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Editorial Note

Complex Equality, Ambiguous Freedoms

Lessons from Canada (and Québec) on Human Rights in Plural Societies

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Abstract: This article discusses how Canadian experience in the legal treatment of cultural diversity, including the sometimes distinct Québécois experience, sheds light on the interpretation and application of human rights in plural societies. Equality is examined here through the concept of 'reasonable accommodation', a concept which has begun to attract attention in Europe. The considerable extent of reasonable accommodation in Canada, the connections between reasonable accommodation and the public policies known as Canadian multiculturalism and Québec interculturalism, and other issues and controversies, are discussed. The paper also addresses the meaning of freedom in a plural society, describing how Canadian courts are still searching for an acceptable balance between individual freedom and the collective dimension of culture. Elaborating on this tension, the paper discusses 'cultural rights' as a useful concept for giving meaning to human rights not just in Canada, but in other plural societies facing similar issues.

I. Introduction

This article discusses how Canadian experience in the legal treatment of cultural diversity, including the sometimes distinct Québécois experience, sheds some light on the problems of interpretation and application of human rights that arise in plural societies. This includes sensitive issues of equality and freedom, such as whether the recognition of cultural differences would jeopardise other human

1 This is a revised version of a paper initially presented at the 6th Meeting on Human Rights in San Sebastian (Spain) on 16 March 2010. A Spanish translation appeared in EJ Ruiz Vieytez and GU Asua (eds), *Derechos Humanos en contextos multiculturales* (Bilbao, Instituto de Derechos Humanos Pedro Arrupe, 2011) 99-139. I am grateful to Eduardo Ruiz Vieytez, Director of the Pedro Arrupe Institute, for agreeing to the English publication. My sincere thanks extend to François Fournier for his helpful comments, as well as to the external referees of the Nordic Journal of Human Rights.

rights, especially equality between the sexes;[2] the extent of free speech in relation to race or religion;[3] or the neutrality of the state in religious matters.[4] Canadian human rights law has developed a number of concepts to deal with such issues, and Québec chose to tackle them publicly, by organizing an unprecedented open consultation on the management of cultural differences. From the point of view of similar plural societies, including Nordic countries, the Canadian and Québécois approaches (including the uncertainties and grey areas that remain) may provide useful lessons, as well, perhaps, as some cautionary tales. This article, therefore, rests on the assumption that legal systems in this field are now engaged in a process of cross-fertilization,[5] and the aim is to emphasise the possible relevance of the Canadian and Québécois approaches for other plural societies facing similar issues.

Two substantive issues will be addressed, pertaining to the meaning and implications of freedom and equality. Part II will first provide the necessary background, by describing the Canadian legal and constitutional framework applicable to cultural diversity. Part III will build on this, by discussing the reach of the concept of equality from the point of view of 'reasonable accommodation'. The North American concept of accommodation has begun to attract attention

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2 For contrasting views, see, eg: Susan M Okin, 'Is Multiculturalism Bad for Women?' in J Cohen, M Howard, M Nussbaum (eds), *Is Multiculturalism Bad for Women?* (Princeton University Press 1999) 1; Charles Taylor, 'The Politics of Recognition' in A Gutmann (ed), *Multiculturalism and the Politics of Recognition* (Princeton University Press 1992) 25-73; Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press 1995).

3 See UN Human Rights Council 'Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, and the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Doudou Diène, Further to Human Rights Council decision 1/107 on incitement to racial and religious hatred and the promotion of tolerance' (20 September 2006) UN Doc A/HRC/2/3. For a recent discussion: Githu Muigai, 'Hate Speech, Freedom of Expression and the Fight against Racism' in *Human Rights in Culturally Diverse Societies: Challenges and Perspectives* (Council of Europe 2009) 91-93.

4 For an overview of the debates: Rik Torfs, 'Relationship between the State and Religious Groups' in J-F Flauss (ed), *La protection internationale de la liberté religieuse* (Bruylant 2002) 131 ff; Pauline Côté & Jeremy Gunn (eds), *The New Religious Question: State Regulation or Interference?* (PIE-Peter Lang 2006).

5 See generally: Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2004), especially ch 2, pp 96-99. Christopher McCruden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20 OJLS 499-532. For a critical view: Ugo Mattei, 'A Theory of Imperial Law: A Study on US Hegemony and the Latin Resistance' (2003) 10 Indiana Journal of Global Legal Studies 383. For theoretical aspects: François Ost, *De la pyramide au réseau? Pour une théorie dialectique du droit* (Facultés Universitaires Saint-Louis 2002).

in the Council of Europe and in the European Union.[6] Specifically, under Canadian anti-discrimination law, institutions (public and private) have a legal duty to adapt to certain needs and characteristics of individuals, in order to alleviate discrimination. The considerable extent of reasonable accommodation will be presented, together with its connections with two distinct public policy approaches for dealing with cultural diversity, namely, Canadian multiculturalism and Québec interculturalism. Subsequently, Part IV will analyse the meaning and implications of freedom in a plural society. Interestingly, since 1982, the Canadian constitution requires courts to interpret human rights and freedoms 'in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians'.[7] Still, despite the rule of multicultural interpretation, Canadian courts are apparently at a loss when determining the meaning of freedom, shifting between incompatible paradigms in a search for an acceptable balance between individual freedom and the group dimension of culture. In conclusion, I will suggest that, in view of that necessary balance, cultural rights may be a useful conceptual framework when attempting to give meaning to freedom not only in Canada, but in other plural societies.

II. Diversity in Canada: Understanding the Constitutional Framework

Canada and Québec are ongoing experiments in the legal treatment of cultural diversity. The land was initially populated by native peoples, whose aboriginal rights as well as treaty relationships with the colonial powers, France and England,

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6 See Council Directive (EU) T2007/78/EC establishing a general framework for equal treatment in employment and occupation [disability] [27 November 2000]. Both the Council of Europe and the European Union have shown interest in the concept of reasonable accommodation in recent years. In partnership with the Province of Québec, a joint EU-Council conference on reasonable accommodation as an instrument for social cohesion was organised in December 2009; see: Council of Europe, *Institutional Accommodation and the Citizen: Legal and Political Interaction in a Pluralist Society* (Trends in Social Cohesion No 21, Council of Europe 2009). A similar interest in reasonable accommodation can be found in a number of individual Member states.

7 Canadian Charter of Rights and Freedoms s 27; see below, section IV.

are still legally recognised today.[8] In Québec, a dual legal system, based on the co-existence of civil law and common law, has been in place for more than two centuries.[9] Since 1969, the federal structures of government have been bilingual by law, although not always in practice.[10] And thanks to a continuous flow of immigration that began more than a century ago, the country's ethnic, religious and linguistic makeup is diverse, and continuously evolving.[11]

Such diversity, inevitably, has had an influence on the Canadian legal system. This is apparent not just in the legal duality of its civil law and common law influences, but also in modern legal constructs, including aboriginal rights, the concept of substantive equality,[12] and practices such as affirmative action. In 1998, in an advisory opinion on the secession of Québec, the Supreme Court of Canada, relying on a tradition of respect for minorities, characterised concern for minority rights as one of the underlying although unwritten principles of the Canadian constitution.[13]

Leaving the issue of secession aside, the Court's analysis of minority rights as one of the basic principles of the Canadian Constitution provides the background for the substantive issues that will be addressed here. The Court invoked three distinct

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8 Olive P Dickason, *Canada's First Nations: a History of Founding Peoples from Earliest Times* (McClelland and Stewart 1992). The relationships between Aboriginal peoples and colonists formed the basis for the 'aboriginal and treaty rights' that are now recognised by the Canadian constitution; see below, II (Aboriginal Rights).

