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The WTO and public morals: Inspiration from the ECHR

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1. Introduction

In the preceding article, Franck Meijboom and Frans Brom showed that at least some consumer concerns are moral issues, which cannot be dealt with satisfactorily in the market because they have a collective dimension. Compare the issue of abortion. If someone considers abortion to be seriously morally wrong or even to be murder, she will not be satisfied by the assurance that it will only be available to those who want it – it should not be available at all. Similarly, if the public believes that genetic modification or supplying hormones to cattle is seriously wrong, labeling is no good alternative as it still allows genetic modification and supplying hormones. Consequently, if the public wants a ban on those activities, government regulation may be necessary in order to do justice to those consumer concerns.

Such government interference with free trade conflicts, at least *prima facie*, with the WTO and with other international obligations.[2] However, there are a number of exceptions which may provide room for national policies in this regard. In this chapter, I will focus on the interpretation of GATT Article XX, paragraph (a). This Article states:

'Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
(a) necessary to protect public morals ...'

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[1] My research assistant Luigi Corrias has been of great help searching useful materials for this chapter; Hildegard Penn did a great job in improving the quality of my English. I would also like to thank those participating in the Tilburg conference in December 2001 and the other members of the research group for their valuable comments and suggestions.

[2] Cf. the contributions to this volume by Annemarie de Brouwer and Geert van Calster.

The central questions of this article are:

1. How should Article XX, paragraph (a) be interpreted with regard to consumer concerns? In what respects does Article XX allow Member States to restrict free trade with an appeal to consumer concerns?
2. If the answer to question 1 is largely negative: Is a new interpretation possible that offers a better way to do justice to consumer concerns without offering too much leeway for protectionism and thus for jeopardizing the central purpose of the WTO; or should a new Article be framed that is largely but in this respect not completely similar to the current Article XX, paragraph (a)?

The first question is the primary question. It is primarily relevant from the perspective of a Member State, which may want to determine whether it would be legitimate to take (some) consumer concerns as the basis for policies restricting free trade.[3] However, if the answer would prove to be largely negative with regard to the possibilities of the existing Article XX, paragraph (a), we may still consider whether a modified interpretation or a new formulation of the Article could provide a better framework for dealing with those consumer concerns. The Seattle protests have, in my view, demonstrated that there is a real problem here, which should not simply be ignored by the WTO. If, in its current framework, the WTO does not have adequate possibilities to address at least some of such consumer concerns, modification should seriously be considered. If a different interpretation of GATT Article XX, paragraph (a) – or a new paragraph inspired by this paragraph – promises to provide a way to deal with at least some of those consumer concerns, it may be worth considering such a modification.

We should start with the question of how Article XX, paragraph (a) should be interpreted. Here we can build on the research by De Brouwer (2000).[4] With regard to the interpretation of this paragraph, she concludes that there has not

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3 For EU members, the direct interpretation of the GATT is not the only relevant restriction as the EU incorporated much of the GATT. Thus, there may also be a problem of EU law for a Member State that decides unilaterally to restrict free trade on grounds connected to consumer concerns. See also the contribution by Geert van Calster to this volume. I will, however, leave this indirect application of WTO regulations aside, for two reasons. First, internal EU law is not directly relevant to conflicts within the framework of the WTO with regard to consumer concerns. Most likely, such a conflict would consist of a complaint by a non-EU member against a EU member, for example, with regard to restrictions on GM food. And second, a EU member might try to frame a common EU policy with regard to consumer concerns; trade restrictions based on such a EU policy may still give rise to complaints by non-EU members.

4 See also her contribution to this volume.

been any case yet discussing it, nor does the history of the GATT/WTO offer much guidance. So we must look elsewhere to find inspiration for an interpretation of this paragraph. Some of the possible sources of inspiration are briefly discussed by De Brouwer; the aim of my research will be to focus on one source in detail. My strategy to construct the best defensible interpretation on the basis of these resources will be to follow a comparative line of research. Articles such as Article XX GATT may be found in a number of international treaties. If we know how they have been interpreted in those treaties, we may have both a heuristic method of interpretation and perhaps also, depending on the treaty and many other factors, a (relatively weak) authority argument to interpret Article XX in a similar way.

This chapter focuses on one of those treaties, the European Convention on Human Rights. This is the treaty on which the most extensive case law and literature can be found with regard to the issue of the appeal to (public) morals as an exception to/restriction on the central purposes of the treaty. Therefore, it offers a good starting point for a heuristic analysis.

2. The protection of (public) morals in the European Convention

An example of the restriction clauses in the European Convention on Human Rights can be found in Article 10. The freedom of expression guaranteed in this Article,

> '... 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 of public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation of rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

Similar restrictions may be found in most other human rights treaties but sometimes also in treaties with very different aims; Article XX of the GATT is an example. One of the most common grounds for restriction is the protection of (public) morals.[5] It is a phrase that may give rise to many problems of interpretation, especially in the light of the pervasive moral pluralism that characterizes not only global society but, increasingly, also national societies. How must the scope and contents of morals be determined? Is this to be left to the states, or is there some universal standard of morals? Shall we merely respect the local view of what morals are (the next question being whose view:

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5 For reasons of simplicity, I will refer to all these 'formalities, conditions, restrictions, or penalties' as restrictions.

that of the majority?) or do we have a critical standard with which we can judge whether what a local community considers an essential part of their moral fabric is so indeed? And even if we can determine the contents of morals, how is the interest of morals to be balanced against the rights of individuals – which certainly constitute an important moral value too?

Many problems of interpretation and justification arise in connection with this concept of morals. At the national level, debates about whether the moral fabric of society justifies a restriction of individual freedoms have been quite frequently connected to more fundamental theoretical themes, for example, in the debates with regard to the decriminalization of homosexuality in various European countries. For example, the British Wolfenden Report on prostitution and homosexuality, which not only addressed these two concrete issues but also tried to formulate some general principles on the limits of the criminal law in the field of morals, led to the famous Hart-Devlin debate (Cf. Devlin, 1965; 1977 and Hart, 1963; 1977).

At the international level, there has been much less attention for these theoretical issues. In the context of the European Convention, however, there are a number of interesting cases with elaborate discussion of the more theoretical issues as well, also in the concurring and dissenting opinions. In one of these cases, the Dudgeon case, both the majority and the partially dissenting opinion of Judge Walsh explicitly refer to the liberal statements of the Wolfenden Report.[6]

Therefore, a good grasp of these issues may well start with the European Convention. How did the European Court and the European Commission deal with the issues? What concept of morals emerged from their case law and how is it to be determined? What implications are connected with the phenomenon of moral pluralism and the phenomenon of moral change? When is an appeal to morals a justification for an infringement or restriction of fundamental rights? These are the issues I will discuss in this chapter.

In section 3, I will discuss the Articles in the Convention where an appeal to morals may be found and their historic background. In section 4, I will discuss the case law, and try to develop some general lines.[7] Finally, I will try to draw some conclusions that may also be helpful for the interpretation of similar phrases in other treaties.

