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The Margin of Appreciation as an Underenforcement Doctrine

Introduction

To fix ideas, consider the seminal *James and Others v. the UK* judgment of the European Court of Human Rights (henceforth 'Court' or 'ECtHR') of 21 February 1986.¹ It concerned a challenge to the Leasehold Reform Act 1967 as amended, which gave tenants residing in houses held on long leases the power to purchase compulsorily the freehold of the property. The applicants claimed, among other things, that the compulsory transfer of their properties amounted to a breach of their right to property, protected by Article 1 of Protocol No.1 (P1-1) of the European Convention on Human Rights (henceforth 'ECHR' or 'the Convention'). They argued that they were deprived of their possessions despite the fact that the 'public interest' test, set out in the second sentence of Article 1 (P1-1), was not satisfied, since their properties were transferred from one individual to another for the latter's private benefit. In settling the dispute, the Court invoked the judge-made² margin of appreciation (henceforth 'MoA') doctrine to find that:

Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is 'in the public interest' (...) Furthermore, the notion of 'public interest' is necessarily extensive. In particular, as the Commission noted, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will

¹ *James and Others v. the United Kingdom*, 21 February 1986 (Series A no.98).

² The term 'margin of appreciation' is not contained in the original text of the Convention. It was first mentioned by the former European Commission of Human Rights in its decision of 26 September 1958 concerning the inter-state application *Greece v. the United Kingdom* and was subsequently expressly taken up by the Court in the case of *Ireland v. the United Kingdom* of 18 January 1978 (Series A no.25 at para. 207). Protocol no. 15 amending the Convention, which was adopted by the Committee of Ministers of the Council of Europe in February 2013, explicitly mentions MoA. Protocol no.15 was opened for signature on 24 June 2013 and will enter into force as soon as all States Parties to the Convention have signed and ratified it.

respect the legislature's judgment as to what is 'in the public interest' *unless that judgment be manifestly without reasonable foundation*. (at para 46, emphasis added)

Now, let us suppose that the standards of correct interpretation and application of Article 1 (P1-1) of the Convention are ultimately determined by the best substantive theory of human rights, whatever that theory might turn out to be (or, for those who think these do not amount to the same thing³, by the best substantive theory of *Convention* rights). On that assumption, the Court's reasoning in the *James* case is an illustration of the phenomenon that constitutional theorist Lawrence Sager dubs 'underenforcement of legal norms'.⁴ By invoking MoA, the *James* Court declined to examine whether the deprivation of the applicants' properties amounted to a violation of Article 1 (P1-1) of the Convention under the best understanding of the right to property. Instead, the Court lowered its standard of review, satisfied that the choices made by the British legislature were not 'manifestly without a reasonable foundation'. Therefore, Article 1 (P1-1) was underenforced in the sense that the Court invoked MoA in order to justify the Article's application under a suboptimal understanding of Convention rights, giving leeway to the respondent state.

Several prominent judges and scholars think that this aspect of MoA is deeply problematic. Their objections take the following general form. First, they claim that the Court is vested with the responsibility, formulated in Article 32 (1) of the Convention, to interpret and apply the Convention and its Protocols following the lodging of individual applications, in order to ensure observance by the states parties and protect human rights.⁵ Second, they

³ Whether an account of Convention rights maps perfectly onto a general account of human rights or whether there are substantial discrepancies between the two is an open and much debated question, on which this chapter shall not take sides. In what follows, I shall simply refer to 'Convention rights', leaving open the possibility that the rights contained in the text of the ECHR are reducible to human rights *simpliciter*.

⁴ See L Sager 'Fair Measure: the Legal Status of Underenforced Constitutional Norms' (1978), 6 *Harvard Law Review* at 1213.

⁵ See, for instance, the partly dissenting opinion of Judge De Meyer to the *Z v. Finland judgment* of 25 February 1997: 'In the present case the Court once again relies on the national authorities' 'margin of appreciation'. I believe that it is high time for the Court to banish the concept from its reasoning. It has already delayed too long in abandoning this hackneyed phrase and recanting the relativism it implies (...) where human rights are concerned, there is no room for a margin of appreciation which would enable the States to decide what is acceptable and what is not'.

stress that it is generally accepted, not least by the Court itself, that this responsibility standardly requires determining whether a violation of a Convention right took place *independently* of the views held by respondent states.⁶ Hence, they insist, underenforcement through MoA is either an abdication of the Court's interpretive responsibility, or else a doctrine that smacks of relativism.⁷ In a nutshell, their argument to this conclusion seems to run as follows. The content and scope of Convention rights depend on substantive considerations. It is either the case that states' views figure among these considerations, or not. If the latter, then MoA appears to be an abdication of the Court's responsibility to make up its own mind on the relevant considerations and to use them as a critical standard whereby to evaluate the states' behavior.⁸ If the former, then MoA assumes that states' views determine the content of Convention rights. But this seems like the very essence of relativism. And many people justifiably think that relativism cannot serve as a robust foundation for Convention (or human) rights.⁹

In this chapter I attempt to provide an understanding of the underenforcement aspect of MoA that can deflect some of the above criticisms. The key idea is that substantive considerations about the content Convention rights tell only part of the story of what a workable scheme of internationally justiciable Convention rights is. The other part is told by *institutional considerations*. These are considerations that apply to the Court *qua* decision-maker by virtue of its particular institutional role in a shared scheme of human rights governance across contracting states of the Council of Europe. My aim is to highlight the function of these considerations in explaining and justifying MoA as an underenforcement doctrine. My claim is not that underenforcement is all there is to MoA. Rather, I suggest that underenforcement on institutional grounds is one plausible reading

⁶ See, on this point, the Court's well-established case law on 'autonomous concepts', which was inaugurated by the 1976 *Engel and Others v. the Netherlands* case (Series A no.22). For discussion of the 'autonomous concepts' method see G Letsas 'The truth in Autonomous Concepts: How to Interpret the ECHR' (2004) 15(2) *European Journal of International Law* 279.

