C/106/D/1932/2010.

⁴⁶ Communication No 2807/2016 (CCPR views adopted on 17 July 2018), CCPR/C/123/D/2807/2016.

⁴⁷ Communication No 2747/2016 (CCPR views adopted on 17 July 2018), CCPR/C/123/D/2747/2016.

⁴⁸ The *kalimah* in question is the specific declaration: ‘There is none worthy of worship except Allah and Muhammad is the Messenger of Allah’.

⁴⁹ The illustration is loosely based on the context in the case of *Zaheeruddin v State* – a case decided by Pakistan’s Supreme Court. See *Zaheeruddin v State* (1993) SCMR 1718; Amjad Mahmood Khan ‘Pakistan’s

eventually results in public unrest. Such unrest seriously affects other civilians including *C*. *B*'s interests are not sufficient reason to ground a duty of justice in *A* to refrain from displaying his religious beliefs. Preventing the manifestation of religion merely due to a subjective antagonism towards a peaceful statement of an individual's beliefs is not publicly justifiable; subjective antagonism is not within the rubric of public reason. Yet the protecting of public order may in fact be an interest that falls within the realm of public reason. All individuals in a society can generally agree that law and order should be maintained, and that the state should protect individuals from acts of violence. So *C*'s interest in public order may be a sufficient reason to impose certain duties on others. However, in this context, it does not seem obvious that *A* owes *C* a duty to refrain from displaying the *kalimah*. *B*'s unlawful reaction, which admittedly harms *C*'s interests in public order, does not supply a publicly justifiable reason for restricting *A*'s conduct. The imposition of such a duty on *A* is surely unreasonable, as it fails to account for the fact that it is *B*'s conduct (and not *A*'s) that actually results in setbacks to *C*'s interests. Yet the state could try to impose a limitation on *A*'s freedom to manifest religion on the basis that the limitation is necessary to protect 'public order' under article 18(3) of the ICCPR. In this particular case, the Committee's current work on limitations may offer a means of constraining the state's ability to impose an unwarranted limitation on *A*'s freedom to manifest religion. The orthodoxy, so to speak, may have an answer to this problem. For instance, the Committee could rely on the principle of non-discrimination to determine that a limitation on *A*'s freedom to manifest religion (purely for the purpose of dissuading *B* from engaging in acts of public disorder) is simply a discriminatory measure that is impermissible under article 26 of the Covenant. Yet this normative constraint concerning non-discrimination may not suffice if the case did not directly concern a religious minority.

Anti-Blasphemy Laws and the Illegitimate use of the "Law, Public Order, and Morality" Limitation on Constitutional Rights' (2015) 13(1) *The Review of Faith & International Affairs* 13.

Imagine we are confronted with a similar set of circumstances concerning *A*, *B*, and *C*, except, on this occasion, *A* is not part of the Ahmadiyya minority community, but is instead a human rights activist advocating for the religious freedom of Ahmadis. *B*, a member of the Sunni majority, reacts to *A*'s activism by organising a protest, which leads to public unrest. Once again, the violence that ensues affects *C*'s interest in public order. *B*'s interests in, say, furthering his religion's supremacy may not be sufficient reason to ground any duty in *A* to refrain from her activism. *C*'s interest may be sufficient reason to impose a positive obligation on the state to maintain public order, and a horizontal duty on *B* and others to refrain from violence. Yet, given the majoritarian interests at play, i.e. the fact that the public disorder is being produced by members of the majority community, the state may attempt to justify a restriction on *A*'s activism on the grounds of 'public order'. It could attempt to frame the limitation under article 19(3) of the ICCPR.