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6 ECHR 30 January 1981, *Dudgeon*, Series A vol. 45, esp. secs. 17 and 49 (where the statements of the Wolfenden Report on the overall function of the criminal law are twice quoted with approval), partially dissenting opinion of Judge Walsh, secs. 11 and 12.

7 The Convention has, of course, also been interpreted by judicial institutions in the context of EC law and domestic law. I will leave these additional interpretations aside.

3. The provisions and their historic background

Articles 8 through 11 of the Convention have a similar structure. The first paragraph defines the right, and the second paragraph formulates the grounds for restrictions of these rights. For example, Article 8.2 is formulated as follows:

> 'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

The precise grounds for restriction vary in these Articles. For example, the economic well-being of the country is not mentioned in the other Articles. The general structure of the exception also varies (for example, Article 10: The freedom ... shall be subject to such limitations as are prescribed by law ...; Article 11: 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 ...). However, the phrase 'for the protection of health or morals' is identical in all four, except that in Article 9 it is combined with public order: 'for the protection of public order, health or morals'. In Article 2.3 of the Fourth Protocol (liberty of movement) the phrase 'for the protection of health or morals' occurs as well.

Article 6 of the Convention is the only other article in which an appeal to morals is made, though in other words. The publicity of the trial and the judgment may be restricted 'in the interest of morals, public order or national security'. This difference in formulation could be taken to imply a difference in meaning. However, there is no indication for such a difference in meaning. In ordinary language, 'in the interests of' and 'for the protection of' are largely exchangeable. In the *travaux préparatoires*, no explanation of the difference in formulation can be found – there is hardly any explicit discussion of these phrases.[8] Nor does the case law so far offer any indications for a difference in interpretation. We may, therefore, assume that this difference in formulation does not imply a difference in meaning; in this chapter, I will use the most common phrase 'protection of morals'.

How should these phrases be interpreted? We may begin by looking at the *travaux préparatoires*. Morals (or morality) play a role in the Convention in

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[8] There were some proposals for alternative formulations, e.g., Article 6 of Recommendation no. 38 included (in the general exception clause) the phrase 'with the purpose of satisfying the just requirements of public morality, order and security and general welfare.' Similar formulations may be found, e.g., in the collected edition of the '*travaux préparatoires*' I (1985), pp. 168-170, and slightly different at V, p. 186.

three ways. First, there is the idea of a common moral tradition, of common values on which the Convention is based. Many representatives stated that the Convention should be seen as based on a common moral tradition characterized by the values of democracy, the dignity of man, and the rule of law. The Preamble of the draft Convention included the phrase: 'To preserve the moral values and democratic principles which are their common heritage'.[9] Although in the end this reference to the common moral tradition was deleted, it is obvious that the idea of this common moral, legal, and political tradition is essential to understanding the whole project of the Convention. Second, morals play a role in the various exception clauses that we mentioned above. And third, the common moral tradition plays a role again when the phrase 'necessary in a democratic society' is discussed.

If we take a closer look at the debates, we may find that there are a number of references to the common moral values or tradition behind the Convention.[10] There are also some references to the fact that we should understand the idea of 'necessary in a democratic society' in light of that same tradition and values.[11] However, there is hardly any substantial reference to the idea behind the exclusionary clause with respect to morals.[12] An interesting perspective on the issue is presented by Teitgen where he argues that the judges of a Court, in order to be able to appraise the needs of morality, order, and security in a democratic society, must participate in such a democratic society.[13] He even mentions the phrase 'democratic morality'. This suggests that, for the interpretation of the Convention, the concept of morality as a ground for restriction cannot be separated from the context of a democratic society.

We cannot get much conceptual clarification either from references in the *travaux préparatoires* to examples that might fall under 'morals'. The only specific examples mentioned are measures to combat vagrancy and

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9 *Travaux préparatoires* I, p. 296.

10 E.g., Mollet (France) (*Travaux préparatoires* I, p. 16); Kraft (Denmark) (I, p. 64); Dominedo (Italy) (I, p. 70), Teitgen (rapporteur, France) (I, p. 292; II, p. 32; V, p. 288); MacBride (President of the Committee of Ministers) (V, p. 214). Various representatives not only refer to this common tradition, but also to the *ius gentium* or the *lex naturalis*. Cf. Dominedo and Teitgen; cf. also Schmall (Netherlands) (II, p. 22); Boggiano-Pico (Italy) (II, p. 100).

11 E.g., the Committee on Legal and Administrative Questions (*Travaux préparatoires* V, p. 12; VII, p. 152).

12 Teitgen (France) (*Travaux préparatoires* I, p. 168-170; I p. 278) is one of the exceptions, but only justifies it in very general terms with a reference to 'the general well-being.' Even more vague are De la Vallée-Poussin (Belgium) (II, p. 64) and De Valera (Ireland) (II, p. 100).

13 Teitgen (France) (*Travaux préparatoires* II, p. 176), in the context of draft Article 6.

drunkenness,[14] but these are justified by the requirements of public morality and order, and it seems that it is primarily the public order that is at stake here.

We may conclude that from the *travaux préparatoires* little guidance can be found on how to interpret the exception clauses, as they are virtually silent. The reason is probably that the idea of such a restriction was so common and uncontroversial that it did not seem necessary to discuss it extensively. It was a common idea in most of the European legal systems that the freedom of citizens could be restricted in the interest of morals. Therefore, to understand these clauses we must study the role of 'the interest of morals' in European domestic law.[15]

In most Civil Law countries, the protection of morals was (at least at the time the Convention was framed) a well-accepted ground for regulating and prohibiting specific types of activities.[16] For example, both in the Napoleonic *Code pénal* (1810) and in the Dutch *Wetboek van Strafrecht* (1886) crimes and misdemeanours against morals were separate titles or sections. In the French *Code pénal*, Section IV, *Attentats aux moeurs* (Articles 330-340), included crimes such as public indecency (including homosexual acts), indecent acts with minors, rape, prostitution, brothel keeping, adultery, and concubinage. All these 'crimes' are connected with sexuality. In the Dutch Penal Code, similar sexual crimes were included, but a broader view of morals was taken. In Book II, Title XIV (Crimes against public morals),[17] Articles 239-254 included, for example, the sale of alcohol to children, surrendering children to others for begging or for hazardous work, and physical abuse and neglect of animals. Book III, Title VI (Lesser offenses related to public morals) contained prohibitions of indecent speech, songs and publications, public drunkenness, a number of very specific forms of maltreatment of animals, and gambling.

In other Civil Law countries, similar titles or sections existed in criminal codes, with similar contents, but sometimes including other issues as well. In Belgium, for example, abortion, the abandonment of infants, and child

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[14] *Travaux préparatoires* III, p. 266.

[15] It was also a common idea in international treaties and declarations. According to Pettiti, Decaux, and Imbert (1995), p. 324, the restriction clauses of the European Convention Articles 8 through 10 were inspired by Article 29, par. 2, UN Declaration on Human Rights.