⁷ See, among many others, the opinion of Judge De Meyer, above n. 5 and E Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards', 31 *New York University Journal of International Law and Politics* (1998-99) 843.

⁸ See, with particular reference to the role of 'consensus' in determining the width of MoA, G Letsas 'Two Concepts of the Margin of Appreciation', 26 *Oxford Journal of Legal Studies* (2006) 705.

⁹ Judge De Meyer, above n. 5 and Benvenisti, above n. 7 at 844.

of *some* uses of MoA. There may well be others, with which the present chapter does not take issue.¹⁰ Throughout, the argument is exploratory rather than conclusive. I intend to put underenforcement on the table of potentially plausible alternatives, rather than provide a full defence. The chapter unfolds as follows. I begin with a general discussion of underenforcement, placing the phenomenon within a more general theoretical framework. This opens up the way for a conceptualisation of MoA as an underenforcement device. I then turn my attention to explanations of MoA as a rational judicial strategy under conditions of resource-bounded rationality. Last, I offer an initial and tentative normative defence of underenforcement uses of MoA in terms of subsidiarity and shared responsibility between the Court and States Parties in the implementation of Convention rights. If I am right, then views criticizing MoA on the sole basis that MoA falls short of implementing first-best substantive theories of Convention rights miss their target.

Underenforcement, Institutional Considerations and MoA

What does it mean to say that the Court underenforces Convention rights? In the relevant literature, more than one attempt has been made to characterize the phenomenon of underenforcement. The rough idea is to distinguish between two ways of implementing any given legal norm: either 'in full' or 'only to a certain extent'. Underenforcement would fall squarely within the second category. Lawrence Sager, who coined the term¹¹, has in the past proposed unpacking this idea in terms of a distinction between 'concepts' and 'conceptions'.¹² According to Sager, the concept/conception distinction corresponds to a distinction between 'the full conceptual limit' of a legal norm and a kind of enforcement of the norm that falls short of implementing that conceptual limit.¹³ More recently, Richard Fallon has suggested that the distinction underpinning underenforcement is between the 'meaning' and the 'implementation' of a legal norm.¹⁴ Both authors seem to point to a crucial difference between the general formulation of a legal norm and an application (or

¹⁰ For some of these other uses, see Letsas, above n. 8.

¹¹ Sager, above n. 4.

¹² The concept/conception distinction has been popularised by John Rawls. See J Rawls, *A Theory of Justice* (Cambridge, Mass. Harvard University Press 1971) at 5.

¹³ Sager, above n. 4 at 1213-14.

¹⁴ R Fallon, *Implementing the Constitution* (Cambridge, Mass. 2001) at 38-39.

implementation¹⁵) of that same norm by a given institutional agent to a particular case or class of cases such that, for reasons that apply specifically to the agent, the general norm is not fully applied.

Even though the distinction highlighted by Sager and Fallon seems intuitively plausible, getting clearer on it can be particularly elusive. One important source of difficulty springs from the fact that, when it comes to considering legal norms and their implementation, there are different and contestable ways of carving up the conceptual field. Of particular relevance is the fact that a sharp distinction between the existence and the implementation of a legal norm seems to make much more sense from a positivist than from an anti-positivist theoretical perspective.¹⁶ Authors of a positivist bent frequently speak of the law as a system of norms or rules. They suggest that legal norms are abstract entities instantiating properties such as validity.¹⁷ They also frequently claim that these norms can be identified independently of their application to particular cases, through recourse to the law's social sources.¹⁸ Many positivists thus contend that application of legal norms only takes place at a later, conceptually second stage.¹⁹ On the other hand, some anti-positivists, most famously Ronald Dworkin²⁰, generally prefer to talk about 'propositions of law' by means of which legal rights and duties are reported at different levels of abstraction, without relying on a sharp distinction between independently identifiable legal norms and applications of those norms to particular cases.²¹ In the present chapter, I shall attempt to take these important jurisprudential nuances on board by proposing an abstract characterisation of underenforcement.

¹⁵ Fallon (*Ibid.* at 37-38) reserves the term 'implementation' to denote an activity that is wider than mere application of norms. In this chapter, though, and since nothing hinges on this, I shall treat both terms as roughly equivalent.

¹⁶ On interpretivist theories of law see N Stavropoulos, 'Legal Interpretivism', entry in the online *Stanford Encyclopedia of Philosophy* (<http://plato.stanford.edu/entries/law-interpretivist>; last accessed on 28 August 2015).

¹⁷ For a classic statement of such a view, see H Kelsen, *Introduction to the Problems of Legal Theory* (Oxford: Clarendon Press 1992) at 12-13.

¹⁸ See, generally, J Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979).

¹⁹ See, for example, J Coleman, 'Negative and Positive Positivism' (1982) 11 *Journal of Legal Studies* 139.

²⁰ See, generally, R Dworkin, *Law's Empire* (Cambridge, Mass. Harvard University Press, 1986).

²¹ Stavropoulos, above n. 16.

My proposal is this. A legal norm is underenforced when there is a substantial gap between the ways the norm should be enforced in the absence of institutional considerations that apply to the enforcing agent, as compared to the ways the norm should be enforced by that same agent in the presence of these considerations. This characterisation of underenforcement avoids any talk of ‘conceptual limits’ or ‘meanings’ of legal norms. Instead, it sets out a rough counterfactual test. The core idea is to imagine a decision situation in which institutional considerations were absent, in order to capture intuitively their distinctive contribution to outcomes, without assuming, along with a number of leading positivists, that legal norms are to be understood as reified entities having some kind of preexisting ‘full conceptual content’.

As formulated, the characterisation rests on three crucial ideas. Firstly, it introduces a distinction between the existence and the enforcement of a legal norm. In the way in which I intend to use it in this chapter, the expression ‘legal norm’ is theoretically innocuous and remains neutral as regards rival conceptions of the nature of law. It refers merely to general propositions reporting legal content, i.e. to general formulations of legal rights and duties, without taking a stance on the kinds of facts that figure among the determinants of such content.²² The distinction thus simply reaffirms the commonsense intuition shared by most lawyers that, once legal content is identified and formulated in general terms, there is a further step to be taken in order to apply it to a concrete case or to a class of cases.

