

international organizations – which certainly are but derivative subjects! – according to objective criteria, but make the legal personality of states depend on constitutive acts performed by other subjects? Higgins, quoted by the author as regarding the recognition of Croatia as constitutive (not only) in a legal sense,²¹ has limited her argument to the much narrower context of the right to self-determination, and this is about as far as this reviewer is willing to go, accepting premature recognition as an exceptional (!) instrument to achieve one of the principles of the United Nations.

The third part, which gives an overview of other organizations aiming at regional economic integration by presenting the whole bandwidth of supranational and purely inter-governmental approaches, from Comunidad Andina to MERCOSUR, is clearly more descriptive and encyclopaedic than the first and second parts. This is not the fault of the author, however, who implicitly recognizes that there is no genuine abstract model of regional economic integration tailored after the EU.

Summing up, Wormuth has presented an interesting study, not merely following the path sketched out by Pescatore more than three decades earlier but finding much new material along the way. It will certainly stimulate further discussion on the general points raised and serve as a good starting point for such discussions. For anyone working both in European and international law it is in any case mandatory reading.

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Jukka Viljanen, ***The European Court of Human Rights as a Developer of the General Doctrines of Human Rights Law. A Study of the Limitations Clauses of the European Convention on Human Rights.***

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The possibility of imposing limitations upon the enjoyment of human rights is arguably the hottest current issue in relation to the European Convention on Human Rights. In addition to an extensive literature over the past decade,¹ Dr. Jukka Viljanen has added this study of the limitation clauses of the Convention. His ambition is astonishing, given the breadth of the topic; he seeks to develop a general doctrine, an '*Allgemeine Lehre*' (at 30), of limitation clauses. He argues that in the European context there are 'no human rights free zones' (at 22); and that the European Convention is all-embracing. But he acknowledges the need for rules governing limitations (at 38) and suggests that a 'three-phase test' should be developed for the purpose of 'forming minimum criteria for all Contracting States at every level of government' (at 175). Based on a review of the Strasbourg case-law (at 33) he admits that no requirement for such a test emerges (at 177), since the 'interpretative links between different parts of the limitation clause testing has hardly ever been displayed openly in Strasbourg case-law' (at 336). One could argue that the onus is on

²¹ Higgins, *supra* note 4.

²² E.g. H. C. Yourow, *The Margin of Appreciation Doctrine* (1996), E. Kastanas, *Unité et Diversité* (1996), J. Schokkenbroek, *Toetsing aan de vrijheidsrechten van het europes verdrag tot bescherming van de rechten van de mens* (1996), A. Rupp-Sweenty, *Die Doctrine von der Margin of Appreciation in der Rechtssprechung des Europäischen Gerichtshofs für Menschenrechte* (1999) and Y. Arai-Takahashi, *The Margin of Appreciation and the Principle of Proportionality* (2002).

Viljanen to convincingly establish why a general theory of limitations is needed. After all, the Court has manoeuvred through the European human rights landscape without a general theory for more than 40 years.

The first limb of the three-phase test is the European Court's interpretation and application of the lawfulness test. Viljanen concludes that it is 'a complicated issue with multiple elements' (at 191) and that the Court has been flexible and cautious in its approach to the review of domestic lawfulness (at 194, 199, 202). This is perhaps unsurprising in light of the longstanding application of the principle of subsidiarity in the review of domestic law (see e.g. *Winterwerp v. the Netherlands* (14 October 1979), Series A no. 33 §46). The Court has been more active in limited areas, such as prisoners' correspondence and telephone tapping (at 203–204), and it is not clear why the Court should adopt an entirely new approach.

The second part of the proposed test is the connection between the legitimate aims pursued and the application of whatever measure gives rise to complaints in individual cases. In this regard, Viljanen finds the Court's approach 'quite flexible' (at 217) by reason of its 'cautious self-restraining interpretative policy' (at 220). This is also common knowledge. Viljanen is sceptical towards the Court's assessment of the legitimacy of pursued aims as part of – rather than independent from – the proportionality assessment, and observes that the comprehensive test may not be 'the best way of constructing a doctrine for limitation clause testing' (at 216). Yet, just what the best way of testing the legitimacy of aims might be remains unclear.

The third and most important element is the proportionality requirement, which is

tightly intertwined with the margin of appreciation doctrine. Viljanen is sceptical about the latter doctrine as, in his view, its 'vagueness' (at 31) makes the outcome of cases 'hard to predict' (at 339). The proportionality principle is met with the same criticism and is said to have a 'fairly small deductive value as a general principle' (at 339).

However, the vague nature of the margin of appreciation doctrine and of the principle of proportionality are problems that cannot be remedied. The world is, after all, a complex place. As the author puts it, 'the spectrum of the proportionality test is so broad that it is difficult to fit the cases into the same picture' (at 340). At the same time, the 'margin of appreciation doctrine consists of different kinds of review and classifying them into a certain category can easily disregard the variety of reasons behind the different types of scrutiny' (at 339). Instead of applying a generally applicable 'three phase test' formula to human rights cases, it might be better for human rights law to be addressed in a flexible and case-sensitive manner that takes due account not only of competing interests, but also of the appropriate powers of national and international institutions.

The conclusion seems to be that human rights adjudication will often not be susceptible to the application of elaborate criteria or formulae and will be better pursued through a less conceptually ambitious but ultimately more satisfactory approach which acknowledges the heterogeneity of the cases that arise.

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