Now the principle of non-discrimination may not play a decisive role in this instance, as the limitation on *A*'s freedom of expression is not being imposed in a manner that is obviously discriminatory. The state may circumvent the principle of non-discrimination by imposing a facially neutral ban on all types of activism that can potentially cause others (such as *B*) to take the law into their own hands. Orthodox interpretative guidance may not offer a clear answer in this regard. Yet the Committee's normative instinct – aptly displayed in its recent jurisprudence – might be to find some way to constrain the state's authority to impose this limitation. For example, in *Claudia Andrea Marchant Reyes et al v Chile* (2017),⁵⁰ the Committee considered the removal and destruction of a work of art on the grounds of 'public order'. The work of art

⁵⁰ Communication No 2627/2015 (CCPR views adopted on 7 November 2017), CCPR/C/121/D/2627/2015.

contained fifteen banners commemorating the fortieth anniversary of the military coup d'état in Chile. The author of the communication had in fact obtained the necessary approvals to display the banners at nine bridges. The state, however, argued that the removal of the banners was in pursuance of the aim of 'preventing potential disruption to public order arising out of the burning of the banners', and that it was the state's 'duty' to safeguard public order.⁵¹ It argued that the limitation was for the 'benefit of persons who crossed the bridges in question on a daily basis, given that the banners could have been burned precisely at the times of the greatest movement of people and caused injury'.⁵² This case is a good example of how the state may seek to offload its obligations (to maintain public order) onto the individual concerned – in this case the artist. The Committee found that 'a disruption of public order due to the burning of the work of art is merely speculative, inasmuch as the State party has provided no evidence of what specific information it had that gave rise to fears that the work might be burned...'.⁵³ Importantly, the Committee opined that the state had a positive obligation to safeguard public order, and that it was the *state's* duty to ensure that the artistic work was not burned.⁵⁴ The Committee accordingly concluded that the state had violated the author's freedom of expression. In this particular case, the Committee's decision was mainly based on the lack of evidence of an actual threat of public order. However, its reasoning has wider implications, as it also establishes that a state's positive obligations to protect public order should not be exploited to impose limitations on the freedom of expression.⁵⁵ It seems obvious that the

⁵¹ *ibid*, para 7.5.

⁵² *ibid*, para 4.3.

⁵³ *ibid*, para 7.5.

⁵⁴ *ibid*.

⁵⁵ Also see *Andrei Sannikov v Belarus*, Communication No 2212/2012 (CCPR views adopted on 6 April 2018), CCPR/C/122/D/2212/2012. In this case, the Committee found that the state had failed to demonstrate that there was a 'direct causal link' between the author's expressions and the unlawful actions of the unidentified

Committee's normative instincts are correct. It is my contention that a duty-based approach to justifying limitations may offer further conceptual, and indeed doctrinal, scaffolding the Committee needs in such cases. Let us return to the illustration concerning *A* (the activist), *B*, and *C* to see how a duty-based approach can offer such scaffolding.

From a conceptual standpoint, it is not obvious that *C*'s interest in public order grounds in *A* a duty to refrain from her activism, despite the fact that it is connected to *B* causing public disorder. *A* does not owe anyone a duty of justice to refrain from her activism. She does not intend for *B* to react violently to her activism, nor can it be said that she is acting in bad faith, i.e. that she intends to incite a reaction from *B*. Therefore, there are no publicly justifiable reasons for suggesting that any competing interests against *A*'s conduct are actually sufficient to impose on her a duty to refrain from such conduct. *B*'s reaction is after all *unreasonable*, and his reaction certainly does not supply good reasons for a limitation. Therefore, it seems unreasonable for the state to focus on *A*'s conduct. Protecting *C*'s interest in public order should instead require the state to take decisive action against those who engage in acts of public disorder, such as *B*. A duty-based approach directs the Committee's attention towards this important dynamic. If the state is required to justify a limitation on *A*'s freedom of expression purely on the basis that *A* owes others a duty of justice, an unwarranted limitation on *A*'s freedom of expression on the purported basis of protecting 'public order' could be avoided.

Prior to concluding, it would be remiss not to mention the renewed need to strengthen the state's burden to justify limitations on the Two Freedoms in the context of grave public emergencies such as the 'coronavirus disease 2019' (COVID-19) pandemic. New threats to the

individuals. Therefore, the author's freedom of expression could not be lawfully limited due to the 'disorder' caused by other individuals.