Secondly, the characterisation deploys the concept of enforcement. It is crucial to emphasise that ‘enforcement’ is used here as an all-encompassing term. The term refers, first and foremost, to activities that include the application of legal norms. These activities typically aim at suitably connecting general legal norms with concrete sets of facts and they should be familiar enough to lawyers and judges arguing about whether individual cases actually fall under the extension of legal concepts. I intend to add a further conceptual component to this traditional view of enforcement-as-application. To that effect,

²² In particular, no stance is taken on whether *moral* facts figure among the determinants of legal content. This question is at the heart of the dispute between positivist and anti-positivist theories of law; see M Greenberg, ‘How Facts Make Law’ (2004) 10 *Legal Theory* 157.

throughout this chapter the term ‘enforcement’ shall also refer to a shared scheme of concretisation of a legal norm that links the implementing actor to other actors, with which the first actor shares institutional responsibility.²³ ‘Enforcement’ in this second sense comprises, for example, the creation by a given court of a doctrinal test that renders the content of an abstract legal norm more concrete and at the same time directs other courts to apply that test *in lieu* of directly applying the abstract and general legal norm itself.²⁴

Thirdly, the characterisation brings into play institutional considerations as a distinct kind of consideration and connects them to underenforcement. Under the characterisation, an agent underenforces a legal norm because special considerations of an institutional nature apply to her. Some of these reasons are to do with the nature and limits of an agent’s institutional role vis-à-vis other agents.²⁵ Crucially, these reasons have a relational aspect. They can only be adequately identified once the agent is placed within a wider institutional context that comprises the relationships, responsibilities and specific interaction that the agent entertains with other agents within a shared scheme of governance. Underenforcement thus typically opens up the possibility of sharing enforcement of legal norms with other institutions in a common scheme of governance. The kinds of institutional considerations that decision-makers ought to take into account crucially depend on their makeup and specific characteristics, as well as the kind of relationships that the decision-maker entertains with other institutions within the common scheme. In developed legal systems, most such schemes are characterized by complex patterns of institutional division of labour. By assigning the primary task of answering certain questions to other institutions, underenforcement helps allocate decision-making authority in pursuit of a common goal. Other institutional considerations derive from intrinsic features of the enforcing agent. These features place constraints on the kinds of decision procedures that the agent should adopt when enforcing legal norms under conditions of bounded rationality, uncertainty and finite resources.²⁶ So institutional considerations may

²³ Fallon, above n. 14 at 42.

²⁴ *Ibid.* at 38.

²⁵ A Kavanagh, ‘Judicial Restraint in the Pursuit of Justice’ (2010) 60 *University of Toronto Law Journal* 23 at 27.

²⁶ See, generally, A Vermeule, *Judging Under Uncertainty* (Cambridge, Mass. Harvard University Press, 2006).

be such as to explain or justify underenforcement. The important point to note is that institutional considerations as a whole are to be distinguished from substantive reasons, which I shall roughly define as reasons that make reference, in law-applying contexts, to the particular merits of the case in the absence of institutional reasons.

By this point, it should have become readily clear why MoA lends itself naturally to an underenforcement reading. Recall that in the *James* case mentioned in the Introduction, the Court lowered its standard of review of the measures taken by the British authorities on two grounds. First, the measures were not ‘manifestly without a reasonable foundation’ given the public interest goal pursued. Second, British authorities were ‘better placed’ than the Court itself to balance the right to property with the public interest aim.²⁷ There are at least two features that make such invocations of MoA instances of underenforcement of the Convention in the intended sense. To begin with, like the US Supreme Court and many other constitutional and supreme courts around the world²⁸, the Court frequently refrains from reviewing the decisions of national authorities under the best substantive theory of Convention rights. Instead, the Court’s review consists in using a ‘reasonableness’ standard, asking whether States Parties exceeded it or not.²⁹ Moreover, the Court explicitly states that underenforcement of Convention rights is justified on institutional grounds, to wit, by the fact that domestic authorities are ‘better placed’ than the Court itself to assess various kinds of limitations to Convention rights.³⁰ In addition, far from being relegated to several isolated examples, this approach is prevalent in numerous areas of its case law.³¹ Among

²⁷ *James and others*, above n. 1 at para 46.

²⁸ To provide just one random example, the French Constitutional Council (*Conseil constitutionnel*) commonly resorts to the argument that its ‘power of appreciation’ is not the same as that of the legislature, in order to lower its standard of review of the constitutionality of Parliament’s acts. See, among many other authorities, its recent decision no. 2013-341 QPC of 27th September 2013 at para 6 (available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028017685>, accessed on 20 August 2015).

²⁹ For an extensive overview of the recent case law of the Court, see Jan Kratochvíl, ‘The Inflation of the Margin of Appreciation by the European Court of Human Rights’ (2011), 29(3) *Netherlands Quarterly of Human Rights* 324.

³⁰ For the first such use of MoA see *Ireland v. the United Kingdom* of 18 January 1978 (Series A no.25) at para 207. The Court’s *dictum* has been consistently used in the quasi-totality of cases invoking MoA to find in favour of the respondent State.