9 French civil law applied in New France until the British conquered the territory (1759). In 1763, the Royal Proclamation decreed that English law would henceforth apply in all civil and criminal matters. However, in the face of popular resentment, the Quebec Act (14 George III, c 83 (UK)) had to reinstate civil law in civil matters as early as 1774. In his classic work, *Le droit civil de la Province de Québec, modèle vivant de droit comparé* (Wilson & Lafleur 1953) Louis Baudouin characterized Québec as a 'living model of comparative law'.

10 The official status of English and French in federal institutions is today enshrined in s 16 of the Canadian Charter of Rights and Freedoms. The official language of the province of Québec is French (Charter of the French Language, RSQ c C-11 (1977)).

11 According to the 2006 Canadian Census, 20 per cent of the Canadian population was born abroad. The proportion belonging to so-called 'visible minorities' was 16 per cent, a number that was expected to rise to 30 per cent over the next twenty years: Statistics Canada, *Immigration in Canada: A Portrait of the Foreign-Born Population, 2006 Census* <http://www.census2006.com/census-recensement/2006/as-sa/97-557/p4-eng.cfm>.

12 *Ontario (Human Rights Commission) v Simpsons-Sears* [1985] 2 SCR 536) (*Simpsons-Sears)*; *CN v Canada (Human Rights Commission)* [1987] 1 SCR 1114. Substantive equality is 'based not on procedural questions of sameness or difference of treatment, but on the harmful and disparate effects of social policy or legislation': Colleen Sheppard, 'Constitutional Equality and Shifting Conceptions of the Role of the State: Obstacles and Possibilities' in S McIntyre and S Rodgers (eds), *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (LexisNexis 2006) 254.

13 *Reference re Secession of Quebec* [1998] 2 SCR 217 [82].

strands in Canadian constitutional law. One was the long-standing existence of special minority privileges; a second one, the more recent constitutionalising of human rights; a third one, the recognition of the rights of aboriginal peoples. However, the Court conveniently subsumed those distinct strands under an overarching concept of 'minority rights' that ignores the tensions and potential contradictions between them.

Special Minority Privileges

Central to the long process of political negotiation that led to the creation of Canada, in the 19th century, was a concern for the rights of Catholics in Ontario and Protestants in Québec. Since both minorities insisted on keeping the privileges they then enjoyed, specific provisions for them as minorities were built into the 1867 British North America Act.[14] This gave constitutional protection to religious privileges that existed in respect of denominational schools. The drafters of the Act did not see those privileges as fundamental rights in any way; as the Supreme Court would later recognize, those rights were essentially historical compromises.[15] The constitutional nature of those privileges, however, would shield them from future challenges based on modern notions of equality.

The Supreme Court faced this in *Adler v Ontario*[16] (1996). The Court turned down a constitutional challenge to the non-funding of private Jewish schools in Ontario (whereas separate Catholic schools are fully funded in that province under the 1867 compromise). The challenge was based on freedom of religion and on the equality provisions of the 1982 Canadian Charter of Rights and Freedoms. The Court, however, ruled that the constitutional provisions of 1867 could not be reviewed under the provisions of 1982 (to do so 'would be to hold one provision of the Constitution violative of another'[17]). The UN Human Rights Committee later noted that the fact that a distinction was enshrined in a constitution did not render it objective and reasonable: when a state decided to provide public funding to religious schools, that funding should be made available without

14 British North America Act, 30 & 31 Victoria c 3 (UK). In Canada, this is known as the Constitution Act 1867; see s 93(1).

15 *Reference re Bill 30, An Act to Amend The Education Act (Ont)* [1987] 1 SCR 1148, 1173.

16 *Adler v Ontario* [1996] 3 SCR 609.

17 Ibid [35].

discrimination.[18] However, the situation in Ontario remains unchanged.[19]

Adler highlighted the tensions and potential contradictions between universal human rights and the minority privileges that were granted in the 19th century. More recently, similar privileges have been included in section 23 the Canadian Charter of Rights and Freedoms, adopted in 1982, guaranteeing minority language (French and English) educational rights. The non-universal nature of section 23 is evident from a reading of its provisions. The right to minority language instruction can be invoked only by Canadian citizens, and will apply only where the number of children involved is sufficient to warrant instruction in the minority language. As for the 1867 religious privileges, that modern provision has been described as historically contingent and 'quite peculiar to Canada'.[20] The Supreme Court has characterized section 23 as 'an exception to the provisions of ss. 15 [equality] and 27 [multiculturalism] in that it accords these groups, the English and the French, special status in comparison with all other linguistic groups in Canada'.[21]

Modern Human Rights Protection

In 1982, along with the so-called 'patriation' of the Canadian Constitution,[22] came the Canadian Charter of Rights and Freedoms[23] (the Charter). The Charter guarantees the rights and freedoms set out in it, subject only to 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.[24] Laws inconsistent with the Charter are 'of no force or effect'.[25]

The Charter is just as notable, perhaps, for what it leaves behind as for what it includes. The classic freedoms of conscience, religion, expression, assembly and association are guaranteed, alongside the democratic rights, legal rights and equality

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18 UN Human Rights Committee, *Waldman v Canada* (1999) UN Doc CCPR/C/67/D/694/1996 [10.6].

19 The Human Rights Committee reiterated its concerns when it examined Canada's periodic report; see: 'Examination of Reports of States Parties under Article 40 of the Covenant – Concluding Observations – Canada' (20 April 2006) UN Doc CCPR/C/CAN/CO/5 [21].

20 *AG (Que) v Quebec Protestant School Boards* [1984] 2 SCR 66, 79.

21 *Mahe v Alberta* [1990] 1 SCR 342, 369.

22 Canada Act 1982 (UK) c 11. Patriation meant that authority to amend the Canadian constitution was transferred from the UK Parliament to Canada.

23 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) (Canadian Charter).

24 Canadian Charter s 1.

25 Constitution Act 1982 (n 23) s 52(1).

rights.[26] The specifically Canadian substance of the Charter consists of mobility rights for Canadian citizens and permanent residents, the status of English and French as official languages, and the minority language educational rights just discussed.[27] However, in comparison with international human rights instruments and with modern foreign constitutions, the Charter also stands out negatively, by making no mention whatsoever of economic and social rights.[28] And apart from the minority language educational rights previously described, cultural rights are absent from the Charter. A rule of interpretation, the implications of which will be discussed in connection with the meaning of freedom, simply states that the Charter shall be interpreted 'in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians'.[29]

Since the Canadian Charter does not reach purely private litigation,[30] the constitutional provisions of the Charter should be read in conjunction with statutory human rights legislation. The main ambit of such legislation is to prohibit discrimination in access to employment and services, including the private sector.[31] In Québec, the provincial Charter of Human Rights and Freedoms[32] goes somewhat further by also guaranteeing fundamental freedoms, political rights, judicial rights, and – in sharp contrast with the Canadian Charter – social and economic rights.[33] The right of persons belonging to ethnic minorities to 'maintain

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26 Canadian Charter (n 23) s 2 (fundamental freedoms), ss 3-5 (democratic rights), ss 7-14 (legal rights), s 15 (equality rights).

27 Section 6 (mobility rights), ss 16-22 (official status of English and French) and s 23.

28 In Gosselin v Quebec (Attorney General) [2002] 4 SCR 429, where low welfare payments were being challenged, the Supreme Court declined to interpret s 7 of the Charter (right to security) as including positive state obligations, per McLachlin, CJ [76-83]. For a critique of the 'underlying individualist philosophy' of the Canadian Charter, see: Robert Vandycke, 'La Charte constitutionnelle et les droits économiques, sociaux et culturels' (1989-1990) Canadian Human Rights Yearbook 167-183.

29 Canadian Charter s 27; see IV below (freedom in a multicultural society).

30 *RWDSU v Dolphin Delivery Ltd* [1986] 2 SCR 573.

31 For a classic overview of anti-discrimination legislation in Canada see Walter S Tarnopolsky, 'The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada' (1968) 46 Canadian Bar Review 565-590.