Two Freedoms have emerged in this context, and many states have sought to justify limitations on the Two Freedoms on the grounds of ‘public health’.⁵⁶ In Malaysia, for example, the government has relied on criminal law to prosecute individuals for allegedly spreading ‘misinformation’ about COVID-19. Some of the legal provisions relied on, such as section 233 of the Communications and Multimedia Act of 1998, have been criticised as overly broad, and permitting ‘arbitrary application by authorities’.⁵⁷ Moreover, in South Africa, the government has sought to limit the freedom of expression (and specifically the right to information) by centralising information sharing on COVID-19.⁵⁸ The measure aimed to prevent a variety of experts, including epidemiologists, virologists, and infectious disease specialists from commenting on the crisis without channelling their comments through the government. Such limitations have not been justified in a conceptually, normatively or politically robust manner. Meanwhile, in Sri Lanka, the government mandated that a corpse of a person who has died, or is suspected to have died, of COVID-19 must be cremated,⁵⁹ despite World Health Organisation Guidelines clearly stipulating that cremation should not be made mandatory.⁶⁰ The measure has had a disparate impact on the religious freedom of the Muslim minority community in Sri

⁵⁶ It is reiterated that this thesis does not deal with the question of derogations from obligations under the ICCPR as provided for under article 4 of the Covenant.

⁵⁷ ARTICLE 19, ‘Malaysia: Stop using repressive laws to counter misinformation about coronavirus’, 24 March 2020, <https://www.article19.org/resources/malaysia-stop-using-repressive-laws-to-counter-misinformation-about-coronavirus/> [last accessed 1 June 2020].

⁵⁸ Sarah Evans and Kyle Cowan, ‘Information squeeze: Covid-19 scientists, experts in SA silenced as government centralises communication’, *news24.com*, <https://www.news24.com/news24/southafrica/news/information-squeeze-covid-19-scientists-experts-in-sa-silenced-as-government-centralises-communication-20200318> [last accessed 1 June 2020].

⁵⁹ Regulation 61A under the Quarantine and Prevention of Diseases Ordinance (Chapter 222) of 1897 (Sri Lanka), Gazette Extraordinary No. 2170/8, 11 April 2020.

⁶⁰ World Health Organisation, *Infection Prevention and Control for the safe management of a dead body in the context of COVID-19: Interim Guidance* (24 March 2020) 1.

Lanka, as the cremation of deceased persons is understood by many Sri Lankan Muslims to be contrary to Islamic teaching.⁶¹

An illustration based on the cremation issue in Sri Lanka may help explain the vulnerability of article 18(3) of the ICCPR to abuse. Imagine community *X* is a religious minority in the country, and has undergone systemic discrimination and violence, mainly at the hands of members of community *Y*, the majority community in the country. The country is in the midst of an epidemic involving a highly contagious disease, and in response, the state announces that all corpses should be cremated rather than buried. Let us assume the disposal of corpses results in some setbacks to the interest of public health, as it involves a risk of persons engaging in such disposal contracting the disease. Let us also assume that participating in public religious events, such as funerals, entails a risk of exacerbating the spread of the disease. In this context, the state claims that since the disease could spread through corpses, cremation is the most efficient way to prevent such transmissions. The state justifies the limitation on the basis that restricting burials (i.e. by mandating cremation) is necessary to protect public health.

Incidentally, cremation is forbidden according to the religious beliefs of community *X*, whereas cremation is the standard means of disposing a corpse according to the religious customs of community *Y*. Article 18(2) recognises the freedom to manifest religion or belief ‘either individually or in community with others’.⁶² The state’s measure clearly amounts to a

⁶¹ See Meera Srinivasan, ‘Petitions challenge Sri Lankan government’s compulsory cremation rule’, *The Hindu*, 14 May 2020, <https://www.thehindu.com/news/international/petitions-challenge-sri-lankan-governments-compulsory-cremation-rule/article31585459.ece> [last accessed 1 June 2020].

⁶² In this illustration, my references to the ‘community’s freedom’ and the ‘community’s duties of justice’ are only references to the aggregation of the freedom and duties of each individual member of that community. I am at no point suggesting that these freedoms and duties only apply to the community as a whole in a collective (non-aggregative) sense.

limitation on community *X*'s freedom to manifest religion, as it compels the community to engage in a method of disposing its dead in a manner that contravenes its religious beliefs, and prevents it from burying its dead according to its religious beliefs.