³¹ For an overview see H C Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (The Hague, Kluwer International, 1996); E Brems, ‘The Margin of Appreciation Doctrine in the Case-law of the European Court of Human Rights: Compliance or Cross-Purposes’ (1996), 56 *Zeitschrift*

other things, the Court uses it when it comes to assessing limitations to the rights protected by Articles 8-11 of the Convention. Regarding these Articles, the Court frequently resorts to the argument that the absence of consensus among States Parties affords the latter a margin of appreciation in the determination of limitations to Convention rights, typically through balancing these rights with the realization of collective goals, such as public order, security, health or morals.³²

Conceiving of MoA as an underenforcement doctrine explained and justified by institutional considerations deflects some of the standard objections marshaled against it. Recall that, in insisting that underenforcement is an abdication of the Court's interpretive responsibility, critics of MoA standardly presuppose that examining the merits of each individual case exhausts the Court's role. Now, MoA appears to be a doctrinal device whereby cases are decided on grounds other than their merits. By criticising MoA for this reason, detractors thus simply assume that uses of MoA could be justified only by some form of relativism in virtue of which the content of Convention rights would depend on the moral conceptions of member states³³ or by giving leeway to some kind of utilitarian calculus threatening the very concept of human rights.³⁴ However, if one takes the view that institutional considerations can explain and justify underenforcement of Convention rights, then one need make no concessions either to relativism or to utilitarianism. An objectivist (as opposed to relativist) or liberal (as opposed to utilitarian) theory of Convention rights is fully compatible with the claim that objectively identifiable liberal rights are to be enforced in ways that depend in part on equally objective reasons that apply to the enforcing agent because of her particular institutional position and characteristics. So underenforcement uses of MoA would be salvaged, since they could be justified by taking into account institutional considerations applying specifically to the Court *qua* enforcing agent.

für ausländisches öffentliches Recht und Völkerrecht 240; Stephen Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Strasbourg, Council of Europe Publishing, 2000); Kratochvíl, above n. 29.

³² For an overview and a critical analysis of the Court's case law regarding Articles 8-11 on limitations of Convention rights on grounds of public morals see G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2009) at 92-98.

³³ Benvenisti, above n. 7 at 844.

³⁴ Letsas, above n. 8 at 729.

Explaining MoA as Underenforcement of Convention Rights: Resource-Bounded Enforcement of the ECHR

If I am right, the hallmark of underenforcement uses of MoA consists in the abandonment of a first-best understanding of the content of Convention rights in favour of a looser ‘reasonableness’ test on institutional grounds. In other words, MoA would imply a suboptimal enforcement of ECHR to individual cases. Such an approach could be explained and justified in many ways.³⁵ Given the limited purposes of the present chapter, I shall here only briefly sketch two kinds of arguments. To begin with, in this section I shall present a number of explanatory considerations pertaining to underenforcement of MoA due to the resource-bounded rationality of the Court. The core idea is that underenforcement can be explained by taking into account the fact that, even if we abstract from issues to do with motivation and strategic interaction between agents disagreeing about the optimal understanding of the Convention³⁶, the effective application of the ECHR requires the use of scarce cognitive resources. Underenforcement can thus be explained as a rational strategy of deployment of these resources under conditions of pervasive uncertainty in a context of wider institutional cooperation. In the next section, I shall outline a normative argument designed at making more plausible the idea of a proper institutional division of labour between the Court and national authorities.

In what sense is the Court a resource-bounded institutional agent? A useful way of introducing resource-boundedness in legal interpretation is by distinguishing between ideal as opposed to non-ideal judicial decision-making. Historically, idealisation of agents’ capacities has been widely used to model decision theory and the theory of rational choice, especially in neoclassical economics.³⁷ In legal contexts, ideal judicial decision-making would be the decision-making of an omniscient legal interpreter under ideal conditions, say

³⁵ For some of these ways, see D Tsarapatsanis, ‘The Margin of Appreciation Doctrine: A Low-Level Institutional View’ (2015) 35 *Legal Studies* 675..

³⁶ See, generally, A Vermeule, *The System of the Constitution* (New York, Oxford University Press, 2011).

³⁷ For an overview, see P Weirich, *Realistic Decision Theory: Rules for Nonideal Agents in Nonideal Circumstances* (New York, Oxford University Press, 2006).

that of judges that are fully rational at least in the sense of holding perfectly consistent sets of beliefs and preferences, fully informed, perfectly well motivated and capable of deliberating without time restrictions, akin to Dworkin's Hercules.³⁸ *Qua* ideal interpreters, courts are to be modeled as frictionless institutions whose activity bears no decision, correction or information costs. Now, idealisation of the various capacities of agents frequently serves to define an optimum by reference to which normative standards applying to non-ideal agents are defined. The task assigned to non-ideal agents would be to approximate as well as they can the ideal standard. In judicial contexts, idealisation approaches imply that courts ought to rely on optimal understandings of the law, or approximate those understandings as best they can. To take an example, if the 'moral reading' of the ECHR were to be considered, *arguendo*, as the best theory of interpretation of the Convention³⁹, the activity of non-ideal interpreters would be assessed by reference to this optimal interpretive benchmark. Transposed, say, to the *James* case cited in the Introduction, this approach would imply that the Court should have either attained or approximated the workings of an ideal enforcer. As a result, it should have tried to identify the optimal moral understanding of the right to property and apply it to the case at hand. Far from adopting a 'reasonableness' standard, as it actually did, and irrespective of the fact that it is a non-ideal agent, the Court should have taken up the Herculean task of providing such an optimal understanding because its role would be identified by reference to such an ideal standard. So from the vantage point of such a benchmark, the Court would have straightforwardly failed to discharge its interpretive duty.⁴⁰

Nevertheless, it is well known that ideal cognitive and motivational capacities do not exist in the actual world. Human epistemic agents are in the grip of what philosopher and cognitive scientist Christopher Cherniak calls the 'finitary predicament'⁴¹: their cognitive resources are limited. As a result, human agents' rationality is resource-dependent or

³⁸ On the ideal judge Hercules see R Dworkin, *Taking Rights Seriously* (Cambridge, Mass. Harvard University Press, 1977) chapter 4.

³⁹ On the 'moral reading' of the ECHR see G Letsas, "The ECHR as a Living Instrument" in A Føllesdal, B Peters and G Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (New York, Cambridge University Press, 2013).