32 Charter of Human Rights and Freedoms, RSQ c C-12 [Québec Charter]. See generally: André Morel, 'La Charte québécoise des droits et libertés de la personne, un document unique dans l'histoire législative canadienne' (1987) 21 Revue juridique Thémis 1-23.

33 Québec Charter ss 39-48. See Pierre Bosset, 'Les droits économiques et sociaux: parents pauvres de la Charte québécoise?' (1996) 75 Can Bar Rev 583-603.

and develop their own cultural interests' is also provided for.[34] Several important developments in Canadian human rights law, including the duty of reasonable accommodation, have emerged in the context of human rights legislation.

Aboriginal Rights

Section 35(1) of the Constitution Act, 1982 states that 'the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed'. The Supreme Court has summed up the rationale behind aboriginal rights:

> [T]he doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples *were already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.[35]

It is clear, therefore, that aboriginal rights cannot be defined on the basis of the philosophical precepts of the liberal enlightenment based on individual dignity.[36] Rather, they are the rights held by 'Indians *qua* Indians'.[37] As such, aboriginal rights can be exercises in anthropology. Thus, in *R v Sparrow*, an Indian man had been charged with fishing with a net larger than permitted under his Indian Band's licence. He defended the charge on the basis that he was exercising an existing aboriginal right. The Court relied on anthropological evidence to establish that, for the Indian tribe concerned, the salmon fishery had always constituted an integral part of their distinctive culture. This led the Court to deciding that an existing aboriginal right was indeed at stake.[38] Aboriginal rights can also be exercises in history. In *R v Sioui*, the Court considered the signature by a British general, in 1760, of a document guaranteeing the Huron Indians, in exchange for their

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34 Québec Charter s 43. See Pierre Bosset, 'Être nulle part et partout à la fois: réflexions sur la place des droits culturels dans la Charte québécoise des droits et libertés' in A-R Nadeau (ed), *La Charte québécoise: origine, enjeux et perspectives* - Revue du Barreau (Éditions Yvon Blais 2007) 81-107.

35 *R v Van der Peet* [1996] 2 SCR 507 [30] (per Lamer, CJ – emphasis in the text).

36 Ibid [19].

37 Brian Slattery, 'Understanding Aboriginal Rights' (1987) 66 Can Bar Rev 727, 776.

38 *R v Sparrow* [1990] 1 SCR 1075.

surrender, British protection and the free exercise of their religion and customs. This mattered in that case, where a Huron had been charged with cutting trees in forbidden areas. The handwritten 1760 document was considered a 'treaty' within the meaning of section 35(1), despite the absence of specific wording and doubts about the authority the British general had to conclude a treaty. The Court took account of historical evidence that demonstrated an intention to create mutually binding obligations between the British and the Hurons.[39] Finally, aboriginal rights may force us to put Western legal concepts into perspective. In *Sparrow*, the Court pointed out that fishing rights were not traditional property rights and that, in applying section 35(1), courts should be careful 'to avoid the application of traditional common law concepts of property'. It was crucial, the Court added, 'to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake'.[40] This suggests that aboriginal rights are also exercises in legal pluralism.

Interestingly, aboriginal rights are affirmed, not in the Canadian Charter of Rights and Freedoms, but in a separate part of the Constitution Act, 1982 entitled 'Rights of the Aboriginal Peoples of Canada'.[41] This would suggest that aboriginal rights and human rights are conceptually distinct. The impression is reinforced by section 25 of the Charter itself, an interpretative clause which states that human rights and freedoms shall not be construed so as to abrogate or derogate from aboriginal rights.[42] The relationship between aboriginal rights and human rights is indeed complex. The 2007 UN Declaration on the Rights of Indigenous Peoples explicitly links indigenous rights to the right of peoples to self-determination.[43] However, the Declaration also proclaims the right of aboriginals, as individuals, to the full enjoyment of all human rights and fundamental freedoms.[44] Clearly, Aboriginal rights illustrate the complementarities and tensions between the group and individual dimensions of human rights – a point to which we will return later, when discussing the meaning of freedom in a multicultural society.

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39 *R v Sioui* [1990] 1 SCR 1025.

40 *Sparrow* (n 38) 1112.

41 Part II of the Constitution act 1982 (n 23).

42 See William Pentney, 'The Rights of the Aboriginal Peoples of Canada and the Constitution Act, 1982: Part I – The Interpretative Prism of Section 25' (1998) 22 UBCL Rev 21-59.

43 Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) UNGA Res 61/295, Preamble. Canada voted against the Declaration.

44 Ibid art 1.

III. Substantive Equality and Reasonable Accommodation

The concept of reasonable accommodation has been taken up in Canadian anti-discrimination law as a vehicle for giving substance to the idea of equality through different treatment. The general idea has been famously expressed in a dictum by Tanaka, J, of the International Court of Justice:

> The principle of equality before the law does not mean the absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal... To treat unequal matters differently according to their inequality is not only permitted but required.[45]

The purpose and scope of reasonable accommodation will be addressed here, as well as some of the issues and controversies that surround it.

Reasonable Accommodation as a Requirement of Equality

The Supreme Court of Canada acknowledged the historical pre-eminence of American law when, in 1985, it imported the notion of reasonable accommodation into Canadian anti-discrimination law.[46] The case featured a saleswoman in a department store, whose religious practice conflicted with her employer's business hours. Reasonable accommodation, the Court ruled, was the corollary of equality and the prohibition of discrimination.[47] The duty of reasonable accommodation is today considered to be an integral part of the right to equality in Canadian anti-discrimination law.[48]

As a result, the duty to accommodate applies not only between employers and workers, but also to relations between the state and users of public services since the

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45 *South West Africa* (Ethiopia v South Africa; Liberia v South Africa) (Second Phase, Judgment) [1966] ICJ Rep 6, 305 (Tanaka, J, dissent).

46 *Ontario Human Rights Commission v Simpsons-Sears* (n 12) 553. See 1972 amendments to the US Civil Rights Act 1964, 42 USC § 2000e(j) and Rehabilitation Act 1973, Public Law 93-112 93rd Congress, HR 8070; Americans with Disabilities Act (1990), 42 USC § 12111(10).

47 *Simpsons-Sears* (n 12) 553-554.

48 See *Commission scolaire régionale de Chambly v Bergevin* [1994] 2 RCS 525, 544.

latter are also covered by anti-discrimination legislation. In principle, the obligation is transversal, in other words reasonable accommodation is not confined to religious diversity, but may apply to all the grounds of discrimination, including disability, sex, pregnancy, age, civil status and national origin.[49] The duty to accommodate will apply to decisions, practices and rules that have a discriminatory effect on the exercise of a human right or freedom. For example, schools,[50] hospitals,[51] courts,[52] municipalities[53] and other public services[54] are legally bound in Canada to reasonably accommodate members of the public who use their services.

Typically, accommodation will take the form of individual exemptions from general rules or standards. Classic examples are the granting of religious holidays[55] or changing the duties of a disabled person.[56] However, in the *Grismer* and *Meiorin* cases (1999), the Supreme Court went further: it required the institutions concerned to take account of the situation of the affected groups when actually drawing up standards. Incorporating accommodation into the standard itself, rather than granting individual exemptions on a piecemeal basis later, was meant to ensure that each person was assessed according to her or his own personal abilities.[57] In terms of public policy, the reach of reasonable accommodation, after *Meiorin* and *Grismer*, is congruent with the concept of cultural adequacy, namely the idea that every human

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49 See cases cited in Pierre Bosset, 'Les fondements juridiques et l'évolution de l'obligation d'accommodement raisonnable' in M Jézéquel (ed), *Les accommodements raisonnables – quoi, comment, jusqu'où?* (Yvon Blais, 2007) 13-14.

50 *Commission des droits de la personne v Collège Notre-Dame du Sacré-Cœur* [2002] RJQ 5 (CA); M*ultani c Commission scolaire Marguerite-Bourgeoys* [2006] 2 RCS 256.