If the state in this illustration is predominantly representative of community *Y* – and given the wider context of discrimination and violence targeting community *X* – it makes sense to be suspicious of the new measure.⁶³ The limitation in question may in fact conceal a majoritarian interest in scapegoating community *X*, and falsely linking an unpopular religious practice (i.e. the burial of the dead) to the spread of the disease.

How would the Committee deal with this case under its current jurisprudential approach? For instance, it could require the state to present stronger evidence of the necessity of the measure, thereby placing on the state a heavy burden of proof to demonstrate that burials in fact exacerbate the spread of the disease in a manner that is not evident in cremation. To recall the Committee's opinion in General Comment No. 34, the state would need to 'demonstrate in specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken'.⁶⁴ The Committee could also rely on the principle of non-discrimination (recognised by article 26 of the ICCPR), and the special rights of religious minorities (recognised by article 27) to assess the permissibility of the measure in question;⁶⁵ although it ostensibly applies to everyone, the measure has a

⁶³ An institutional preference for a practice that is common only among a particular religious community may constitute a form of 'religious establishment', which also requires specific public justification. See Kevin Vallier, 'Religious Establishment and Public Justification' in Cécile Laborde and Aurélie Bardon (ed), *Religion in Liberal Political Philosophy* (Oxford University Press 2017).

⁶⁴ Human Rights Committee, *General Comment No 34 – Article 19 (Freedoms of opinion and expression)*, 12 September 2011, CCPR/C/GC/34, para 35.

⁶⁵ The principle of 'reasonable accommodation' can be relied on to impose a positive obligation on the state to consider the special interests of a religious minority when setting out general law and policy. Some scholars have recommended such an approach. See for example, Matthew Gibson, 'The God "Dilution"? Religion,

discriminatory impact on community *X*. By relying on such criteria and normative constraints, the Committee may find that the limitation is impermissible under article 18(3) of the ICCPR.

A duty-based justificatory approach could complement and strengthen the Committee's efforts to place on the state a substantial burden to justify the limitation in question. Under this approach, the state would be required to demonstrate (through the presentation of good, publicly justifiable reasons) that community *X* has a duty of justice to refrain from engaging in the practice of burial. The interest in public health, and specifically in being free from a dangerous disease, may be sufficient reason to ground certain duties in others. For example, the interest may be sufficient to ground the duty to refrain from attending public religious events, such as funerals, until the disease is brought under control. Others in society may then have a claim right against an individual attending such public religious events, and the individual concerned may have a duty of justice to refrain from such conduct. A limitation on the individual's freedom to manifest religion or belief could be justified under these specific circumstances, i.e. attending public religious events could be temporarily excluded from the scope of the freedom to manifest religion or belief under these specific circumstances. Yet the interest in public health is not necessarily sufficient to ground in community *X* a duty to refrain from burying its dead.

Discrimination and the Case for Reasonable Accommodation' (2013) 72 *Cambridge Law Journal* 578; Elisabeth Griffiths, 'The "Reasonable Accommodation" of Religion: Is this a Better Way of Advancing Equality in Cases of Religious Discrimination?' (2016) 16(2-3) *International Journal of Discrimination and the Law* 161; Heiner Bielefeldt, 'Freedom of Religion or Belief – A Human Right under Pressure' (2012) 1 *Oxford Journal of Law and Religion* 15. Gibson in fact argues that the principle enables 'religious individuals to feel less alienated by the law' (p. 616). The question has arisen in some individual communications before the Human Rights Committee, including in *F.A v France*, Communication No 2662/2015 (CCPR views adopted on 16 July 2018), CCPR/C/123/D/2662/2015 and *Prince v South Africa*, Communication No. 1474/2006 (CCPR views adopted on 31 October 2007), CCPR/C/91/D/1474/2006. However, the Committee has not explicitly recommended that this principle be relied upon in determining the permissibility of a limitation under article 18(3) of the ICCPR. In any event, while the principle of 'reasonableness' is entirely relevant to justifying limitations, the idea of 'accommodation' carries with it notions of 'toleration' that can in fact reinforce and entrench a majority-minority dynamic. See Michael Walzer, *On Toleration* (Yale University Press 1997); Humeira Iqtidar and Tanika Sarkar (eds), *Tolerance, Secularization, and Democratic Politics in South Asia* (Cambridge University Press 2018). For this reason, I have chosen not to prioritise the principle of 'reasonable accommodation' within the duty-based approach to justifying limitations on the freedom to manifest religion or belief.