⁴⁰ *Ibid.*

⁴¹ See C Cherniak, *Minimal Rationality* (Cambridge, MIT Press, 1986).

bounded. Bounded rationality approaches in general, whether in law or in other domains, challenge models of human decision-making based on idealisation strategies. Instead of supposing that optimal normative standards set the benchmark against which the activity of non-ideal agents should be evaluated, these approaches purport to accommodate cognitive limitations by lowering the relevant normative standard itself. Resource-bounded approaches thus focus on how agents with limited information, time and cognitive capacities rationally ought to make judgments and decisions. These approaches became particularly prominent since the 1970s, when an impressive array of experimental results suggested that human agents reason and decide in ways that systematically violate the formal canons of rationality.⁴² Bounded rationality models attribute at least part of the explanation for these shortcomings to the lack of cognitive resources available to these agents in particular circumstances. Charting the actual limits of these resources is an important part of cognitive science and empirical psychology. Both conceptualize the human mind as a finite information-processing device, strictly limited with regard to its memory, attention and computation capacities.⁴³

Empirical findings pertaining to the bounded cognitive resources of finite agents impact on understandings of the normative benchmark against which to evaluate the cognitive performance of finite agents in the following way. Instead of supposing, as idealisation approaches generally do, that the task of these agents is to approximate ideal decision-making as best they can, bounded rationality accounts ask which reasoning strategies agents with cognitive resources ought to follow in order to reliably attain sets of specified epistemic goals for different kinds of environments.⁴⁴ Accordingly, the strategies identified are resource-dependent: they are tailored to the actual cognitive abilities and resources of finite agents. Resource-dependence as a constraint on the selection of reasoning strategies can be justified in two ways. The first appeals to ‘ought-implies-can’ considerations. In a nutshell, the argument is that it is not rational to ask of agents that they comply with epistemic norms, compliance with which is impossible, given the agents’ actual cognitive

⁴² For an overview see D Kahneman, *Thinking Fast and Slow* (New York, Farrar, Straus and Giroux, 2011).

⁴³ See B E Goldstein, *Cognitive Psychology: Connecting Mind, Research and Everyday Experience* (Belmont, Wadsworth, 2011).

⁴⁴ See G Gigerenzer and R Selten, *Bounded Rationality: The Adaptive Toolbox* (Cambridge, MIT Press, 2001).

setup.⁴⁵ Whilst the exact meaning of the ‘can’ part of this ‘ought-implies-can’ constraint has turned out to be controversial⁴⁶, still it clearly rules out at least certain kinds of reasoning strategies (e.g. those that are computationally intractable absent infinite time). The second appeals to cost/benefit considerations.⁴⁷ It follows from resource-relativity that reasoning strategies come at varying costs. Some can be more expensive than others. Identifying reasoning strategies at acceptable cognitive costs thus forms a major part of the motivation behind resource-bounded approaches. Here again, one main idea is that reliability can be traded off against other values, such as speed in decision-making.⁴⁸ Moreover, reliability can be the collective outcome of the distribution of tractable cognitive tasks between various cooperating agents, rather than the result of the exercise of a solitary agent’s cognitive capacities.⁴⁹

This general point about the efficient deployment of scarce cognitive resources also applies to judicial decision-making and thus to the ECtHR. In the actual world, courts function under non-ideal conditions. Judges’ rationality is bounded⁵⁰, their access to pertinent information is limited, their information-processing capacity is both restricted and in the grip of various cognitive biases, their memory and attentional resources are restricted⁵¹ and they are under relentless time pressure, amplified by the ever-increasing volume of their caseload. Under these circumstances, resource-bounded approaches underline that it is not enough that reasoning strategies score high on the reliability dimension, as idealisation approaches generally suppose. It is important that they also come at an acceptable cost with regard to the finite cognitive resources of judges. Thus, to come back to the problem of enforcement of the ECHR, resource-bounded models of decision-making insist that reasoning strategies connecting political morality with the content of Convention

⁴⁵ P Thagard, ‘From the Descriptive to the Normative in Psychology and Logic’, (1982) 49 (1) *Philosophy of Science* 24.

⁴⁶ See eg R Feldman and E Conee, ‘Evidentialism’, (1985) 48 *Philosophical Studies* 15.

⁴⁷ See generally M Bishop and J D Trout, *Epistemology and the Psychology of Human Judgment* (Oxford, Oxford University Press, 2005).

⁴⁸ *Ibid.*

⁴⁹ F D’Agostino, *Naturalizing Epistemology: Thomas Kuhn and the ‘Essential Tension’* (Palgrave Macmillan, 2010).

⁵⁰ Vermeule, above n. 36 at 154-156.

⁵¹ For an overview see N Lavie, ‘Distracted and Confused? Selective Attention Under Load’ (2005) 5 *Trends in Cognitive Science* 75.

rights, such as the moral reading of the ECHR, take account of the limitations of judges' cognitive resources. Even if the relevant moral and empirical facts would be accessible to idealised, i.e. resource-independent, judges, resource-bounded approaches maintain that we still ought to ask, first, whether these facts are also in principle accessible to resource-dependent judges and, second, at what costs.

Now, considerations to do with the resource-dependence of judicial decision-making appear to be able to straightforwardly explain instances of underenforcement doctrines, such as MoA. The core idea is that finite *bona fide* judicial agents can rationally choose to simplify their cognitive tasks by sometimes opting for a lower 'reasonableness' standard of review than for review based on an optimal understanding of the relevant standard. In the context of the ECHR, this is especially the case when the Court is justifiably uncertain about the consequences of its decisions, both in relation to the merits of the individual case before it and to its more wide systemic effects, insofar as these effects can alter the enforceability of European-wide understandings of Convention rights. In cases of uncertainty, the Court can use underenforcement doctrines, such as MoA, to outsource decision-making to trusted national authorities, if it has reason to believe that these decision-makers may be more reliable, with respect to a certain range of issues, than the Court itself. Moreover, such a practice can result in considerable gains in time, which is also an independently identifiable crucial variable.