51 *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624 [medical services must provide sign language interpreters for the deaf].

52 *Centre de la Communauté Sourde du Montréal Métropolitain v Régie du logement* [1996] RJQ 1776 (TDP Qué).

53 *Morel v Corporation de Saint-Sylvestre* [1987] DLQ 391 (CA Qué) 393.

54 *Canadian Association of the Deaf v Canada* [2007] 2 CF 323 [access to government services].

55 Eg in *Bergevin (n 48).*

56 See *Commission des droits de la personne du Québec v Emballages Polystar* (1997) 28 CHRR D/76 (TDP Qué).

57 *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* [1999] 3 SCR 868 [19] [*Grismer*]; *British Columbia (Public Service Employees Relations Commission) v BCGSEU* [1999] 3 SCR 3 [*Meiorin*].

right has a cultural component that ought to be respected in public programs.[58]

Undue hardship is a notion inherent in the concept of reasonable accommodation. As the Supreme Court stated when it approved the concept of reasonable accommodation, 'all rights must be limited in the interest of preserving a social structure in which each right may receive protection without undue interference with others'.[59] As the flip side of reasonable accommodation, the notion of undue hardship calls for a balance between the right to accommodation and the interests of others concerned. Canadian courts apply three types of test to determine whether an accommodation entails undue hardship: financial costs, impact on the organisation's functioning, and infringement of other rights.[60] Third-party attitudes that are inconsistent with human rights are irrelevant.[61]

Recently, however, the Court has placed significant limits on the duty of reasonable accommodation. In *Hutterian Brethren of Wilson Colony* (2009), the Court said that the duty did not apply to acts of parliament.[62] The case derived from regulations requiring all persons holding a driver's licence in the province of Alberta to have a photo attached. Members of the Wilson Hutterian Colony, who are forbidden by their religion from being photographed, challenged the constitutionality of this provision on the grounds that it was an unjustified breach of their freedom of religion, forcing them to choose between the latter and their ability to move around autonomously by car. The lower courts[63] had upheld their challenge, and included a duty to accommodate in the proportionality test applicable to violations of constitutional rights. However, a majority of judges in the Supreme Court rejected this approach. They drew a sharp distinction between the situation of the legislature and that of the parties subject

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58 See for instance UN Committee on Economic, Social and Cultural Rights, 'General Comment 4, The Right to Adequate Housing' (1991) Un Doc E/C.12/1992/23 [8(g)]: '*Cultural adequacy*. The way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing. Activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed'. The concept of cultural adequacy (or acceptability) has also been used by the ESCR Committee in connection with the right to adequate food (General Comment 12, E/C.12/1995/5), the right to education (General Comment 13, E/C.12/1999/10), and the right to health (General Comment 14, E/C.12/2000/4).

59 *Simpsons-Sears* (n 12) 554-555.

60 See cases mentioned in Christian Brunelle, *Discrimination et obligation d'accommodement raisonnable en milieu de travail syndiqué* (Yvon Blais 2001) 248-252.

61 *Central Okanagan School District No 23 c Renaud* [1992] 2 RCS 970, 987-988. See also Multani (n 50) [76].

62 *Alberta v. Hutterian Brethren of Wilson Colony* [2009] 2 SCR 5567 [*Hutterian Brethren*].

63 See 57 Alta. LR (4th) 300 (QB); 77 Alta. LR (4th) 281 (CA).

to the duty to accommodate ('most commonly an employer and employee'):

> By their very nature, laws of general application are not tailored to the unique needs of individual claimants. The legislature has no capacity or legal obligation to engage in such an individualized determination, and in many cases would have no advance notice of a law's potential to infringe Charter rights. It cannot be expected to tailor a law to every possible future contingency, or every sincerely held religious belief.[64]

Hutterian Brethren means that the nature of measures breaching the right to equality or freedom of religion must first be established. The duty of accommodation will apply when applicants can show that a government action or administrative practice infringes a fundamental right. However, if the validity of a law is being challenged, only the proportionality test can be applied, and according to the Court this involves not an individualised assessment of the sort applicable to reasonable accommodation, but a general assessment that takes account of what the Court called 'the broader societal context'.[65]

Issues and Controversies

As just described, the original, modest legal aim of reasonable accommodation was to find a practical way of dealing with certain problems of discrimination. However, through the so-called 'reasonable accommodation crisis', the concept was suddenly propelled into the heart of a heated debate on Québec's sense of identity.

Distinct stages marked the 'crisis'. In an initial stage that can be traced back to the introduction of reasonable accommodation in the mid-eighties, public opinion gradually became aware of the requirements of anti-discrimination law. Over that period, the courts delivered rulings that, for example, confirmed the duty of accommodation in respect of paid leaves for religious purposes,[66] or gave police authorities the right to allow the wearing of religious symbols by police

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64 *Hutterian Brethren* (n 62) [68-69].

65 Ibid [66-67]. The Court considered that the regulation in question, aimed at minimising identity theft associated with driver's licences, met the proportionality test.

66 *Central Alberta Dairy Pool c Alberta (Human Rights Commission)* [1990] 2 RCS 489; *Central Okanagan School District No 23 c Renaud* [1992] 2 RCS 970; *Commission scolaire régionale de Chambly c Bergevin* [1994] 2 RCS 525.

officers.[67] However, reasonable accommodation remained, by and large, a concept that interested only lawyers and the people directly concerned.

In 2002, a ruling from a lower court raised some controversy by allowing a Sikh boy to wear a kirpan or dagger in school (a solution that had been previously been agreed with the parents).[68] In March 2006, the Supreme Court of Canada delivered its judgment in that case. The Court confirmed that the boy was legally entitled to wear a kirpan, with security safeguards.[69] However, the debate intensified, as media reports gradually became filled with what seemed to be increasingly outrageous cases of 'unreasonable' accommodations.[70] An opposition party, the *Action démocratique du Québec*, exploited the issue of reasonable accommodation, alleging incompatibilities with Québec values and identity. By early 2007, reasonable accommodation had become a political issue. With an election campaign looming, and perhaps hoping to defuse the issue, Québec Premier Jean Charest decided to set up a consultation commission on reasonable accommodation. The Bouchard-Taylor commission was asked to conduct consultations on accommodation practices and to make recommendations to ensure that they were compatible with the values of Quebec as a pluralist, democratic and egalitarian society. The hearings lasted four months. They were broadcasted live on national television, in what has been probably the most ambitious participatory exercise in recent Québec history.

The remit of the Bouchard-Taylor commission was based on the assumption that accommodation practices may call into question the 'fair balance between the rights of the majority and the rights of minorities'[71] – a rather intriguing statement in modern legal systems where the concept of majority rights has no legal (as opposed to political) meaning. This in fact posited that there existed a conflict between reasonable accommodation and the values of Québec society. The official remit listed the following values as counterweights to reasonable accommodation: equality between the sexes; separation between Church and state; the primacy of the French language; the protection of human rights and freedoms; justice and the rule of law; the protection of minority rights, and the rejection of racism and discrimination. The list was highly tautological, as many of those elements refer to

67 *Grant c Canada (Attorney General)* [1995] DLR (4th) 556 (FCA, leave to appeal denied by the Supreme Court). The court declined to modify an internal rule at the Royal Canadian Mounted Police allowing Sikh police officers to wear a turban.

68 *Singh Multani c Commission scolaire Marguerite-Bourgeoys* 2002 CanLII 473 (CS Qué).

69 Ibid; the Court ruled that the kirpan should be secured in a sheath, that the sheath should be sewn, and that the kirpan should be worn under the boy's trousers at all times.

70 For a critical review of media reports during the 'accommodation crisis' see Maryse Potvin, *Crise des accommodements raisonnables: une fiction médiatique?* (Athéna 2008).