Good, publicly justifiable reasons would need to be presented to establish that others have a claim right that community *X* refrains from the practice of burials. The duty-based approach presumes that community *X* has the concrete liberty to dispose the corpses of its members in a manner that poses no greater a threat (to public health) than does other methods of disposing corpses. It places the burden on the state to displace that presumption by demonstrating a duty of justice to specifically refrain from burials. In this case, if the state fails to present good, publicly justifiable reasons as to why burials pose a graver threat to public health than other methods of disposing corpses, it would fail to displace that presumption.

A duty-based justificatory approach complements and strengthens the Committee's current thinking on limitations. Under such an approach, the Committee's attention is directed towards the question of whether community *X*'s conduct in particular (i.e. burying its dead) threatens public health to a greater extent than the general public health risks associated with disposing corpses of persons who died of, or were suspected of having, the contagious disease. It better constrains the state's ability to target the conduct of a minority community under the guise of 'public health'. For instance, the Committee could ask whether the threat to public health emanates from the burial of the dead or from the general activity that all communities engage in, i.e. the disposal of corpses. The requirement that the state only presents publicly justifiable reasons effectively excludes certain types of reasons that are outside the rubric of public reason. For instance, it is unlikely that a society will find the prohibition of *all* methods of disposing corpses reasonable; corpses must surely be disposed. Therefore, no public health risk can reasonably justify the denial of liberty in general to dispose of corpses in a dignified manner, and according to the religious beliefs of a community. So the only question that arises then is whether one method of disposing corpses poses a significantly graver public health risk than other methods. By requiring the state to present only publicly justifiable reasons for

imposing on community *X* a duty of justice, the Committee might be better placed to constrain the state's ability to conceal the advancement of majoritarian interests through the limitation. In these circumstances, the Committee could find that the interest in public health is insufficient reason to impose a duty on community *X* to specifically refrain from burying its dead. Instead, a more general duty of justice is owed by all communities to dispose of corpses in a responsible manner that minimises risks to public health, and also to refrain from participating in public religious events. This duty of justice may form the basis of certain types of limitations on the freedom of religion or belief; but it does not justify a targeted restriction on community *X*'s conduct alone.

A duty-based justificatory approach has conceptual value, as it reaffirms the conceptual features of liberty, i.e. that members of community *X* have the concrete liberty to bury their dead unless a duty of justice to refrain from such burial can be satisfactorily demonstrated. It also has normative value, as it places the onus on the state to demonstrate why, within *public reason*, the interest in public health is sufficient to ground in community *X* a specific duty of justice to refrain from burying its dead. Finally, it has political value, as it provides a sound doctrinal basis for constraining the state from advancing an invidious majoritarian aim to target an 'unpopular' minority religious practice.

From a doctrinal standpoint, I have attempted to show in the first section of this chapter that the ICCPR's object and purpose can accommodate a duty-based approach. The Covenant recognises that duties owed to others can shape the limits of an individual's rights and freedoms. More specifically, article 19(3) of the ICCPR frames an individual's 'duties and responsibilities' as the actual reason for which the freedom of expression may be subject to limitations. A similar idea is implicitly embedded in article 18(3). Therefore, the Committee

has a clear doctrinal basis under the ICCPR to make use of the conceptual, normative, and political value that a duty-based approach can offer, particularly in complex cases involving well-concealed majoritarian interests, or attempts by the state to offload its positive obligations.

In the previous chapter, I argued that the Human Rights Committee has emerged as a vehicle for advancing a good faith interpretation of articles 18(3) and 19(3) of the ICCPR. Within this overarching context, this chapter presented a doctrinal case for adopting a duty-based justificatory approach to limiting the Two Freedoms under the ICCPR. I argued that such an approach can be accommodated within the object and purpose of the ICCPR, and the Covenant's overall textual scheme. The idea that rights and duties are correlative remains quite central to the ICCPR, and particularly its provisions relating to limiting basic liberties such as the Two Freedoms. The idea that individuals owe others duties of justice when exercising their rights and freedoms is not at all alien to the Covenant. Moreover, the notion that limitations on these rights and freedoms are connected to those very duties of justice is also evident in the text of the Covenant, and in the observations of numerous drafters. Article 19(3) of the ICCPR offers the clearest indication that limitations on the freedom of expression flow from individual duties. Therefore, a simple good faith interpretation of the ICCPR offers a doctrinal basis for a duty-based justificatory approach, i.e. that limitations on the Two Freedoms must be justified on the basis that the individual concerned owes a duty of justice to refrain from the conduct in question. It is up to the state, however, to demonstrate this duty of justice by presenting good, publicly justifiable reasons for recognising such a duty.