We can use two kinds of examples from the Court's case-law to briefly illustrate these general points. To begin with, there are situations, such as the one exemplified in the *James* case cited in the Introduction, in which determining whether a violation of the Convention actually took place seemingly requires subtle processing of particularly complex empirical information. In cases such as *James*, which are to do with reviewing the economic and social policy of States Parties⁵², it is doubtful whether the Court can process empirical information more reliably than national institutions. Typically, in such cases implementation of the Convention takes the form of a rather complex cognitive

⁵² For an overview of the Court's case-law in this area see Tsarapatsanis, above n. 35 at 694-697.

cooperation between institutions: legislatures set out general norms, the executive uses its expertise to further concretise these norms and domestic courts, at least in States Parties that have incorporated the Convention⁵³, independently check for ECHR violations. It could thus make sense to allocate a substantial part of the decision-making power to national institutions via MoA under two broad conditions. First, the Court must have good reasons to trust that the decision-making competence of the institutions to which a substantial part of decision-making power is allocated is higher than its own. If that is not the case, for example because the Court has found out from its own experience that a particular Member State's judicial institutions systematically fail to protect certain kinds of rights or that the Court itself can do a better job at protecting those rights, then it has a powerful countervailing reason to review from scratch the decisions of national authorities. Second, insofar as the Court uses MoA to underenforce but not to refuse to enforce Convention norms, it has to discharge its duty of reviewing alleged breaches of Convention rights by establishing a workable threshold and by making clear to national authorities that decisions above that threshold will trigger a full exercise of the Court's powers of review. Again, this is exactly what happened in the *James* case, in which the Court explicitly said that the determination of the concept of public interest by the British legislature was deemed to be in accordance with the Convention because the legislature's judgment was not found to be 'manifestly without a reasonable foundation'.

As a second example, take time. Suppose that part of the difficulty of deciding cases under a moral reading of the ECHR stems from the fact that complex factors have to be taken into account, which judges do not have enough time to calculate in their totality, in order to arrive at an acceptable degree of certainty. If the Court had more time, it could arguably score better on the reliability dimension, by scrupulously attempting to calculate them. However, the Court does not have infinite time. In fact, its time is a particularly scarce resource, which it has to allocate in both an efficient and a just way. Again, depending on the circumstances in which it is placed, the Court can sometimes reasonably trade off marginal increases in reliability for speed by following underenforcement doctrines, which

⁵³ L Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime', (2008) 19(1) *European Journal of International Law* 125 at 141-149.

bring into play the cognitive capacities of national authorities. Following Andrew Coan⁵⁴, we can use the expression ‘judicial capacity’ to refer to the actual ability of the Court to adequately handle a given volume of cases within a given amount of time, whilst assuming the Court’s adherence to certain qualitative standards of decision-making. Now, despite the fact that many writers frequently point to the ‘case overload crisis’ confronted by the Court,⁵⁵ to this day no systematic attempts appear to have been made to proceed to a specific analysis of judicial capacity *qua* institutional consideration and to link it to underenforcement doctrines, such as MoA. However, such a link appears quite direct, since capacity is intimately related to the allocation of time as a scarce cognitive resource. In the Court’s case, the demand to decide cases in a timely and efficient manner is formally recognised as a special judicial duty, unambiguously set out in Article 6 of the Convention. Underenforcing Convention rights through uses of MoA, which entails sharing enforcement responsibility with national institutions, can thus be a rational response to capacity-related pressures, by allowing for considerable gains in time. This strategy, moreover, is anything but unfamiliar. The Court itself, in its Preliminary Opinion on the subject of case overload⁵⁶, proposed a number of concrete institutional reforms to remedy ‘the mismatch between the Court’s workload and its capacity’.⁵⁷ One leading idea is for the Court to allocate more time and resources to the examination of so-called ‘priority cases’⁵⁸ than to cases for which it can reasonably assume that national enforcing authorities will be at least equally apt at dealing with. Besides, underenforcement through MoA is exactly how the Court has proceeded in cases in which national courts have already provided detailed legal analysis based on the principles and criteria set out in the Court’s case law. In these cases, the Court has used MoA to suggest that departures from the outcome arrived at by national courts is acceptable only for ‘strong reasons’. For example, in the recent *Palomo Sánchez and Others v. Spain* case, which was about balancing the right to freedom of expression under Article 10 of the Convention with the right to protection of one’s reputation, the Court held that:

⁵⁴ A. Coan ‘Judicial Capacity and the Substance of Constitutional Law’ (2012) 122 *Yale Law Journal* 100 at 102.

⁵⁵ See eg S. Greer, ‘What’s Wrong with the European Convention’ (2008) 30 *Human Rights Quarterly* 680.

⁵⁶ See the Preliminary Opinion of the Court in Preparation of the Brighton Conference of 20 February 2012, (http://echr.coe.int/Documents/2012_Brighton_Opinion_ENG.pdf, last accessed on 20 August 2015).

⁵⁷ Preliminary Opinion above n 52 at para 5.

⁵⁸ Preliminary Opinion above n 52 at para 24.

If the reasoning of the domestic courts' decisions concerning the limits of freedom of expression in cases involving a person's reputation is sufficient and consistent with the criteria established by the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts⁵⁹

My suggestion is that the use of MoA as an underenforcement doctrine in cases such as *Palomo Sánchez* can be explained by capacity concerns. It can be rational for the Court to cut down on its decision costs by externalising part of these costs to national judicial institutions. The rationality of such outsourcing hinges on national courts using the Court's criteria to determine whether an infringement of the ECHR took place. This implies that national courts will arrive at decisions which reflect the Court's own mode of reasoning. The Court will then pass judgment on the cases without having to examine anew all the relevant factors. Accordingly, it will be in a position to decide cases more quickly, thus enhancing its overall capacity.

Justifying MoA as Underenforcement of Convention Rights: Normative Institutional Considerations

Let us suppose, *arguendo*, that resource-bounded accounts are on the right track when it comes to providing an explanation of underenforcement uses of MoA. Still, it could be argued, resource-boundedness can only provide an extremely thin normative basis for such uses. After all, every agent that is under a duty to enforce the ECHR is resource-bounded, be it the Court or national authorities, including national courts. As already observed, underenforcement through MoA, which implies qualified deference to the decisions made by national authorities on the resolution of disputes to do with Convention rights, can be fully justified, if at all, only by appealing to normative institutional considerations aimed at the proper division of power between the Court and national authorities. In this last section,

⁵⁹ *Palomo Sánchez and Others v. Spain* [GC], nos 28955/06, 28957/06, 28959/06 and 28964/06, 12 September 2011 at para. 57; in the same vein see *MGN Limited v. the United Kingdom*, no. 39401/04, 18 January 2011 (at paras.) and *Axel Springer AG v. Germany (no.2)* [GC], nos. 40660/08 and 60641/08, 7 February 2012 (at para. 88).