[16] During the past two hundred years, the various codes and statutes have undergone many changes. Especially in the last fifty years, but earlier as well, various prohibitions mentioned in this section have been abolished. Examples are adultery and homosexuality. In my presentation, I will ignore these variations as I am interested here in the types of activities that were considered to belong to the field of morals around 1950 when the Convention was framed.

[17] The standard English translation of the Dutch Penal Code translates *zeden* (the translation of the French *moeurs*) with 'public morals', not with 'morals'.

abduction are also included in the Belgian Penal code, Title VII (Crimes and misdemeanours against the order of the family and against public morals).[18]

Of course, the contents of these sections were not regarded as comprising the complete field of morals, but merely part thereof. Various other titles or sections could also be justified with an appeal to basic moral values, whether they dealt with murder, theft, abortion, or bigamy.[19]

As to the scope of morals, we may conclude from a brief overview of the above provisions that at least issues dealing with sexuality, alcohol and drugs, gambling, and the treatment of animals were regarded as moral issues. With regard to the contents of the substantive norms, there was more variation. Issues such as gambling, homosexuality, adultery, prostitution, abuse of alcohol and drugs, and animal maltreatment were prohibited in some countries though not in all, and if they were regulated, there was substantive variation in the way they were dealt with.

The idea may not only be found in criminal codes, but also in private law. For example, in Article 3: 40 of the new Dutch Civil Code (Article 1371 in conjunction with Article 1373 of the former Civil Code, based on Article 1133 of the French *Code Napoléon*), a contract is declared void if it is contrary to 'de goede zeden'. However, in the case law this phrase has been given much broader scope than it has in criminal law. According to Haazen (2001, p. 577), it is nothing more – and nothing less – than a reference to unwritten law in the various spheres of society.[20] This is an extremely broad interpretation of the concept of morals.

We may conclude that the appeal to morals as a ground for criminal prohibitions (and for other restrictions of personal freedom) was a broadly accepted idea in the European legal traditions at the time the Convention was

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[18] Titel VII, Misdaden en wanbedrijven tegen de orde der familie en tegen de openbare zedelijkheid.' An interesting detail is that the Dutch Code translates *moeurs* from the Napoleonic Code pénal as 'zedelijkheid', while the Belgian Code translates it as '*openbare* zedelijkheid'. This illustrates how 'public morals' and 'morals' may be taken to be identical in meaning.

[19] In the common law tradition, the idea that the law may protect morals is more accepted and less restrictively interpreted because in common law thinking the law is more closely connected to custom, to the immanent wisdom of the community. Cf. Cotterrell (1989), pp. 21-51; see also Simester and Sullivan (2000), pp. 8-9, referring to the case *Shaw v. DPP* (1962) AC 220, which introduced the common law offence of a conspiracy to corrupt public morals. They state (p. 27, n. 9) that since 1962 the House of Lords has disavowed further extensions of the common law to enforce morality.

[20] Haazen (2001), pp. 576-577, makes the interesting observation that in as far as the case law has connected 'goede zeden' with sexuality, e.g., with regard to prostitution, it usually was not in support of traditional sexual morality. This observation suggests that in private law this concept has evolved indeed to something beyond what is usually seen as the field of morals.

drafted. Its core was undoubtedly the field of sexuality, but issues such as alcohol abuse, gambling, and animal maltreatment were also part thereof, at least in the various criminal codes. Although there was a common core in the scope of morals, there was a wide variation with respect to the substantive standards. In the field of private law, the concept was also known but was given a much wider meaning.

For the interpretation of the European Convention, we may infer that at least the issues regulated in the criminal codes should be considered to belong to the minimal core of the scope of morals. This is only a minimal core, as there may be many issues that also belong to the field of morals but are not regulated under those specific titles in the criminal codes. So, beyond this core, other issues may also be part of morals. Nevertheless, this core is a good starting point for the interpretation of the term of morals in the various provisions of the Convention.

A much broader scope of the concept, more or less identical to unwritten law, may be found in private law. However, this interpretation of morals is very broad. If we were to take it as a guideline for the interpretation of the Convention, it would hardly be a distinctive criterion anymore. It may be justified, though, to develop such a broad interpretation for other reasons. (As will be discussed later, the Court has, in fact taken such a very broad interpretation.) But it seems that an appeal to the authoritative meaning of the term in domestic private law is not a good reason for such a broad interpretation.

4. Case law

The analysis of the origin of the references to morals in the European Convention has so far brought little conceptual clarity. The study of the use of the terms in the Napoleonic *Code pénal* and the legal traditions inspired by it, at least offered us an idea of what might be the scope of morals, but little more. So it is now time to turn to the case law of the European Court and the Commission to see whether there is more to be found there.

I will structure the discussion of the case law by searching for the answer to three questions. First, what are the concept and scope of morals? Second, how are the interests of morals balanced against the interests of the various rights, and what role does the margin of appreciation play in this balancing process? And third, how does the Court deal with moral pluralism and moral change?

4.1 The concept of morals

The European Court so far has not given a precise definition or a demarcation of the concept of morals, let alone presented a substantive conception of morals in the context of these clauses – nor has the Commission. Usually, when Member States try to justify a restriction on a right, they appeal to a number of grounds. In such cases, the Court often leaves open whether all these grounds are at issue (Cf. Harris, O'Boyle, and Warbrick, 1995 at p. 290). It only discusses one ground that clearly plays a role, thus leaving it open whether another ground might also be invoked.[21] As a result, there is no clear demarcation of morals against other grounds, such as public order or the protection of the rights and freedoms of others. There is not merely an accidental overlap here. The other grounds may, at least sometimes, be subsumed under the protection of morals, thus giving this phrase a very broad meaning.[22] So a clear demarcation of the scope of morals is lacking.[23]

The Court did not choose an alternative either, to develop a European substantive view of morals. In the *Handyside* case it argued that:

'... it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them.'[24]

These sentences have been repeatedly quoted and reaffirmed in later judgments, such as *Dudgeon*, *Müller*, and *Open Door*.[25] It should be noted, however, that the phrase 'in principle' does not completely exclude that the

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[21] E.g., in the *Open Door* case (ECHR 29 October 1992, A 246-A) the Irish state cited two aims, the protection of morals and the protection of the rights of others, but the Court collapsed it into the single aim of protection of morals and left it undecided whether the rights of the unborn were also included in the protection of the rights of others.

[22] In *Dudgeon*, sec. 47, the Court argued that the protection of others amounts to one aspect of the protection of morals.

[23] In *Norris* (ECHR 26 October 1988, Series A vol. 142, sec. 44) the Court stated that the concept of morals in Articles 8 through 10 has the same meaning. Cf. Pettiti, Decaux ,and Imbert (1995), p. 336.

[24] *Handyside* (ECHR 12 December 1976, Series A vol. 24), sec. 48.

[25] Cf. *Dudgeon*, sec. 52; *Müller* (1988, Series A vol. 133), secs. 33-36; *Open Door*, sec. 68, quoting the same phrase from *Handyside*, and arguing that the power of appreciation is not unlimited.