71 Québec, OC 95-2007, *Official Gazette* (2007) Issue No 9 (28 February) 1372.

other elements in the same list. 'Equality between the sexes', for example, requires the rejection of 'discrimination', which is itself one of the cornerstones of 'human rights and freedoms'. By creating confusion and overlapping between concepts, the remit of the commission in fact downgraded human rights.[72]

The Bouchard-Taylor Report, after months of consultation and analysis, established that the reasonable accommodation crisis was a crisis of perception rather than a real crisis.[73] This was based on the finding that several cases of 'unreasonable' accommodation were in fact exaggerated, based on misunderstandings about the nature of reasonable accommodation, or simply factually wrong.[74] In terms of public policy, the Report emphasized 'interculturalism' as a model for managing diversity; an 'open' concept of *laïcité* (secularism) as a guiding principle for the relations between religions and the state; and 'harmonization principles' (including reasonable accommodation) as vehicles for putting the above principles into action. Three substantive issues related to reasonable accommodation will be addressed here.

Is Accommodation Compatible with Other Rights?

The potential conflict between reasonable accommodation and other fundamental rights was one of the crucial aspects that were debated during the commission. Equality between men and women was of special concern (it will be recalled that gender equality was one of the key factors the commission had to ponder when examining accommodation practices).

The view, sometimes expressed during the debates, that feminism and multiculturalism are irreconcilable apparently rests on an ontological distinction between gender and culture: accommodation based on cultural factors, and especially religion, will then be seen as potentially clashing with women's rights.[75] The debate over reasonable accommodation in Québec featured a concern with the legal aspects of that relationship. While the Bouchard-Taylor commission was still analysing its hearings, the government of Québec in fact introduced a bill that

72 See Pierre Bosset, 'Regards d'un juriste sur le rapport Bouchard-Taylor' (2009) 3 Journal of Parliamentary and Political Law 323, 330.

73 Consultation Commission on Accommodation Practices Related to Cultural Differences (Québec), 'Building the Future: a Time for Reconciliation' (Montréal 2008) <online: http://www.accommodements.qc.ca/documentation/rapports/rapport-final-integral-en.pdf>. The word 'crisis' appears frequently in the report, but generally in inverted commas.

74 Bouchard-Taylor Report c III.

75 For a critique of this dichotomy see Sirma Bilge, 'Le dilemme genre/culture, ou comment penser la citoyenneté des femmes minoritaires au-delà de la doxa féminisme/multiculturalisme?' in *Actes du Colloque Diversité de foi, égalité de droits* (Conseil du statut de la femme 2006) 89.

amended the Québec Charter in order to provide that the rights and freedoms were 'guaranteed equally to women and men' – this, despite the fact that the Charter already prohibited discrimination on the basis of sex.[76] The bill was eventually adopted, although, by general agreement, its import is largely symbolic, and it does not establish a hierarchy between gender equality and religious freedom.[77]

Giving priority to gender equality over religious freedom was supported by a number of feminist groups. Other feminists groups, however, echoed the postcolonial critique of Western feminism that to invoke 'an unproblematic category of Woman, while presuming that this represents all women',[78] can only be exclusionary. They counter-argued that women can be both religious believers and women, and feared the impact a hierarchy of rights would have on the delicate balance between women's right to equality and women's freedom of religion.

Sadly, a forgotten element in the debate was that reasonable accommodation, as a requirement of equality, is also part of human rights. Finding an appropriate balance between accommodation and other human rights, therefore, should respect what the World Conference on Human Rights called the indivisible, interrelated and interdependent character of all human rights.[79] *Bruker v Marcovitz*, a case decided by the Supreme Court during the Bouchard-Taylor commission, illustrates the capacity of human rights law to balance religious freedom with gender equality. In that case, a husband had refused to grant the *guet*, or Jewish divorce, to his wife, in violation of a prior contractual agreement. Paying damages, he argued, would have violated his freedom of religion. However, the Court rejected his argument on the ground that 'the assertion of a claim to religious freedom must be reconciled with countervailing rights, values, and harm'.[80] This encompassed the wife's right to equality and her freedom of religion, including the impact of not obtaining the *guet* on her capacity to remarry in the Jewish religion. *Bruker* was not a reasonable accommodation case; but in its careful consideration of the woman's rights – including her religious freedom – it confirmed the capacity of Canadian courts to deal satisfactorily with *ad hoc*

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76 SQ 2008 c 15 (see now s 50.1 of the Québec Charter).

77 For an analysis of the amendment, see Québec Human Rights and Youth Rights Commission <www.cdpdj.qc.ca/fr/publications/docs/pl63_modification_preambule_Charte.pdf> 10. Also see Québec Bar, <www.barreau.qc.ca/pdf/medias/positions/2008/20080201a-projet-loi-63.pdf> 3; Bouchard-Taylor Report 175.

78 Carol Smart, 'The Woman of Legal Discourse' (1992) 1 Social & Legal Studies 29, 30.

79 World Conference on Human Rights, 'Vienna Declaration and Programme of Action' (12 July 1993) UN Doc A/CONF.157/23 [5]; in Canadian constitutional law, see *Dagenais v Société Radio-Canada* [1994] 3 RCS 835, 877.

80 *Bruker v Marcovitz* 2007 3 RCS 607 [77] (Abella, J).

conflicts that may exist between religious freedom and women's rights, even in the absence of a hierarchy of rights.[81]

As a temporary epilogue to this ongoing story, a bill recently tabled in the Québec National Assembly specifically provides that any accommodation granted in the provision of public services will have to comply with the Québec Charter, 'in particular as concerns the right to gender equality'.[82] In view of the Charter's existing provisions and current case-law, this looks like an unnecessary precaution. At the time of writing, that bill was still under consideration.

Is Accommodation a Group Right?

It is sometimes debated whether reasonable accommodation is forcing collective solutions upon society under the guise of individual rights.[83] A weak form of this argument is that granting accommodation in individual cases will have a 'snowball effect' that will eventually become unmanageable. The legal answer is that such a snowball effect must be demonstrated; and such demonstration is incumbent upon the institution that is being required to accommodate.[84] Empirical evidence suggests that the fear, in fact, is largely unfounded.[85]

A philosophically stronger argument is based on the presumed communitarian (or illiberal[86]) philosophy behind reasonable accommodation. This will sound counter-intuitive to North American lawyers, for whom reasonable accommodation is a remedy to individual cases of discrimination. Such a view also runs

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81 In another Québec case, jobs at the Montreal Jewish Hospital had been specified as being reserved for men and others for women. The Tribunal referred to s 9.1 of the Quebec Charter of Rights, a limitations clause applicable to freedom of religion. Female staff, the Tribunal decided, were entitled to measures of accommodation and it was up to the hospital to show that this would have involved undue hardship. The ruling confirms the need to balance freedom of religion with women's right to equality. See *Commission des droits de la personne et des droits de la jeunesse v Hôpital général juif Sir Mortimer B Davis* TDPQ Montréal 500-53-000182-020, 2007 QCTDP 29 (CanLII).

82 Québec National Assembly, First Session, 39th Legislature, Bill 94 – An Act to Establish Guidelines Governing Accommodation Requests within the Administration and Certain Institutions (2010) s 4; reintroduced 24 February 2011 (Second Session).

83 See, eg Yolande Geadah, *Accommodements raisonnables – droit à la différence et non différence des droits* (VLB 2007) 17-18.

84 See *Simpsons-Sears* (n 12) 559: the burden of proving undue hardship rests on the institution concerned.

85 See, eg Comité consultatif sur l'intégration et l'accommodement raisonnables en milieu scolaire, *Une école québécoise inclusive: dialogue, valeurs et repères communs* (Report to the Minister of Education, Montréal, 2007). The number of requests for accommodation brought to the attention of local school authorities had remained stable over a three-year period.

