

REFRAMING HUMAN RIGHTS AND TRADE

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Potential and limits of a human rights
perspective of WTO law on cultural
and educational goods and services

John MORIJN



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For Lina

ACKNOWLEDGMENT

Acknowledgments should be like the writing process itself: focused and not too long. While I have not quite lived up to this standard with regard to the rest of this work, I will try and stick to it here.

First and foremost, I very gratefully acknowledge the academic and personal guidance of Professor Francesco Francioni of the European University Institute Law Department, who supervised the PhD thesis on which this book is based. He has patiently helped me find a focus in the rich field of study, and forced me to explain every step along the way. His consistent encouragement and critical and careful reading of all of the many intermediate written pieces leading to the final work, his countless interesting and challenging suggestions for improvement of the text, as well as his support with many other aspects of my research studentship in Florence, have been truly invaluable. His culture and passion for the topic of international (human rights) law will remain a personal and professional example for me. Grazie tante.

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that resulted from his PhD thesis definitely set the standard very high, and has served as a permanent source of motivation and reflection throughout the writing of my own work. (Moreover, his fan, which he left me after finishing in Florence helped keep my head cool, at least literally, during consecutive Florentine summers).

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I gratefully acknowledge the support of the Dutch Ministry of Education that financed the grant to study at the European University Institute. I also gratefully acknowledge the European University Institute's financial support to broaden my horizon as a visiting research scholar at Michigan Law School in the autumn of 2005, as well as for facilitating my participation in many conferences and other events.

Writing this book has been a long, often lonely, regularly confrontational and occasionally even enjoyable journey – particularly when at some very late point in the day a structure emerged that seemed less implausible than countless previous attempts to tie down ‘the beast’. Various researched underneath a leaky airco in an East-Timor hotel room, in a rather grim and freezing town in eastern Bosnia-Herzegovina, as well as in the most incredibly well resourced and academically generous places such as the libraries of the European University Institute, the University of Michigan Law School and the University of Groningen Law Library, I feel that this book has eventually become as truly international a product as its area of focus.

Thinking about the case study of the book, finding an international legal balance between economic and social-cultural perspectives of education and culture, has also been a most personal journey for me. The two sides in this debate correspond to the professions of my parents, and therefore to the way they raised me.

My father used to work from home as a bookbinder. Growing up, I remember the smell of glue and leather, all these strangely shaped scissors, and piles of beautiful books and bibles awaiting his hands. Having thrown away his clock (‘because its sound annoyed him’), my father ruled over this sanctuary of books in both

timeless and tireless fashion. In this role he definitely viewed himself as a trader, an entrepreneur. He could be very satisfied when he had managed to buy a book for a good (i.e. 'low') price, restore it, and then sell it – after one of his trademark smooth sales-talks – for a better (i.e. 'high') price. At that time he also often said: 'if I took time to read all these books, I would not have time to make money out of repairing them'. Yet, I know no-one with a greater love for books and their artistic beauty. His impressive 'consumption' since he retired evidences the lasting nature of his love of the written.

My mother has been a secondary school teacher of biology all her life. I remember the kitchen-table filled with copied images of animals and plants when she was again assembling – probably in blatant violation of some copyright rules – an exam. Being a teacher, according to my mother, is quite distinct from, say, being a shoemaker or a factory worker. It is not only, not even mainly, a paid job concerning educating young people about biology. Rather, it is very much a vocation to instil manners and familiarise young people with societal values – in my mother's world things very much outside and beyond economic calculus. It would give her the greatest possible satisfaction if, at the end of the school-year, again, against all the odds, she had managed to shepherd a number of difficult students to a diploma – their ticket to the world (and the economic market). Yet, at the same time she would appreciate the necessity of purchasing schoolbooks and the students or the State paying for the yearly school fee.

Given that I have always continued to consider the motivations of both my parents equally valid, economic and socio-cultural perspectives on educational and cultural goods and services have never been in contradiction for me. One perspective can never take precedence over the other without losing something essential. At some very fundamental personal level, therefore, this book came to be about the question of whether and how a possible tension or even a contradiction between the socio-cultural and economic realities has been fixed into current international legal norms. And if so, to what extent these norms could then be better aligned to come to the sort of balance that, from a very young age, was made so apparent to me by my parents.

Some parts of this work and the human rights analysis presented in it have been previously published as follows:

- 'Addressing human rights concerns within the World Trade Organisation – A perspective of human rights 'AND' trade and its application to Article XX GATT', Thesis European Master's Degree in Human Rights and Democratisation, July 2002, available at: www.kenan-flagler.unc.edu/assets/documents/hrtHRinWTO.pdf (97 pp.)