I shall briefly chart three such kinds of considerations in order to lend some normative plausibility to underenforcement uses of MoA. These pertain, first, to shared responsibility in the enforcement of the ECHR between the Court and national authorities, second, to subsidiarity and, third, to legitimacy concerns.

A. Shared Responsibility

Whilst it is true that the ECtHR is a judicial institution whose duty is to resolve disputes involving individuals on alleged violations of Convention rights,⁶⁰ reducing the Court's function to that of a dispute resolution mechanism would be a mistake. In fact, the Court is placed within a wider and complex division of institutional labour. First, the Court typically supervises national institutions on Convention matters. Insofar as it lacks in democratic legitimacy, it must make use of its institutional independence with care, paying due respect to the political decisions of democratically elected national legislatures.⁶¹ Second, the Court must also pay attention to the systemic effects of its judgments in the overall project of enforcement of the Convention.⁶² Thus, far from merely interpreting the Convention or applying it to individual cases under its best understanding of Convention rights in the abstract, the Court also assumes a central coordinating role in enforcing it, by closely cooperating with national authorities.

Enforcement of the Convention is not a task that various national and supranational institutions could perform in isolation. Rather, it is a collective endeavour, which requires meticulous efforts at close collaboration. In this joint endeavour, the Court and national institutions enter as partners. At the very least, this entails that the Court ought to take its

⁶⁰ Formally decisions by the Court only have an *inter partes* legal effect; it is debatable whether they also have *erga omnes* legal force and, if so, on which basis. See Judge Boštjan M. Zupancic, *Constitutional Law and the Jurisprudence of the European Court of Human Rights: An Attempt at a Synthesis*, (2001) 2 *German Law Journal* (available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=30>, last accessed on 20 August 2015).

⁶¹ See generally D Kyritsis, 'Constitutional Review in Representative Democracy' (2012) 32(2) *Oxford Journal of Legal Studies* 297 at 315-318.

⁶² On some of these systemic effects, see Helfer, above n. 53 at 134-138; L Helfer and E Voeten, 'International Courts as Agents of Legal Change: Evidence from the LGBT Rights in Europe' (2014) 68(2) *International Organization* 1.

partners' *bona fide* judgments regarding the content of Convention rights seriously, especially insofar as some partners wield democratic legitimacy. Because of the partnership, national institutions are jointly responsible with the Court for respecting and promoting Convention rights. This collaborative aspect is recognised by Article 1 of the Convention, which makes it a duty for national authorities to protect and uphold Convention rights.⁶³ Likewise, Article 13 instructs States Parties to provide effective domestic remedies for individuals alleging violations of their ECHR rights.⁶⁴ Moreover, most States Parties have incorporated the Convention in their domestic legal systems, thus creating an obligation addressed to national legislatures and courts to comply with the ECHR and use it actively in their own decision-making.⁶⁵ Under the ECHR partnership, the Court trusts that national institutions shall use their distinctive abilities and resources to give pride of place to its reasoning, so as to infuse their decision-making with Convention rights considerations in their ordinary functioning.⁶⁶

Combining resource-boundedness with joint responsibility with national authorities in the enforcement of the Convention can justify underenforcement uses of MoA in the following way. Under conditions of uncertainty, bounded rationality and time pressure, members of the Court are sometimes confronted with a difficult institutional choice: should they *always* try to identify as best as they can the relevant substantive considerations of the case at hand *irrespective* of their relationships with national institutions, or should they rather, at least in some circumstances, invoke MoA to underenforce the Convention and defer to the judgment of national institutions if they are justified in thinking that these institutions are more likely to reach a correct decision? Reasons of trust suggest that deference to *bona fide* partners can sometimes be a justified option. Under certain circumstances, the Court can legitimately conclude that national institutions, because of their specific characteristics and abilities, are better placed than the Court itself to pass judgment on a number of contentious issues. As part of a larger political project, the Court relies on others not in

⁶³ Article 1 of the Convention reads as follows: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.'

⁶⁴ On the gradual jurisprudential construction of an expansive understanding of Article 13 see Helfer, above n. 53 at 144-146.

⁶⁵ *Ibid.* at 141-149.

⁶⁶ *Ibid.*

order to abdicate its responsibility, but in order to discharge its institutional duty, which is to enforce the Convention, as best as it can.

B. Subsidiarity

Subsidiarity considerations warrant similar conclusions. The principle of subsidiarity is firmly grounded in the context of the ECHR system.⁶⁷ It was frequently mentioned and used by the Court even before Protocol 15 was made open for signature.⁶⁸ The principle appears to flow naturally from some of the most basic structural institutional features of the Convention system, to wit, the obligation of States Parties to primarily secure themselves the rights enshrined in the ECHR⁶⁹ and the procedural rule of exhaustion of domestic remedies, combined with the obligation to invoke alleged violations of Convention rights before national authorities on pain of inadmissibility.⁷⁰ Moreover, and apart from textual homes, there are solid, even if disputed, reasons to think that subsidiarity is a normatively appealing principle in its own right.⁷¹

Subsidiarity applies in circumstances involving the distribution of powers between decision-making bodies located at different levels. Typically, these include a higher-level central unit and lower-level sub-units.⁷² According to a standard definition, provided by Andreas Føllesdal, subsidiarity stipulates that when two bodies are concurrently responsible for exercising the same power

⁶⁷ See generally P Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 *American Journal of International Law* 38 at 40.

⁶⁸ In this respect, see the seminal *Belgian Linguistic Case* (23 July 1968, Series A no. 6, p.34 at para 10) and *Handyside v. the United Kingdom*, 7 December 1976, (Application No. 5493/72) [1976] ECHR 5; more recently, see *Selmouni v. France* (Grand Chamber), 28 July 1999 (Application No. 28503/94) at para 74.

⁶⁹ See Article 1 ECHR.