Court might develop its own view of the requirements of morals, even if it has not done so – so far.

This quote from *Handyside* is a central formulation of the margin of appreciation doctrine, which will be discussed in the next subsection. It is usually primarily applied to the balancing of the various interests but it is clear from this text that it need not be restricted to that. It also applies to the interpretation of vague terms such as the protection of morals (Van Dijk, Van Hoof, and Heringa, 1998 at p. 85). As the margin of appreciation is not unlimited, the Court might thus also develop at least a marginal test of whether a certain interest can indeed be seen as an interest of morals.

However, so far, the Court did not take this track (Cf. Pettiti, Decaux and Imbert, 1995 at p. 341). For example, in the various cases regarding homosexuality, the Court never took the position that homosexuality is not morally wrong, but simply accepted that according to the Member State it was immoral.[26] Neither did it argue that abortion is morally wrong; it merely accepted that according to the majority of the Irish population it was morally wrong.[27] It thus refrained from trying to formulate even the most minimal common European conception of morals. In the case law so far, there is no case where the Court explicitly rejected the claim of a Member State that a restriction was based on the protection of morals. Harris, O'Boyle, and Wabrick (1995, p. 344) argue that 'States have always been able to convince the Court that they were acting for a proper purpose, even where this has been disputed by the applicant'. It seems, therefore, that we may simply infer the rule that whenever a state claims that something falls in the range of morals, it does. This approach is not uncontroversial. For example, Van Dijk and Van Hoof (1984) have initially criticized the Court's decision in the *Dudgeon* case for not constructing such a European conception.[28]

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[26] For example, in *Dudgeon*, sec. 46, the Court described 'morals' as 'the moral standards obtaining in Northern Ireland,' thus making it clear that the term 'morals' refers to the social or positive morality of the population in (a part of) the Member State. Similarly, in *Open Door*, sec. 63, it referred to the right to life of the unborn as '... based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion as expressed in the 1983 referendum.' In this minimal sense, it indeed provided some more specific conception of 'morals,' as the moral beliefs obtaining in the territory of the Member State or a specific part thereof.

[27] *Open Door*, sec. 63.

[28] In the first English edition of their book on the European Convention, Van Dijk and Van Hoof (1984, pp. 435-436) state: 'That this term is interpreted in each individual case by reference to the national conceptions on this point is irreconcilable with an international system like the Convention, certainly in the long run.' In the second English edition (1998, with Heringa as third author), this criticism is no longer included.

The approach of the Court has been a different one. Rather than directly confronting the issue of what is a justifiable appeal to morals, it has focused on balancing the interests of morals against the interests served with the right. As Van Dijk, Van Hoof, and Heringa (1998, pp. 771-772) state in a more general way with regard to all the grounds for restriction:

'In fact, the examination of the question of whether the protection of a justifiable interest is at issue generally coincides with the examination as to the necessity. As a result, the interests listed as grounds for restrictions have received only scant independent attention in the case law. They are defined in relation to the evaluation of what may be considered necessary in a democratic society.'

Probably this is in general the most workable approach. Yet, it might be questioned whether sometimes a more straightforward criticism of the appeal to morals by a state would not have been preferable. In the early stage of the development of the European Convention, this may have been a wise strategy. Officially denying that something is a claim of morals, while someone else sincerely believes that it is, may be unnecessarily confronting, and thence not a strategy that builds support for the European Convention and its institutions (Cf. Van der Burg and Brom, 1999).

Nevertheless, it may be argued that this will not do in the long run. Building a European legal common rights tradition without any minimal standards or marginal criticism of what a defensible concept of morals is, may be too minimal a view (Cf. Van Dijk, Van Hoof, and Heringa, 1998 at pp. 435-436). The Court need not completely exclude a critical stance toward claims by Member States that something is a requirement of morals. Even if one would not go so far as to make one common standard which encompasses all morals – which might, in the light of pervasive moral pluralism, indeed have been a dead end – the Court could at least formulate some minimum criteria. Perhaps it is impossible for the Court to formulate positively what morals require; it may be less demanding and controversial to state that something at least is not a requirement of morals. For example, if some Member State were to defend that prohibition of interracial marriages is a requirement of morals, we should hope that the Court would clearly state that it is not, rather than saying that such a prohibition is not necessary in a democratic society.

Moreover, we may find support for a more activist strategy in the concept of autonomous meaning (Van Dijk, Van Hoof, and Heringa, 1998 at p. 77).

'[S]ome of the terms used in the treaty are considered to have a special, autonomous meaning, which is independent from, and does not necessarily correspond to, the meaning which identical or similar terms may have in the domestic law of the Contracting States.'

So far, it seems that the Court has not applied this idea to the term 'morals'. But perhaps in the future it should at least try to do so in a minimal way.

Anyhow, so far the Court has not developed a substantive conception, nor a clear demarcation or definition of the concept of morals. A third alternative could be to try to determine the scope of morals. One way would be to simply look at those cases where this clause was invoked by the Member States and the appeal was accepted by the Court (including those cases where, in the end, the Court decided that the appeal did not justify the restriction of the right).

The most obvious field is that of human sexuality. In cases regarding prohibitions or age restrictions of homosexuality regarding pornography or sexual education, the appeal to morals was accepted. Some of the cases on transsexuals also fall in this field, especially where the right to marry was at issue.[29] Publications of an obscene nature are uncontroversial too.[30] A second field that is an uncontroversial part of morals is that of abortion.[31] The image of the scope that emerges from this is largely the same as the one we found after our analysis of the domestic laws of the Member States.

The conclusion may be that the Court has so far not come up with a helpful demarcation of the scope of morals. From the case law, we may identify a number of issues that fall within the scope of morals, but that need not exclude other issues to be relevant as well. For example, there have (as far as I know) been no cases regarding the treatment of animals. This may not come as a surprise, as there will be few cases where the protection of animals could justify a restriction on one of the freedoms at issue. Yet, if such a case were to arise, we might safely predict that it would also be accepted as falling within the scope of morals.

4.2 Balancing and the margin of appreciation

We saw that, when deciding whether an appeal to morals justifies a restriction of a right, the Court's central test is that of balancing. Is the infringement of the right really necessary in a democratic society for this purpose? Are the means proportionate to the purpose?

The basic idea here is that any interpretation must be consistent '... with the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society' (Van Dijk, Van Hoof, and Heringa, 1998 at p. 73). The idea of interpretation in light of this basic purpose has implications for the way in which the rights and freedoms are to be interpreted (extensively) and the way in which the exceptions are to be

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[29] Cf. also *Marckx* (ECHR 13 June 1979, Series A, vol. 31); the family's full development is related to morals and public order.