86 Luc B Tremblay, 'Religion, tolérance et laïcité: le tournant multiculturel de la Cour suprême' in J-F Gaudreault-DesBiens (ed) *Le droit, la religion et le 'raisonnable'* (Thémis 2009) 248-257.

contrary to the general outlook of charters of rights and their 'individualistic, rationalist and secular values'.[87] Even when discussing so-called group rights (such as the cultural rights of minorities), human rights law defines individuals – not groups – as beneficiaries of such rights.[88] Legal sociologist Pierre Noreau, based on empirical field research on the attitudes of minorities towards law in Québec, has demonstrated that legal concepts and judicial proceedings provide minority individuals with forums where their rights as citizens can be exercised, thereby encouraging participation in the polity.[89] Thus, for individuals, legal concepts such as reasonable accommodation may actually be vehicles for integration. It is submitted that before reasonable accommodation is criticised for its alleged communitarian outlook, further empirical research is needed on its impact on the social participation of persons belonging to minorities.

Is Accommodation an Avatar of Multiculturalism?

Debating cultural diversity and human rights can also be a proxy for wider debates on identity politics and – in the case of reasonable accommodation – be instrumentalised in the discussion of other issues. In the case of Québec, reasonable accommodation has fuelled nation-to-nation issues and been criticised, in particular, as an imposition of Canadian multiculturalism upon an unwilling Québec.[90]

For four decades, multiculturalism has been official public policy in Canada.[91] Québec has had its own policy, informally known as interculturalism, since

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87 José Woehrling, 'L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse' (1998) 43 McGill LJ 325, 401 (my translation).

88 See, eg s 43 of the Québec Charter of Human Rights and Freedoms and s 27 of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). On cultural rights, see Conclusion below.

89 Pierre Noreau, 'Le droit comme vecteur politique de la citoyenneté' in M Coutu and others (eds), *Droits fondamentaux et citoyenneté - Une citoyenneté fragmentée, limitée, illusoire?* (Thémis 2000) 323-359. See also, by the same author *Le droit en partage: le monde juridique face à la diversité ethnoculturelle* (Thémis 2003) especially at 27-113.

90 For variations on this theme, see eg Mathieu Bock-Côté, 'Derrière la laïcité, la nation: retour sur la controverse des accommodements raisonnables et sur la crise du multiculturalisme québécois' (2007-2008) 98 Globe – Revue Internationale d'Études Québécoises 95-113; Charles Courtois, 'Bouchard-Taylor: un rapport trudeauiste' (November-December 2008) 98 L'Action Nationale 60-80.

91 Official statement by Prime Minister Trudeau in the House of Commons, Hansard (8 October 1971) 8545-8546.

1990.[92] Multiculturalism and interculturalism share a number of fundamental assumptions and normative orientations. They include: the recognition of the diverse character of Canadian and Québec society; a rejection of the assimilationist model; and an emphasis on the social dimensions of integration and on substantive concepts of equality.[93] In recent years, the two models have come closer, as the Canadian Multiculturalism Act and the programs under it have emphasised social participation and citizenship.[94] Significant differences between the two models lie essentially in the dynamic relationship between a majority and its minorities (multiculturalism does not recognise the existence of a 'Canadian' majority, whereas interculturalism posits a Québécois majority that is engaged in a constant dialogue with minorities) and in the stronger emphasis that is placed by interculturalism on cross-cultural interaction, on the gradual development of a shared culture, and on the French language as a common vehicle for social interaction.[95]

Whether reasonable accommodation is an avatar of Canadian multiculturalism is highly debatable. Critics of the so-called multiculturalist ideology behind reasonable accommodation tend to ignore the fact that the principle of multicultural interpretation of rights inserted in the Canadian constitution in 1982 had no bearing on the introduction of reasonable accommodation into Canadian anti-discrimination law. In fact, the *Simpsons-Sears* case, which in 1985 introduced reasonable accommodation into Canadian law, was decided under legislation as it stood at the time of the facts in the late 1970s, that is to say well before the Canadian Charter. The recognition of the concept of reasonable accommodation in that case was the result of an evolution in legal thinking that traced its roots well beyond Canadian borders, including in American law and in international law.[96] Critics also disregard the fact that reasonable accommodation has been

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92 Government of Québec, 'Au Québec pour bâtir ensemble– Énoncé de politique en matière d'immigration et d'intégration' (1990) <http://www.micc.gouv.qc.ca/publications/fr/ministere/Enonce-politique-immigration-integration-Quebec1991.pdf>. See François Rocher and others, '*Le concept d'interculturalisme en contexte québécois: généalogie d'un néologisme*' (Report to the Consultation Commission on Accommodation Practices Related to Cultural Differences 21 December 2007) <http://www.accommodements.qc.ca/documentation/rapports/rapport-3-rocher-francois.pdf>.

93 Linda Pietrantonio, Danielle Juteau and Marie McAndrew, 'Multiculturalisme ou intégration: un faux débat' in K Fall, R Hadj-Moussa and D Simeoni (eds), *Les convergences culturelles dans les sociétés pluriethniques* (Presses de l'Université du Québec, 1996) 147, 155.

94 Canadian Multiculturalism Act 1985 RSC c 24 (4th Supplement). On the evolution of multiculturalism programs see Denise Helly, 'Le multiculturalisme canadien: de la promotion des cultures immigrées à la cohésion sociale, 1971-1999' (2000) 6 Cahiers de l'URMIS.

95 F Rocher and others (n 92) 40-44.

96 See Pierre Bosset, *La discrimination indirecte dans le domaine de l'emploi: aspects juridiques* (Yvon Blais, 1989) 95-97.

embraced unreservedly by Québec courts when applying provincial human rights legislation.

It is submitted that a more constructive approach than criticising reasonable accommodation for its multiculturalist outlook would consist in fleshing out the practical requirements of interculturalism: this would allow, perhaps, for the gradual development of a Québécois model of reasonable accommodation. The Bouchard-Taylor Report recommended officialising interculturalism into a formal statement by the Québec National Assembly, a recommendation which has not yet been acted upon.

An Assessment

The Bouchard-Taylor commission's extensive discussions led to a whole series of recommendations on the integration of immigrants, interculturalism, inequality and discrimination, the status of the French language and secularism. This ambitious approach did not receive unanimous support, including among lawyers, particularly in view of the risk of trying to take on too much and losing sight of accommodation practices properly speaking. With hindsight, though, the commission's all-encompassing approach had the merit of showing that, while accommodation will fit in harmoniously with either an intercultural or multicultural approach to diversity, it cannot, of itself, constitute a comprehensive diversity policy.

A possible limitation of reasonable accommodation as an instrument of policy stems from what can be characterised, so far, as its narrow focus on religion. The Bouchard-Taylor commission's official title (Consultation Commission on Accommodation Practices Related to Cultural Differences) hinted at a broad notion of reasonable accommodation that would encompass linguistic, ethnic or national origin forms of diversity alongside religion. This would have been congruent with the Supreme Court's recognition that custom – a quintessential manifestation of culture – may benefit from the protection of charters even in the absence of a strict religious obligation.[97] However, one actually finds very few court decisions where reasonable accommodation is relied on in conjunction with language, race, colour or ethnic or national origin.[98] It is as if cultural diversity

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97 See *Syndicat Northcrest v Amselem* [2004] 2 SCR 551 [68].

98 For a rare example: *Commission des droits de la personne et des droits de la jeunesse v Collège Montmorency,* JE 2004-966 (TDP Québec). The court recognised the need to take account of immigrant's potential difficulties in producing official documents from their country of origin.

were somehow confined to religion. The hearings of the Bouchard-Taylor commission showed that the 'crisis' of reasonable accommodation was, in fact, largely a (perceived) crisis of *religious* accommodation. One may wonder, therefore, whether appointing a commission on 'cultural differences' was not merely a coded reference to religious diversity. There are reasons to think that the omnipresence of religious grounds in accommodation case-law reflects, at least in part, the reluctance of Canadian courts to require genuinely objective evidence to support demands based on religion, the test being rather the applicant's (subjective) sincerity.[99] However, given the transversal nature of reasonable accommodation, the door for accommodation requests based on language or ethnic or national origin is open. Mention has been made already of cases where courts have ordered medical services and court officials to provide sign-language interpreters for the deaf.[100] In the Canadian context, statutory laws usually contain built-in provisions favourable to the accommodation of language specificities in public services.[101] However, this illustrates that language accommodation in public services has, so far, been considered a matter of statutory law, not human rights.