- ‘Universality of human rights and the challenges of cultural particularism – Re-grounding universality by way of particularist interpretation’, June 2005, at: www.irmgard-coninx-stiftung.de/fileadmin/user_upload/pdf/archive/037%20Morijn.pdf (14pp).
- ‘Balancing fundamental rights and common market freedoms in Union Law: *Schmidberger* and *Omega* in the light of the European Constitution’, (2006) 12(1) *European Law Journal* 15–40.
- ‘Economic liberalisation of education provision within the EC & WTO: A human rights perspective’, (2006) 2 *Croatian Yearbook of European Law and Policy* 99–136.
- ‘The place of cultural rights in the WTO system’, in: F. Francioni; M. Scheinin (eds.), *CULTURAL HUMAN RIGHTS*, Martinus Nijhoff Publishing, The Hague, 2008, pp. 285–316.
- ‘Conflicts between fundamental rights or conflicting fundamental rights vocabularies? An analysis of diverging uses of ‘fundamental rights’ in the context of international and European trade law’, in: E. Brems (ed.), *CONFLICTS BETWEEN FUNDAMENTAL RIGHTS*, Intersentia, Antwerp, 2008, pp. 591–616.
- ‘Onderwijs als sociaal-cultureel beleidsterrein En als economisch te verlenen of ontvangen dienst: Anatomie van een juridisch spanningsveld’, (2007–08) 5–6 *Tijdschrift voor Onderwijsrecht en Onderwijsbeleid* 451–463. (‘Education provision as a subject of social-cultural policy-making and as a service to be received or provided on an economic basis: Anatomy of a legally complex field’, in: (Flemish) *Journal of Education Law and Educational Policy*, 2008).
- ‘Handelsliberalisering, hoger onderwijs en mensenrechtenbescherming’ in: C.F. Lorenz (red.), *IF YOU’RE SO SMART, WHY AREN’T YOU RICH? UNIVERSITEIT, MARKT & MANAGEMENT*, Boom Uitgevers, Den Haag, 2008, pp. 67–85. (‘Trade liberalisation, higher education and human rights protection’, in: C.F. Lorenz (ed.), *IF YOU’RE SO SMART, WHY AREN’T YOU RICH? UNIVERSITY, MARKET & MANAGEMENT*, Boom Publishing, The Hague, 2008).
- ‘Proportional’ by what measure(s)? Balancing investor interests and human rights by way of applying the proportionality principle in investor-state arbitration’, in: P.-M. Dupuy; F. Francioni; E.-U. Petersmann (eds.), *HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION*, Oxford University Press, Oxford, 2009, pp. 422–451 (co-authored with J. Krommendijk)

Finally, this book would have never finally seen the light of day without almost seven years of unquestioning, unconditional and unrelenting support, of all

imaginable sorts and kinds, by my wife Lina, my parents Willemien and Willem, and my brother Ton. It is dedicated to them, with love.

(Lina: you are on every page, because having you in my life enriches everything I do. Thank you for keeping up with me and Schmidberger for all this time.

Ma, Pa en Ton: bedankt voor jullie hulp, geduld en belangstelling. Ook al zal het misschien lastig te lezen en te begrijpen zijn, dit ‘boekkie’ is er dan uiteindelijk toch gekomen – voor en door jullie).

John Morijn
Florence/The Hague, May 2010.

FOREWORD BY FRANCESCO FRANCONI

There are few more satisfying moments for an academic than to see the successful completion of a doctoral thesis by one of his or her supervisees. The satisfaction is even greater when the thesis is published as a book, enabling it to reach a wider audience. This is the case of John Morijn's work, which was first developed as a PhD dissertation in the doctoral programme of the European University Institute of Florence and is now published in book form.

"Reframing Human Rights" addresses the much-debated issue of the interface between the values of trade liberalisation and human rights, but it focuses on a specific and much less explored question: the relationship between GATT-WTO obligations and rights pertaining to education and culture. In this field, commitments to trade liberalisation are not made according to hard and fast rules. The General Agreement on Trade in Services (GATS) contains a pledge to a "progressive liberalisation of services", including cultural and educational services. It is in this grey area, and within the perspective of a dynamic evolution of international economic law, that John Morijn's work brings valuable insights and innovative thinking to the ways in which educational and cultural concerns may be integrated into the system of economic liberalisation.

Morijn examines the question against the background of the historical shift in educational and cultural services from the purely socio-cultural domain to the economic arena, a shift made inevitable by the trend towards privatisation and by the increasing costs of running educational and cultural services. This shift is situated at the origin of the present divergence in normative approaches to the question of how to reconcile free trade and culture. On the one hand, free trade advocates see trade as the best means to guarantee a free flow of ideas and to ensure creative exchange between different cultures. On the other hand, culture proponents pay greater attention to the preservation of social structures as well as of national and local processes the sum total of which makes up the creative diversity of humanity. Hence, they insist on the need to "protect" existing cultures and educational systems so as to prevent their gradual erosion, and possible extinction, by dominant cultural industries.

John Morijn rightly criticizes this polarization of antagonistic views and proposes a different approach based on a recognition of the relevance of cultural diversity not only between states, but also within states. This approach bolsters the case for the cultural and educational human rights of individuals and

communities which may have or wish to develop a distinctive culture as compared to the prevailing culture of the majority of the people in a particular state. By taking this bottom-up approach the author makes use of the language and message of human rights in presenting the accommodation of cultural concerns with trade as a moral and legal imperative. But rather than seeking such accommodation in opposition to trade law, the author offers his solution from within the system of trade law. First, he provides ample evidence of the positive impact of an open system of international trade in educational and cultural services; he then convincingly argues that the human rights dimension of culture and education can effectively be integrated into the WTO system by way of criteria of interpretation based on the principle of consistency, and, when necessary, by policy initiatives aimed at bringing trade law in line with the need to safeguard the cultural and education rights of individuals and peoples in member states.

This book is not only the successful result of a doctoral project. It is a substantial contribution to the advancement of our knowledge and understanding in relation to the contemporary question of what is the role of the law in reconciling free trade with the diversity of cultural expression and educational systems.

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