[30] Cf. *Handyside.*

[31] Cf. *Open Doors.*

interpreted (narrowly).[32] The latter may imply that the ground for restriction itself should be construed narrowly, but also that a State's judgment that this ground justifies a restriction of the right or freedom that is necessary in a democratic society is subject to strict scrutiny. From the preceding subsection it became clear that when the protection of morals is the ground for restrictions the Court has adopted a very broad interpretation. Therefore, the only way to make a critical assessment of the appeal is to focus on the balancing process.

Balancing is one of the vaguest metaphors in legal practice, as it is unclear how the weights are determined and the balance is to be struck. The Court gives at least some guidance with the doctrine of the margin of appreciation. There are two fundamental reasons for this doctrine (Van Dijk, Van Hoof, and Heringa, 1998 at p. 92). First, the principle of subsidiarity holds that the task of securing the rights and liberties is, in the first place, left to the States and that the European institutions provide supervision of that task, which must take into account some margin of discretion for the States.[33] Second, according to the Court, the proper balance can best be struck by those who are best acquainted with the local circumstances, the States. The States should therefore have a certain margin of appreciation in balancing the rights and the interests that may justify restricting those rights.

This margin varies. One of the factors is how objectively the interest can be determined. With regard to, for example, public order, the margin is relatively small, as the Court developed a substantive, objective doctrine of what public order is and when it justifies certain measures. Morals are on the other extreme of the continuum; the States are allowed a wide margin of appreciation here, both with respect to the contents of morals and with respect to the justification of the restrictions. But even then the margin is not unlimited.[34] Harris, O'Boyle, and Warbrick (1995) state, referring to *Müller*:

> 'The Court held that the idea of 'morals' might be determined by the opinions within even a narrow locality, let alone from state to state. However, it has not gone so far as accepting states' claims that questions of morals are so subjective that the Court should simply defer to their conclusions.'[35]

According to Van Dijk, Van Hoof, and Heringa (1998, pp. 87ff), there are a number of factors that influence the variable scope of the margin of appreciation:

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[32] Cf. *Klass* (ECHR 6 September 1978, Series A, no. 28), sec. 42.
[33] *Handyside*. Cf. Van Dijk, Van Hoof, and Heringa (1998), pp. 83-84.
[34] Cf. *Open Door*; Van Dijk, Van Hoof, and Heringa (1998), p. 91.
[35] Cf. also *Open Door*, sec. 68. Cf. Pettite, Decaux, and Imbert (1995), p. 341.

1. The existence of a European common ground between the law and practice of the States. If there is such a common ground, the margin is narrower. Maintaining the authority of the judiciary is a much more objective notion than the protection of morals. This leaves a wide margin of appreciation for the protection of morals.
2. The nature of the right or of the activities of the individual. If the right or activity is very important for a democratic society (for example, the freedom of speech) or if the activity is very important for the well-being of the individual (for example, homosexual activities), the margin of appreciation will be narrower.
3. The nature of the aim pursued by the contested measure and the circumstances or the context of that measure. For example, the protection of national security and the protection of morals offer very wide margins of appreciation.
4. Does the case concern general policies (social, economic, environmental, urban and rural planning, et cetera) of the State? If so, the legislature should enjoy a wide margin of appreciation.

4.3 Moral pluralism and moral change

Europe may be pluralistic with respect to its legal traditions, but it is even more pluralistic with respect to morality. The phenomenon of the pervasive pluralism of modern societies is one of the central themes of modern political philosophy, and rightly so. The European Court did not close its eyes to this phenomenon; it explicitly recognized it in its case law.

The Court did so in two ways. First, by accepting virtually every appeal to morals, without developing its own substantive view or formal definition. And second, by leaving a wide margin of appreciation to the states in deciding whether the interests of morals weigh so heavily that they justify the infringement of a right.

This does not imply that it has fully accepted pervasive pluralism and decided in favor of a full moral neutrality of the Court. On the contrary, the protection of human rights itself is also based on a common moral European tradition (see Article 1 Statute). The evolving and growing protection offered by the Court may be seen as an attempt to formulate this common moral consensus on the meaning of human rights and democracy. It has only fully accepted this fact of moral pluralism with regard to the exception clauses. Moreover, according to Van Dijk, Van Hoof, and Heringa (1998, p. 91), it seems

at least marginally to have taken a stance on how far moral pluralism is to be accepted.[36]

Even if the acceptance of moral pluralism with regard to the interpretation of the exception clauses is not unlimited, it is very broad. The famous quote from *Handyside* leaves little doubt: 'The view taken by their respective laws of the requirements of morals varies from time to time and from place to place.'[37] The Court has even accepted moral pluralism within a country.[38]

Similarly, the Court has also accepted that moral views change, 'especially in our era which is characterized by a rapid and far-reaching evolution of opinions on the subject'.[39] Its view on change is highly interesting. The Court explicitly declared that 'the Convention is a living instrument which ... must be interpreted in the light of present-day conditions'.[40] This implies, for example, that some activity that around 1950 was considered so immoral that its prohibition was necessary in a democratic society, may some years later no longer be subject to justified prohibition. The prohibition of homosexuality is an example of such a shift, as is explicitly expressed in the *Dudgeon* case:[41]

'As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behavior to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the Member States.'[42]

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36 The problem is, it seems, that although it has so far never ruled in concrete cases that a specific restriction by a Member State was not to be accepted as based on the protection of morals at all, it has also stated that it is only 'in principle' that the determination of what morals is is best done by the local or national authorities.

37 *Handyside*, sec. 48.

38 Cf. *Handyside* (book tolerated in other parts of the UK); *Dudgeon*, sec. 46 (different moral views with regard to homosexuality within the UK may give rise to differences in legislation); *Otto-Preminger-Institut* (ECHR 20 September 1994, series A, vol. 295-A), sec. 49, adopts a similar principle with regard to the protection both of religious feelings and of morals.

39 *Handyside*, sec. 48.

40 *Tyrer* (ECHR 25 April 1978, series A, vol. 26), sec. 31, repeated in, e.g., *Marckx*. Cf. Van Dijk, Van Hoof, and Heringa (1998), p. 78.

41 Although the early case in which a prohibition of homosexuality was accepted was a Commission case (Appl. 104/55, *X v. Federal Republic of Germany*, Yearbook I (1955-1957), p. 228 (229)), and the later cases, starting from *Dudgeon*, were decided by the Court, it seems no unjustified speculation that in the 1950s the Court would also have accepted the prohibition.

42 Similar arguments may be found in other cases, e.g., with regard to the distinction between legitimate and illegitimate children, in *Marckx*, sec. 41.

In some of its judgments, the Court held that social development in Europe is not yet so far that a consensus has emerged, which implies that in the future such a consensus might emerge. For example, in the transsexualism case of *Cossey*, the Court stated that there had been developments in recent years, both in the law of some of the Member States and at the European level in the European Parliament and the Parliamentary Assembly of the Council of Europe, but that there still was diversity of practice. Therefore, there was still little common ground and, consequently, a wide margin of appreciation. However, it also explicitly stated:

'Since the Convention always has to be interpreted and applied in the light of current circumstances, it is important that the need for appropriate legal measures in this area should be kept under review.'[43]

This idea of evolutive interpretation takes the idea of social and legal evolution highly serious, much more than most courts in national jurisdictions do. However, from the Court's case law it is still unclear where the locus of the evolution precisely is. Is it an evolution in the law of the Member States, is it an evolution in public policy and official practice (for example, the *de facto* nonenforcement of certain criminal prohibitions), or is it the evolution in morality itself, in the moral opinions among the population? It certainly is the first, but the other interpretations also seem to be in line with the vague formulations in the various cases where the phenomenon of evolution is discussed.