In any event, dealing with cultural diversity will involve much more than simply managing individual examples of discrimination: the institutional and systemic elements of racism and discrimination will also have to be tackled. Clearly, reasonable accommodation, here, is only part of the solution. Affirmative action programs, which offer collective remedies to persons from discriminated against groups by granting their members temporary preferential treatment, do not come under the reasonable accommodation umbrella and may at times prove necessary. Neither does the reasonable accommodation approach extend to

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99 *Syndicat Northcrest v Amselem (n 97)*. The Bouchard-Taylor commission considered the problem of subjectivity in its report but concluded that, all things considered, the courts were qualified to judge the sincerity of accommodation applications and that there was no need to re-examine the sincerity test: Bouchard-Taylor Report 176-178.

100 See the *Eldridge (n 51)* and Centre de la communauté sourde (n 52). While the accommodation of deaf people is generally seen to be based on disability, there are those within the deaf community who think that failure to provide sign language interpretation is a form of discrimination based on language. Clearly, this brings us within the sphere of cultural difference. For an interesting discussion see Mary Ellen Maatman, 'Listening to Deaf Culture: A Reconceptualization of Difference Analysis under Title VII' (1996) 13 Hofstra Labor LJ 269.

101 Eg, under s 2(5) of the Act Respecting Health Services and Social Services, RSQ c S-4.2, Québec's health and social services system is designed 'to take account of the distinctive […] linguistic, sociocultural, ethnocultural and socioeconomic characteristics of each region'. Also see the provisions of the Charter of the French Language (n 10) on the language of the civil administration (Chapter IV, ss 15, 21-22, 27-28 and 29.1) and the language of semi-public bodies (Chapter V s 32), providing for a right of access to public services in a language other than French.

fundamentally political issues, such as the relationships between national groups. In the case of Québec, this means the French-speaking majority, the English-speaking minority, and the aboriginal peoples. Those relationships continue to be managed mainly through the political process. This is also true of Canada as a whole: apart from the recent constitutionalising of aboriginal rights, the triangular relationships between the English-speaking majority, Québec as a nation in search of recognition and the aboriginal peoples are and, for the foreseeable future, will remain fundamentally political in nature.

Going back to reasonable accommodation, the pragmatic underlying approach of the concept reflects the Anglo-Saxon judicial philosophy and its inductive method. It is therefore understandable that there may be certain reservations about reasonable accommodation in civil law jurisdictions, because of its casuistic and apparently un-Cartesian nature. It is perhaps not surprising that the concept of accommodation emerged in a common law country, the United States, before migrating to Canada, where it has since seen major developments.[102] Nevertheless, we should not exaggerate the importance of legal cultures in the way a concept such as reasonable accommodation is received. Despite its civil law tradition, Québec has adopted the notion without difficulty and incorporated it into its anti-discrimination legal armoury. We can perhaps hypothesise that legal systems' receptiveness to concepts such as reasonable accommodation may depend less on legal culture than on institutional factors, particularly the level of discretion of the courts in interpreting legislation or their powers to make reparation or impose sanctions.

IV. The Meaning(s) of Freedom in a Multicultural Society

Like equality, freedom is one of the cornerstones of human rights. Determining the axiological meaning of freedom – its purpose – is crucial, not just for the sake of

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102 The comparative course of reasonable accommodation in Canadian law and in American law has been charted by Belgian academics: Emmanuelle Bribosia, Julie Ringelheim and Isabelle Rorive, 'Aménager la diversité: le droit de l'égalité face à la pluralité religieuse' (2009) 78 Revue Trimestrielle des Droits de L'homme 319, 325-348.

'social cohesion' as a potential limit to freedom,[103] but also because freedom itself is a cultural and social construct. Section 27 of the Canadian Charter, emphasizing multiculturalism as a guiding principle for the interpretation of rights, suggests that Canadian law might offer interesting insights into how a legal system may construe the significance of freedom in a multicultural society. However, as will be seen now, axiological choices are constantly being made by Canadian courts about the meaning of freedom and the appropriate role of the state.

Freedom in Canadian Human Rights Law: Competing Paradigms

Formulating Paradigms

In *Big M Drug Mart* (1985), a case featuring the prohibition of commercial activities on Sunday as a possible violation of religious freedom, the Supreme Court of Canada elaborated on the philosophical underpinnings of freedom. The Court's outlook in that case was highly individualistic: freedom safeguarded individual self-determination, a human being's sphere of autonomy, responsibility, 'even solitude'.[104] According to the Court, individual conscience and individual judgment stood 'at the heart of our democratic political tradition':

> The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.[105]

In *Oakes* (1986), a case dealing with Section 1 of the Charter (the 'limitations clause'), the Court gave the concept of freedom a meaning that took account of the inevitable power relationships that exist within any society. The Court characterized a 'free' and democratic society as being based on five essential values:

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103 As a limit to freedom, social cohesion is tied to modern criticisms of individualism; it is often seen as a protection against the 'tyranny of minorities'. The vague nature of 'social cohesion' as a concept must be emphasised. Its very indeterminateness allows for varying political uses. See Paul Bernard, 'La cohésion sociale: critique dialectique d'un quasi-concept' (1999) 41 Lien Social et Politique – RIAC 47-59, 48.

104 Nathalie DesRosiers, 'Liberté, pour l'instant, égalité, de temps en temps, fraternité, …pas encore: les 25 ans de la charte canadienne des droits et libertés' in JE Magnet and B Adell (eds) *The Canadian Charter of Rights and Freedoms After Twenty-Five Years* (LexisNexis 2009) 123, 132.

105 *R c Big M Drug Mart* [1985] 1 SCR 295 [95] and [122-123]. JS Mill himself may have written this passage. See *On Liberty* (Penguin Classics 1982).

'respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society'.[106] Such values point to a different concept of freedom, one that departs from the romantic individualism of *Big M Drug Mart*. Under the *Oakes* view of freedom, society may legitimately use its authority in order to help the have-nots use their freedom effectively, or else to protect them from the unfettered freedom of the haves. The *Oakes* view of a free and democratic society is congruent with the Welfare State that was still the dominant view of the state in the eighties in Canada.[107] It is also representative of the importance attached to the constitutional rights of minorities and to multiculturalism in Canadian judicial discourse.[108]

Putting Paradigms at Work

Despite *Big M Drug Mart* and *Oakes*, the meaning of freedom according to the Supreme Court of Canada is neither especially coherent, nor predictable. The Court's decisions throughout the years in fact point to different, competing paradigms that can be ascribed to different views on the proper role of the state.[109]

In a notorious 1987 trilogy, the Court expounded a radically individualistic view of freedom.[110] A majority of the Court emphasised what it called the individual nature of freedom of association: it existed purely for the purpose of facilitating the group exercise of individual rights.[111] Thus, since individually workers have no right to breach a work contract, the collective right of workers to strike was

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106 *R v Oakes* [1986] 1 SCR 103 [64].

107 Andrée Lajoie, *Jugements de valeurs – le discours judiciaire et le droit* (Presses Universitaires de France 1997) 80.

108 As mentioned above, the protection of minorities is a basic constitutional principle: *Re Secession of Québec* (n 13). Multicultural policies have occasionally been mentioned by the Court as normative: eg, *Multani v Commission scolaire Marguerite-Bourgeoys* (n 50) [76] (religious tolerance as 'a very important value of Canadian society'). See also the remarks in *Syndicat Northcrest v Amselem* (n 97) [87] (Canada as an exemplary multiethnic and multicultural society).