The language of duties comes with certain pitfalls. I attempted to confront these pitfalls by clarifying that a duty-based approach must be methodologically precise; the relevant duties must only be horizontal duties of justice that individuals owe other individuals or the community. Duties of justice must not be confused with the kinds of duties states often refer to when asserting the importance of obedience and loyalty to the state. I then presented both methodological and ethical reasons for selecting ‘duties of justice’ as the appropriate marker or threshold that a state must demonstrate to justify a limitation on the Two Freedoms.

This chapter then revisited the case for a duty-based justificatory approach. I argued that such an approach is conceptually coherent because it maintains the essential features of a liberty. It is normatively compelling because it maintains the importance of basic liberties such as the Two Freedoms, and presumes that they cannot be interfered with, unless the state satisfactorily demonstrates otherwise. Perhaps most importantly, a duty-based approach can help constrain the state’s ability to abuse its authority to impose limitations on the Two Freedoms. It can constrain the tendency of states to introduce majoritarian considerations into their decision-making, or to offload their positive obligations onto individuals whose conduct attracts majority outrage. In essence, the duty-based approach compels states to justify any limitation on an individual’s Two Freedoms purely in terms of the duties of justice that *that individual* owes others. It brings the individual concerned into sharp focus, and ensures that limitations on an individual’s Two Freedoms are always based on that individual’s duties of justice.

If indeed a duty-based justificatory approach can be accommodated under the ICCPR, the Committee may be well-placed to advance this approach among states through its future jurisprudence. Although the Committee’s work is not legally binding, it has made important

strides in constraining state authority to limit the Two Freedoms. For instance, the Committee's work on non-discrimination has helped establish the view that limitations must always be compatible with the principle of non-discrimination. While states may not overtly accept the authoritative status of the Committee's work, there is little doubt that they view the Committee as a genuine source of guidance on how to interpret and apply the Covenant in good faith. Such guidance could help separate limitations that are in bad faith from those that are aligned with a good faith interpretation of the ICCPR. In this context, the Committee's work could incrementally introduce a more conceptually, normatively, and politically robust burden on states to justify limitations on the Two Freedoms. It is certainly hoped that such a burden could better advance the ICCPR's object and purpose.

Conclusion

The individual's inner thoughts, beliefs, and convictions are deeply valuable, as they are central to what makes the individual a moral agent. This inner realm deserves to be protected from interference. Such protection extends to the external manifestations and expressions of these thoughts, beliefs, and convictions. Liberal democratic societies have come to recognise the value of the freedom to manifest religion or belief, and the freedom of expression – what I have called the 'Two Freedoms' – primarily due to their intimate connection with the individual's inner realm, and their profound importance to human interaction. Yet the Two Freedoms are not absolute; they may be subjected to limitations, as they invariably involve contact with others. International human rights law – and specifically the International Covenant on Civil and Political Rights (ICCPR) – sets out the legal framework that governs limitations on the Two Freedoms. According to articles 18(3) and 19(3) of the ICCPR, the Two Freedoms may be limited on grounds such as public order, health or morals, and the rights of others.

This thesis grappled with the question of how limitations on the Two Freedoms under the ICCPR ought to be justified. In practice, the Two Freedoms are at constant risk of being subjected to unwarranted limitations. States appear to rely on common limitation grounds such as 'public order' and 'public morals' to impose far-reaching limitations on the politically vulnerable, including minorities and political dissenters. The treatment of Ahmadis in Pakistan, Muslims in Europe, and sexual minorities in Russia, is emblematic of this problem. My intuition is that foundational legal instruments such as the ICCPR, which set out the state's burden to justify limitations on the Two Freedoms, are *vulnerable* to abuse. This vulnerability stems from a deficiency in the justificatory burden thus far contemplated by the orthodox interpretation of limitation clauses such as articles 18(3) and 19(3) of the ICCPR. This thesis has attempted to

offer a more conceptually coherent, normatively compelling, and politically appealing interpretation of articles 18(3) and 19(3) with the aim of responding to and addressing this vulnerability.