We should be careful here. Because of its refusal to develop a substantive view of morals, the Court cannot directly base its evolving interpretation of the law on a change in social morals. It primarily argues that the views of whether morals really justify an intervention have changed. In this way, it focuses on social and moral developments, but does not confront them directly – at most indirectly. It is likely, nevertheless, that the Court acknowledges the importance of moral change indirectly, because the appeal to morals obviously becomes a less convincing basis for restrictions if the moral views or the intensity of those views change.

4.4 Tentative conclusions on the European Convention

This brief analysis of the European Convention makes it possible to discern some general lines. With regard to the scope of the concept of morals, the

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[43] *Cossey*, sec. 42. In the recent *Goodwin*-case (ECHR 11 July 2002), Sec. 93, the Court concluded that, in the light of recent developments, the matter no longer falls within the margin of appreciation.

European Convention has been interpreted very broadly. There is clearly an uncontroversial core. According to the case law and history, issues connected with sexuality, with alcohol and drugs, with gambling, and with religion, fall under this heading. This is the minimal core of the concept.[44]

How broad exactly the concept of morals should be interpreted beyond this core, is unclear. In the European legal traditions, criminal prohibitions with regard to the already mentioned common core may often be found, but in some countries these prohibitions have (had) a broader scope. For example, issues with regard to the treatment of animals were also considered part of the protection of morals in some countries at the time the European Convention was framed. In various European Member States, private law also referred to morals, for example, holding that a contract is void when it conflicts with morals, but usually it takes a very broad view of the concept of morals. It seems even defensible that, in Dutch law, the concept has been interpreted so widely that almost everything that is considered a norm of unwritten law may be subsumed under it. Restricting the scope of morals in the European Convention to what is part of the criminal prohibitions in the interests of morals would clearly be too restrictive; expanding it to the meaning it has in private law would make it too broad.

The European Court has taken a very ecumenical view and in fact seems to accept that everything has to do with morals when a Member State argues so. We may, nevertheless, assume that the Court would be willing to apply some form of marginal test if the appeal to morals in a concrete case were very far-fetched, even if the case law so far does not provide any criteria. Probably cases in which an appeal to morals is purely window-dressing are not very likely to be brought to the Court, and therefore have so far not resulted in case law.

A note of warning is in place here. The broad way the concept is interpreted by the Court should not be seen as an authoritative statement of the ordinary meaning of the concept within the European traditions, as this broad interpretation of the concept can only be understood in combination with the method for balancing the interests of morals against the interests served by the specific provisions of the Convention.[45] As the full emphasis with the

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[44] Not surprisingly, these themes are similar to the ones that Charnovitz (1998), pp. 729-730, discerns with respect to the WTO, although the WTO list is longer; it 'would seemingly, at least, include slavery, weapons, narcotics, liquor, pornography, religion, compulsory labor, and animal welfare'. Charnovitz adds that this list is certainly not exclusive; he also mentions humanitarian goals such as human rights and democracy (p. 717). De Brouwer (2000), p. 43, referring to McGovern, adds the degradation of the environment by industrial processes.

[45] Cf. Van Dijk, Van Hoof, and Heringa (1998), pp. 771-772: '[T]he interests listed as grounds for restrictions have received only scant independent attention in the case-law. They are defined in relation to the evaluation of what may be considered necessary in a democratic society.'

evaluation of whether a certain restriction is acceptable, falls on the balancing test, the Court probably did not feel the need to take a more explicit stance on the concept of morals as such.

There are two other interesting observations that can be made with regard to the European Convention concept of morals. First, unanimity is not considered necessary with regard to morals, not even within the territory of the State, nor are morals regarded as unchangeable. So it seems that a State may appeal to the protection of morals if there is only a small majority or even a minority that holds the moral beliefs. And, certainly, it is not a requirement that all other states accept this view of morals. The Court deliberately refrained from developing a substantive concept of morals based on a common European tradition.

Second, the Court explicitly accepted that morals can change. Morals may vary from time to time and from place to place. So far, the case law only explicitly recognized changes that led to a broader interpretation of the rights protected by the Convention. It is likely that the Court would much less easily (if at all) accept a change of morals that would lead to a more restrictive interpretation of the fundamental rights protected by the Convention. Thus, it remains an open question whether the Court would accept a claim, for example, of a Member State that claims that the moral norms with regard to pornography have become stricter, and that, as a consequence, restrictions on the freedom of expression are now deemed necessary that twenty years ago were not deemed necessary. Similarly, it should be regarded as an open question whether recent changes in moral views regarding the humane treatment of animals might be accepted as the ground for more restrictive interpretations of, for example, the right to privacy or the freedom of movement.

5. Implications for Article XX GATT

What are we to learn from this analysis for the interpretation of the GATT? Of course, we should begin by carefully studying the differences. An analysis of Articles 8 through 11 of the European Convention cannot simply be translated into an analysis of GATT Article XX, paragraph (a). There are a number of relevant differences that should be taken into account, such as:

- The GATT mentions 'public morals', the European Convention 'morals'. Does this really mean the same or could there be differences with regard to 'private immorality'?[46]
- The GATT requires that a measure is 'necessary', the European Convention that it is 'necessary in a democratic society', which seems to include a reference to a substantive criterion which the GATT text lacks. What does this imply for the method of balancing?[47]
- The European Convention focuses on the protection of human rights in the European democratic tradition; the GATT on the promotion of free trade on a global scale. What does this imply both for the possibilities to develop a common concept of morals and for the method of balancing?
- The European Convention provides for a judicial system for enforcement; the WTO Panels have a different standing and role.
- The institutional and historical context of these Articles differs in many other ways, for example, the wider framework of the WTO versus that of the Council of Europe. What do these contextual differences imply for the interpretation of the Articles?
- A central issue in the context of the WTO is whether restrictions should be only inwardly directed or also outwardly directed. This issue is much less central in the context of the European Convention, where the conflict is usually between a Member State and one of its own citizens.
- The WTO focuses on conflicts between states, the European Convention mainly on conflicts between citizens and their states.

Despite all these differences, it seems that the analysis of the European Convention can be fruitful for understanding GATT Article XX. I think that it is important, however, to distinguish between the implications for the interpretation of the concept of 'public morals', and the implications for the interpretation of Article XX as a whole, especially with regard to the balancing between the interests of morals and the interests of free trade.