⁷⁰ See Article 35 para 1 ECHR. The Court insists that, in order to be admissible, the complaint to the effect that a Convention rights has been breached has to be raised 'at least in substance'. See *Castells v. Spain*, 23 April 1992 (Application No. 11798/85) at para 32.

⁷¹ Carozza, above n 67 at 40-19; see also A von Staden, 'The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review' (2012), 10(4) *International Journal of Constitutional Law* 1023 at 1033-1038.

⁷² See A Føllesdal 'Survey Article: Subsidiarity' (1998) 6(2) *Journal of Political Philosophy* 190 at 193-197.

powers or tasks should rest with the lower-level sub-units of that order unless allocating them to a higher-level central unit would ensure higher comparative efficiency or effectiveness in achieving them.⁷³

Correspondingly, under standard accounts subsidiarity puts forward a criterion of efficiency when it comes to deciding whether to attribute decision-making power to a central unit in the realization of a commonly shared value or objective. Allocation of decision-making power to the central unit is justified if that allocation is the best way of realizing the common value or objective.

Under standard accounts of subsidiarity, the link with MoA as an underenforcement doctrine appears direct: underenforcement of the Convention is justified whenever national authorities, because of their superior institutional abilities, are better placed to pass judgment on the interpretation or application of the Convention than the Court itself. Conversely, the principle of subsidiarity is flouted whenever the Court tries by its own resource-bounded cognitive powers to decide on alleged violations of the ECHR, if these could be more reliably tracked by deferring to the judgment of national institutions. In such circumstances, underenforcement of the ECHR on institutional grounds can be justified. At the heart of the subsidiarity argument in favour of underenforcement uses of MoA thus lies a judgment about the comparative institutional abilities of resource-bounded candidate Convention enforcers.

C. Legitimacy

Legitimacy of the ECtHR is the third source of normative reasons that can justify underenforcement of the Convention in an important number of cases. Legitimacy should here be understood in a normative, and indeed moralized, rather than descriptive or sociological way: it purports to articulate the conditions under which various agents involved in a shared practice *ought* to pay heed to the inputs of their partners given the

⁷³ *Ibid.* at 190.

point of the shared practice which, in our case, is to do with human rights protection. Legitimacy concerns pertaining to international protection of human rights, inasmuch as they are to do with the conditions and constraints under which power should be exercised on individuals, point to a wide variety of moral resources. Some of these are to do with normative doctrines of separation of powers⁷⁴ properly transposed to the workings of international human rights regimes⁷⁵: international judicial institutions thus 'promote trustworthiness'⁷⁶ in domestic institutions, since they align the workings of these institutions with effective international oversight, providing an additional checks-and-balances mechanism. This is, in a nutshell, one of the main rationales that can justify regional human rights protection of the kind offered by the ECHR system.

This mechanism, however, is also constrained by legitimacy considerations that are to do with the Court's relationship with States Parties. Trustworthiness is not a one-way street, nor does it involve only two players, to wit, the Court and individuals. Rather, it involves complex normative relationships between *three* kinds of agents: the Court, which exercises interpretive power on States Parties by making the latter abide with its decisions, States Parties to the Convention and individuals on which these States Parties exercise coercion. Under these conditions, there are at least two kinds of normative considerations that can justify a suboptimal implementation of the Convention by the ECtHR through MoA. First, traditional concerns to do with democratic legitimacy⁷⁷: courts, international and domestic alike, sometimes have to balance substantive reasons, akin to the protection of rights, against procedural ones, pertaining to the democratic credentials of a given political decision. In so doing, they may well choose to sustain a political decision that appears wrong under their own lights, because it is a decision arrived at through a suitably democratic procedure. Second, insofar as human rights issues can be cognitively demanding, as they typically are in hard cases, they may well become the object of reasonable disagreement.

⁷⁴ See, generally, D Kyritsis, *Shared Authority: Courts and Legislatures in Legal Theory* (Hart Publishing, 2015).

⁷⁵ See A Føllesdal, 'The Legitimacy of International Human Rights Review: The Case of the European Court of Human Rights' (2009) 40 *Journal of Social Philosophy* 595.

⁷⁶ *Ibid.* at 598.

⁷⁷ See, generally, R Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention of Human Rights' (2015) 25 *European Journal of International Law* 1019.

Where there is reasonable disagreement about the content of Convention rights, the question of legitimacy becomes pressing: under which conditions should the Court exercise its interpretive power over States Parties? Here again, it appears acceptable, at least in some cases, to use MoA in order to drive a wedge between an optimal moral understanding of the content of Convention rights in the abstract and the right way to decide outcomes, i.e. to exercise power on States.

Conclusion

The aim of this chapter was modest: to lend some initial plausibility to an underenforcement reading of MoA. After an attempt at clarification of the concept of underenforcement, I contended that underenforcement uses of MoA could be explained, among other things, by appealing to considerations to do with the resource-bounded interpretive activity of the Court. It is a somewhat peculiar feature of academic legal scholarship that adjudication is usually represented not as the activity of real-life judges marked by specific constraints, but as that of idealised decision-makers in a frictionless world. The chapter claims that this tendency should be firmly resisted, since it tends to obscure underenforcement judicial doctrines, such as MoA. Absent a specification of institutional considerations, MoA appears to be either a relativist doctrine or else an outright abdication of judicial responsibility. Both of these possibilities are justifiably unattractive to friends of Convention rights. However, the suggestion of this chapter is that they are hardly necessary corollaries of MoA. In fact, once we unpack MoA in terms of underenforcement, it becomes possible to explain and justify MoA by appealing to specifically institutional considerations, without presupposing any kind of relativism. The chapter suggests that normative institutional reasons pertaining to subsidiarity, shared responsibility and legitimacy in the enforcement of the Convention could justify, under certain circumstances, underenforcement of the ECHR through MoA. However, much more needs to be said on this front. I submit, then, that, in order to come to a more correct view of MoA, it is high time we started exploring actively the complex normative and explanatory issues posed by institutional considerations and the resource-boundedness of Convention enforcers.