In this concluding chapter, I wish to reiterate some of the central ideas that were explored in this thesis. My aim is to leave the reader with a reminder of my overarching observations, and what potential impact these conclusions might have for future research.

Four major observations flow from this thesis. First, I observed that the common justificatory approaches featured in the liberal tradition have certain merits worth building on, and weaknesses that require addressing. An *unconstrained interest-based justificatory approach* contemplates an inclusive deliberative process, where a wide range of interests that societies consider valuable are included in the justificatory equation. No interest within the rubric of public reason is excluded at the outset. Yet this approach has conceptual and political weaknesses – particularly when applied to assess the permissibility of limitations on basic liberties such as the Two Freedoms. Conceptually speaking, an individual's liberty is constrained by the competing duties that the individual owes others. I attempted to show how such duties are invariably 'duties of justice'. Thus, a justificatory approach that fails to require the state to demonstrate that the individual concerned owes a duty of justice to others to refrain from engaging in the impugned conduct is conceptually incoherent. Because of this conceptual weakness, an unconstrained interest-based approach is vulnerable to political abuse. Common limitation grounds such as 'public order' and 'public morals' can be manipulated to limit the Two Freedoms of minorities and political dissenters for reasons that are essentially majoritarian. These grounds then become shorthand for majoritarian conceptions of 'order' and 'morals'. Moreover, under an unconstrained interest-based approach, the state can more easily

offload its positive obligations to protect others in society from threats to public order or public health by placing the onus on the individual to refrain from conduct that appears to ‘cause’ the threat. Yet in many of these instances, the threat emanates from the unreasonable response of other private actors (to the individual’s conduct), rather than the conduct itself.

A constrained interest-based justificatory approach has normative merit, as it compels the state to base limitations on the Two Freedoms only on certain types of interests that are of equal value to the Two Freedoms. For instance, requiring the state to demonstrate that the limitations serve a competing basic liberty is a good example of a constrained interest-based approach. Such an approach offers maximum protection to the Two Freedoms, as it places a significantly heavy justificatory burden on the state. Yet the main weakness of this approach is that it is too demanding; it often excludes from the justificatory equation interests that are commonly valued in societies.

Based on these relative merits and weaknesses, I presented the case for a *duty-based justificatory approach*. The approach is grounded in a conceptual appreciation of what interests, duties, rights, and liberties are, and how these conceptions interact with each other. I clarified that a right emerges when an interest or set of interests are sufficient reason to impose a duty on another. I also clarified that a right, and therefore a corresponding duty of justice, constrains the scope of a liberty. Liberty is accordingly the area of individual conduct that is unconstrained by duties of justice. With this matrix in mind, I argued that a justificatory approach that is grounded in duties of justice is conceptually coherent. The state would need to demonstrate that the competing interests (of others) at play are sufficient reason to impose a duty on the individual concerned to refrain from engaging in the impugned conduct. I argued that this approach is normatively compelling, as it places the onus on the state to displace the

presumption that the individual has a liberty to engage in the conduct; such a justificatory burden may only be met through the presentation of good, publicly justifiable reasons as to why the competing interests are sufficient reason to impose a duty of justice on the individual concerned. The approach is also politically appealing, as it constrains the ability of the state to limit the Two Freedoms for majoritarian purposes or to offload its positive obligations. The state is compelled to show how the *individual concerned* owes others a horizontal duty of justice to refrain from the impugned conduct.