5.1 The concept of morals

Does the analysis with regard to the interpretation of the term 'morals' in the context of the European Convention provide us with inspiration for the

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[46] The analysis of the history of the Convention and the European traditions, e.g., the comparison between the Dutch and Belgian Penal Codes, suggests that there is no difference, but this suggestion should be explored in greater detail before definitive conclusions can be drawn.

[47] It can be argued, however, that the chapeau of Article XX also provides criteria of balancing.

interpretation of the term 'public morals' in GATT Article XX, paragraph (a)? Of course, it is easy to submit that the European Convention has no legal authority for the WTO at all, and this would be completely correct from a legal point of view. However, it is not that simple. If words have no clear meaning, they should be interpreted in light of the ordinary meaning.[48] This ordinary meaning can partly be determined by referring to the meaning it received from authoritative bodies in the framework of other international treaties. Additional sources for determining the meaning may be the way these terms were used in the domestic laws of the Member States at the time of the framing of the treaty – but sometimes also the development the interpretation of the terms has undergone since the framing.[49] It is obvious that if one of the best known and influential European treaties uses the term in a certain way and if this Convention should be partly interpreted in light of the domestic traditions (especially if constituting a common European tradition), then the meaning the term has in the context of both this Convention and this general tradition may be used as authoritative sources for the interpretation of the WTO. They are certainly not absolutely authoritative, if only because it is only one of the legal traditions represented in the WTO, yet it could at least have some authority, especially when in the context of the WTO framework itself no clear interpretations can be constructed.[50]

The least provocative suggestion would be that we may infer from the European Convention that at least the minimal core of morals as developed in the European case law should also be considered to be part of the minimal core of public morals in the GATT. This leaves open the question whether issues with regard to our relationship to animals and to nature should also be implied. As at least in some criminal codes the concept of morals has traditionally included the treatment of animals, it may be argued that these issues should be included in the minimal core as well. In light of the growing concerns in recent decades with regard to animals and nature, which go beyond simple welfare, there seems to be no reason to restrict these moral issues to animal welfare only. Moreover, although most of the concerns are not connected to beliefs that can be called religious in the more traditional sense (although some do), they are usually embedded in broader views of the good life, which function in ways similar to religious views. There seems to be no reason to exclude such views from the concept of morals, merely because they are not connected to what is usually considered to be a religious view. This interpretation of the European

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48 Article 31(1) of the Vienna Convention of the Law of Treaties; see De Brouwer (2000), pp. 35 f., for a discussion of this phrase.

49 Although these sources will not always be fully authoritative; the text of the treaty will often be considered to have autonomous meaning.

50 On the problem of additional sources for interpretation, see De Brouwer (2000); Charnovitz (1998).

Convention is in line with that of the GATT. According to De Brouwer (2000), issues of animal welfare and religious issues should be considered to be included in public morals in the WTO.

A further suggestion could be derived from the way the European Court deals with plurality in time and in space. It does not require that the views a particular Member State submits as morals are shared by other Member States. It may not even be required that the views are shared by the majority of the population. Of course, the fact that the Member State's views of morals are not widely shared may sometimes be a reason to argue that the restriction is probably not strictly necessary. But for a successful argument that a restriction is justified by the interests of public morals, it need not be shown that this view of morals is widely shared within the Member State itself, let alone in the world community. Nor need it be shown that the moral beliefs have always been shared; they may be relatively new.

We need to evaluate whether such arguments would hold in the context of the WTO as well. Yet the fact that the European Court developed this line of interpretation may be a good reason for considering it for the WTO as well, because in that organization it will be even more difficult to develop a common denominator.

The minimal core of morals in the context of the European Convention should thus be considered part of the concept of morals in the context of the WTO as well, and probably this minimal core should be interpreted to include issues regarding our relationship with animals and with nature. With regard to the extremely broad interpretation of the concept that the European Court gave, however, it is doubtful whether it is authoritative as well. The reason is that we should regard this not so much as an authoritative statement of the meaning of morals, but rather as part of a method of interpreting the Convention as a whole. Nevertheless, there may be good grounds to follow the European example, despite arguments that were made to the contrary. Just like in the debate on the European Convention (Van Dijk and Van Hoof, 1984 at pp. 435-436), the suggestion has been made that WTO panels should set limits to what is considered to be public morals and leave only a small margin for individual governments to define public morals.[51] The European Court did not follow this suggestion (in my view, largely on good grounds) and did not only refrain from giving a substantive conception but also from giving a wide margin of appreciation to the Member States whether the protection of morals was considered to be necessary. It is worth exploring whether this line would also be possible in the context of the WTO, where pluralism with regard to morals is even more pervasive than in the context of the European Convention.

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[51] De Brouwer (2000), p. 43, referring to a suggestion by Feddersen.

As a conclusion, I would like to submit a number of tentative hypotheses with regard to the interpretation of GATT Article XX, paragraph (a), based on the interpretation of similar paragraphs in the context of the European Convention:

1. Moral concerns connected with our relationship to animals could certainly fall within the scope of public morals; moral concerns with regard to, for example, GM food and biotechnological products could probably be brought within this scope as well if they are connected with general views of life – religious or nonreligious.
2. Moral concerns connected with other issues do not belong to the clear core of the term 'public morals'. There are nevertheless good arguments to hold that if a government takes such concerns seriously, they could also be a ground for an appeal to this paragraph.
3. For a successful appeal to the public morals exception (that is, merely that it falls under the meaning of the term, not that it is justified), it is not necessary that the Member State shows that these concerns are widely shared among the population, although the wider the support for these concerns, probably the more weight may be given to the appeal to morals.
4. For a successful appeal to the public morals exception, it is not necessary that the Member State shows that these concerns have a long history; they may have newly emerged.

5.2 *The method of balancing*

More problematic is the idea of balancing. An appeal to the European Convention or European common traditions here has a much weaker authority – if it has any at all. But the Convention may at least have some heuristic value. There are various reasons for this weaker authority. First, and most importantly, these are not questions of how to interpret central words with an unclear meaning, but fully normative questions of how to balance the purpose of the treaty against the weight of the ground for exception. For such a problem, the arguments based on the Vienna Convention are not valid; as they only apply to the interpretation of unclear terms, not to the much more normative project of interpreting the full paragraph.

The second reason is that the test of Article XX differs in the essential point that it cannot be based on the common criterion of 'necessary in a democratic society'. The common frame of reference in the European Convention both for the rights and for the exceptions to those rights is that of a democratic society. The protection of the rights is an essential characteristic of a democracy, and the protection of other conflicting interests should be evaluated within the same framework. However, the interests that may be grounds for the Member

States to restrict free trade usually bear no relation at all to the central value of the GATT, that of free trade. This makes it much more difficult to find some common framework in which the interests of free trade can be balanced against other conflicting interests such as the protection of morals.

The third reason (probably connected with the second problem mentioned) is that the case law of the GATT has so far been very strict when appeals to other paragraphs of Article XX were made (Cf. De Brouwer, 2000). It is likely that similar strict requirements would be formulated with regard to paragraph (a). On the other hand, the European case law on the morals clause and on various other clauses – and especially the margin of appreciation doctrine – seems to leave much more leeway for appreciation by the Member States. The requirements formulated by the Appellate Bodies and Panels to prove that a measure was necessary seem thus to be much stricter than the requirements that the European Court formulated.