Second, I observed that the ICCPR – the foremost international legal instrument that sets out the state’s burden to justify limitations on the Two Freedoms – does not necessarily contemplate a conceptually coherent, normatively compelling, or politically appealing justificatory approach. I first explored the historical discourse concerning the drafting of articles 18(3) and 19(3) of the ICCPR, and concluded that drafters were ultimately dissatisfied with the ambiguity and obscurity of the limitation grounds listed in the two limitation clauses. I next explored the orthodox interpretation of articles 18(3) and 19(3), and concluded that both a literal interpretation, and an interpretation guided by certain interpretative sources, only contemplate an unconstrained interest-based approach. This conclusion confirmed my concern that the two limitation clauses were vulnerable to abuse. However, I maintained that the clauses were only vulnerable, and not insurmountably deficient.

Third, I observed that the Human Rights Committee has over the years developed a jurisprudence through which a substantial justificatory burden has been imposed on states when they seek to limit the Two Freedoms. Although the Committee’s jurisprudence does not reflect a duty-based approach, it grapples with the limitation clauses’ vulnerability to abuse, and reveals a normative instinct on the part of the Committee to maximise protection of the Two

Freedoms, and to constrain the state's authority to limit them. I argue that a simple good faith approach to treaty interpretation (whereby the object and purpose of the ICCPR and principles of effectiveness and reasonableness govern the ICCPR's interpretation) grounds the Committee's recent jurisprudence. The idea of covenant compatibility, i.e. that a limitation must comply not only with the criteria set out in the limitation clause, but also with the object and purpose and other provisions of the ICCPR, appears to flow from the Committee's good faith interpretation of the Covenant.

Finally, I observed that a duty-based approach to justifying limitations on the Two Freedoms can actually be accommodated within the object and purpose of the ICCPR. When the background thinking of the drafters, the Covenant's preamble, and specific treaty provisions such as article 19(3) are taken together, it seems entirely plausible that a justificatory approach based on duties of justice can be contemplated under the ICCPR. I then concluded that this approach can provide the Committee with a doctrinal framework – a form of scaffolding – for the normative thinking that is evident in its recent jurisprudence. Although its pronouncements are not legally binding on states, the Committee's work has significant value as a source of guidance to interpret the ICCPR in good faith. It is accordingly well-placed to promote a duty-based justificatory approach among states. Such an approach is more conceptually coherent, normatively compelling, and politically appealing than what the orthodoxy offers.

I end this thesis with a few concluding thoughts on the implications of a duty-based approach to justifying limitations on the Two Freedoms under the ICCPR. These implications could form the basis for future research that builds on the main findings of this thesis. Three such implications warrant mention. First, a duty-based approach could potentially be applied to other rights and freedoms recognised in the ICCPR. The Covenant contains limitation clauses

with respect to other rights and freedoms, such as the freedom of movement, the freedom of association, the right to peaceful assembly, and the right to privacy. A duty-based approach can potentially be adopted to set out the state's justificatory burden when limiting these rights and freedoms as well. Second, a duty-based approach may be generally applicable to other international and regional human rights treaties with limitation clauses that are similar to those found in the ICCPR. A range of regional human rights instruments including the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights come to mind. Finally, a duty-based approach can potentially be applied in domestic adjudicative settings, where constitutional courts are called upon to determine the permissibility of limitations on the Two Freedoms, and other rights and freedoms. Advances in international human rights law no doubt influence jurisprudence in the domestic sphere. Accordingly, the work of the Committee in advancing a more conceptually coherent, normatively compelling, and politically appealing justificatory approach to limiting the Two Freedoms has the potential to influence greater protection of the Two Freedoms (and indeed other individual rights and freedoms) at multiple levels.

Our commitment to protecting the Two Freedoms surely involves vigilant surveillance of the state's role in setting out their limits. This commitment will certainly be tested during grave public emergencies such as the COVID-19 global health crisis. If we do indeed value the Two Freedoms, placing a substantial justificatory burden on the state when it seeks to limit these precious basic liberties and claim rights is crucial. This thesis has attempted to show that a justificatory approach based on duties of justice could offer a path to placing such a burden on states. Limitations on the Two Freedoms must only be for good, publicly justifiable reasons

that ground in the individual concerned a duty of justice to refrain from the conduct in question. The Human Rights Committee is meanwhile well-placed to be a vehicle for advancing this justificatory approach – an approach that could add further impetus to our perennial struggle to defend two of our most cherished freedoms: the freedom to manifest religion or belief, and the freedom of expression.

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