For these three reasons, it may seem doubtful whether the European Convention is of any use to the WTO with regard to the balancing problem. Nevertheless, it seems worthwhile to explore this issue for heuristic reasons, especially with regard to the issue of morals where national diversity is such a crucial characteristic of the current situation. In light of this variation, it does not seem likely that a common substantive conception of morality can be formulated that distinguishes adequately between justified appeals and unjustified appeals, nor is it possible to say that the weight of the interests of morals, even with regard to the same issue, should always be the same for every country. For example, a ban on alcohol in an Islamic country has a different meaning than the restrictions on alcohol in Sweden, let alone the restrictions in a country such as France, where wine seems to be part of the national identity. Perhaps the way the European institutions have struggled with this issue may offer inspiration for the WTO.

6. Should a government appeal to the morals clause?

One last question should at least be mentioned briefly in this context. Even if we accept that the GATT may provide more room for state intervention with regard to consumer concerns than often is believed, we may still ask whether it would be wise to appeal to this paragraph (or to modify it). Member States may have good prudential reasons for hesitating to make such an appeal. It seems a very broad and open clause without clear demarcations and, if an appeal to the paragraph in cases of consumer concerns (which are usually not very clearly formulated) were to be accepted, it could lead to successful appeals in many other cases. For example, a state wanting to promote community values as held in traditional fishing or agricultural communities might argue that these are strongly connected to traditional production methods and that therefore these

production methods should be supported or protected. Or a state, holding that the war on drugs is a war to protect the moral fabric of society could require companies to organize mandatory drugs test among their staff, and then make a similar demand to exporting companies in other, more liberal countries. Both examples show that the interests of free trade might be seriously harmed by a liberal interpretation of the morals clause.[52]

It could thus damage the primary purpose of the WTO, free trade, and in the end also harm the interests of the Member State that first appealed to the paragraph. For the European Union, there is an additional reason as its relationship to its own Member States has similarities to the relation of the WTO toward the Member States of the WTO. If the EU were to state that an appeal to public morals constitutes a legitimate exception to WTO rules, this could backfire and be used by EU Member States to legitimize exceptions to EU rules as well.

Therefore, a Member State should very seriously consider whether it really wants to appeal to this clause (or whether it would campaign for a modification of the clause) in order to reply to consumer concerns. The risk of backfiring is high. Nevertheless, this is no ground for not attempting it at all, but only for proceeding with care. Is market regulation really a proportionate and necessary means to do justice to those concerns? Are there less restrictive alternatives? Moreover, it should also question whether its interventions in this field reflect a consistent pattern, based on defensible policies.

This brings us to the second dimension of the question whether a state should appeal to the morals clause in order to justify certain market interventions, namely that of normative political philosophy. Is it a legitimate state task to respond to consumer concerns such as those mentioned? It is especially liberal political theory that seems to provide a general negative answer to the question. Many liberals (and libertarians) argue that the state has no business in controversial moral issues. When citizens are divided on the moral acceptability of genetic modification or the use of hormones in beef production, the state should not take a stance on it, just as it should not take a stance in issues such as sexual practices or the use of alcohol and other drugs. Perhaps it should promote labeling so that consumers can choose, but it should certainly not prohibit certain production practices merely on the basis of moral concerns among the population.

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[52] For a moderate view of the risks, see Charnovitz (1998), p. 731: "The danger of protectionist abuse is real. Virtually anything can be characterized as a moral issue. At this point however, it seems premature to worry about overuse of Article XX (a). One can imagine nations justifying many import bans as morally-based. Throughout the 50 years of the GATT-WTO system, however, no member state has challenged a morally-based import ban."

This version of liberalism may be a defensible position, but there are good reasons why such an approach will not help us much in the analysis of the issues at hand. First, like every political theory, liberalism still struggles with issues connected with animals and nature. Liberalism may have strong arguments when arguing that sexual activities between consenting adults should not be prohibited, but this prototypical case is not what we are dealing with here. It is doubtful whether the case against government intervention with regard to animal integrity or biodiversity protection can be compared with the case against government intervention with regard to 'private immorality'. Because of its humanistic and individualistic presuppositions, traditional liberal political theory can hardly be expected to produce authoritative answers to the issue we are dealing with here. Second, so far no state has committed itself openly and consistently to liberalism, and certainly not in this strong sense in which it would also exclude interventions connected with animal or nature issues. It may be that some states are more liberal than others, and this may explain part of the tensions between Member States in this respect, such as those on hormone beef or GM food. However, even a strongly liberal state may still decide that on specific cultural or moral issues it does not take a liberal stance.

This does not mean that states or political theory can ignore these questions. Political theorists should, indeed, spend much more reflection on how to do justice to consumer concerns, in order to suggest a consistent and defensible approach. And states should also try to work out consistent political and legislative policies in order to deal with those concerns. But I doubt whether liberal political theory is the best starting point to begin with for elaborating such consistent policies. And certainly, the suggestion that liberal political theory provides authoritative arguments against making an appeal to the morals clause must be rejected.

Liberal political theory is not relevant to the interpretation of the GATT either, because there is no common philosophy behind the treaty, let alone that this philosophy is that of liberalism. There is a difference here with the European Convention. The European Convention is based on a common democratic tradition, so ideas such as liberal democracy, the rule of law, and human rights are part of the implicit political philosophy behind the Convention. In this sense, at least some ideas of liberalism may be seen as connected with the Convention. Therefore, in the *Dudgeon* case the Court could appeal to the liberal view expressed in the Wolfenden Report.[53] The GATT's only basic idea that has a similar authority is that of free trade, and although this is connected with some other elements of the liberal tradition, it is certainly not enough to regard liberal political theory as an authoritative tradition behind the GATT.

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[53] See note 7 above.

7. Conclusion

Even from a brief analysis of the European Convention we can learn that it provides us with interesting perspectives on GATT Article XX, paragraph (a), both with regard to the scope and meaning of the concept of morals and with regard to the way it should be balanced against the interests of free trade.

Moreover, I think it may offer a fruitful perspective for dealing with consumer concerns. Most of these concerns are not merely about risks or consequences; they are often also connected with much less tangible concerns of a moral nature about the kind of society we want, the kind of life we want to live, and the way our relation to animals and nature should be. These are clearly normative concerns. If there was not a paragraph in international treaties under which these concerns could be brought, we would probably invent one in which the term 'moral' was included. As the term 'morals' is already included in the GATT, it is worthwhile to explore to what extent this may be a way to do justice to at least some of those concerns without compromising the purpose of the WTO, free trade, in an unacceptable way. As the WTO has yet no case law and little other experience with regard to conceptualizing, structuring, and evaluating these issues, it may be helpful to turn to other international institutions for inspiration. The European Convention seems an interesting source for this.