109 Lajoie (n 107) 57-65. See also Michel Coutu, 'Les libertés et droits fondamentaux, entre individu et société' in P Bosset (ed) *La Charte québécoise des droits et libertés après 25 ans* (Vol 2, Commission des Droits de la Personne et des Droits de la Jeunesse 2003) 163-199.

110 See *Re Public Service Employees Relations Act* [1987] 1 SCR 313; *PSAC v Canada* [1987] 1 SCR 424; *RWDSU v Saskatchewan* [1987] 1 SCR 460.

111 *Re Public Service Employees Relations Act* (n 110) [176] (McIntyre, J).

not constitutionally protected.[112] Such an interpretation of freedom of association blatantly disregarded the inequalities in power between labour and management that are such a crucial aspect of freedom of association in the workplace.[113] In such a classic liberal paradigm, the state stands over and above social power relationships: it should not intervene to strike an 'artificial' balance among them. The liberal paradigm also emphasises individual freedoms over state authority; it has been especially influential in the fields of criminal law and administrative law.[114]

However, the 1987 trilogy was the high-water mark for the liberal paradigm. Freedom of expression cases soon gave the Court an opportunity to redefine the scope of freedom. In those cases, the Court emphasized the state's responsibility in striking an appropriate balance of power between social actors. Soon, the Court would allow the state to limit freedom of expression in order to protect vulnerable groups of individuals such as children[115] or sexually abused women.[116] Conversely, taking unequal power relationships into account led the Court to recognising a constitutional right to exercise freedom of expression on public property.[117] Thus, the Court granted constitutional protection to the posting of messages on electricity poles, pointing out that minority groups and economically disadvantaged groups traditionally rely on such means as an affordable way of expressing ideas (metaphorically, the Court described posters as 'the circulating libraries of the poor'[118]). Eventually, the Court repudiated its 1987 trilogy and adopted a much more favourable view of union activity as a constitutionally protected value.[119] Clearly, such cases cannot be subsumed under the liberal paradigm; the approach

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112 However, since playing golf individually is legal, playing golf in association with others is constitutionally protected, according to the Court: ibid [175]. For an ironical comment see Harry Arthurs, 'The Right to Golf: Reflections on the Future of Workers Unions and the Rest of Us under the Charter' (1988) 13 Queen's LJ 17.

113 Coutu (n 109) 169.

114 See, for instance *Hunter v Southam* [1984] 2 SCR 145; *Singh et al v MEI* [1985] 1 SCR 177; *Re Motor Vehicle Act (BC)* [1985] 2 SCR 486; *R v Therens* [1985] 1 SCR 613; *R v Swain* [1991] 1 SCR 933; *R v Stinchcombe* [1995] 1 RCS 754; *Suresh v Canada (Minister of Citizenship and Immigration)* 2002 CSC 1; *Charkaoui v Canada (Citizenship and Immigration)* 2007 CSC 9.

115 *Irwin Toy v Quebec (Attorney General)* [1989] 1 SCR 927 [protecting young children against advertising].

116 *R v Butler* [1992] 1 SCR 452 [obscenity].

117 *Committee for the Republic of Canada v Canada* [1991] 1 SCR 139; *Ramsden v Peterborough* [1993] 2 SCR 1084.

118 Ramsden (n 117) 1102.

119 *Dunmore c Ontario (Attorney General)* [2001] 3 SCR 1016 [union rights of farm workers as vulnerable group]; *Health Services and Support - Facilities Subsector Bargaining Association v British Columbia* [2007] 2 RCS 391 [procedural right to group bargaining].

followed is based on a social view of democracy, the state, and freedom itself.[120]

All things considered, identifying a specific sense for freedom in the case-law of the Supreme Court of Canada proves a thankless exercise. Changes in paradigms occur over time – as evidenced by the changes in the Court's own case-law – and may also occur when comparing specific freedoms. Furthermore, choosing a paradigm is never an innocent act, as this reflects underlying views about the state, whether liberal, social or – in some cases – authoritarian or repressive.[121]

The Plot Thickens: Freedom in a Multicultural Society

As will now be seen, multiculturality questions the capacity of existing legal paradigms, and the underlying views about the role of the state, to provide adequate legal 'answers' to the problem of elucidating the meaning of freedom.

Not only does multiculturality bring religious, ethnic and religious specificities to the fore, it also highlights the connections between individuals and the various groups they belong to. Group belongings blur the classic (liberal or social) points of reference. In 1985, the entry into force of section 15 of the Canadian Charter, guaranteeing equality rights, changed the terms of the equation, by introducing discrimination as a factor in Canadian constitutional law. From then on, different values only remotely related to classic liberalism entered the stage, stressing social solidarity with universal undertones, but also insisting on a need to compensate long-standing injustices suffered by specific groups.[122] In the absence of a proper understanding of the complex relationship between the individual and group dimensions of freedom, determining the meaning of freedom in such a context can be a messy affair.

Canadian law, thus far, has resorted to various competing approaches in dealing with the complex issue of freedom in a multicultural society. When the meaning

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120 Coutu (n 109) 180.

121 A third paradigm has indeed emerged in recent years, based on security concerns. It will be recalled that, under s 7 of the Charter, the Court was initially willing to leave the individual a personal sphere of autonomy, responsibility, even solitude (see above). However, the Court recently restricted an individual's private sanctuary to a much narrower sphere, limited only to those 'basic choices going to the core of what it means to enjoy individual dignity and independence': *R v Malmo-Levine* [2003] 3 SCR 571 [85]. In this case, this resulted in excluding the private consumption of marijuana from the protection of s 7. The Court rejected the utilitarian views of JS Mill as 'too simple' (quoting HLA Hart) and relied instead on social consensus as a justification for limiting freedom. The vaguer concept of 'fundamental justice' put forward by the Court might be the prelude to a greater reliance on penal law as an instrument of social control: N DesRosiers (n 104) 138-139.

122 Lajoie (n 107) 61-62.

of 'religion' was at stake, liberalism has been the paradigm of choice. For instance, priority has to be given to an individual's private conscience, even when clashing with majority religious practices or not conforming to the official teachings of an established religion. In 1986, the Court described the purpose of religious freedom as being to 'ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being'.[123] The Court's reluctance to pass judgment on the validity of religious beliefs in that case was based on the intimate character of such beliefs. The course was kept in *Amselem* (2004).[124] In the *Big M Drug Mart* tradition, the Court recalled the notions of autonomy and self-determination. This ruled out any attempt at verifying the obligatory nature of religious practices (the Court said this was not only inappropriate, but plagued with difficulties).

On the other hand, the social purposes of freedom mentioned in *Oakes*, especially the enhancement of the social participation of individuals and groups, were invoked in other cases, to justify limitations on freedom in a multicultural society. The hate propaganda cases of the early nineties[125] insisted on the commitment to multiculturalism embodied in section 27 of the Charter. In *R v Keegstra*, Chief Justice Dickson, for the majority, wrote: 'I am of the belief that s. 27 and the commitment to a multicultural vision of our nation bear notice in emphasizing the acute importance of the objective of eradicating hate propaganda from society.'[126] Dickson explicitly linked individual self-fulfilment to group belonging when writing that section 27 emphasized the need 'to prevent attacks on the individual's connection with his or her culture, and hence upon the process of self-development'.[127] In *Multani* (2006), the Court ruled that an absolute prohibition on wearing a kirpan at school would stifle the promotion of values such as multiculturalism, thereby violating the proportionality requirement.[128] An underlying element of such cases is the consideration that is being given to the close relationship between an individual and the cultural group or groups he belongs to.

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123 *R v Edwards Books and Arts* [1986] 2 SCR 713 [97] (Dickson, CJ).

124 *Syndicat Northcrest v Amselem* (n 97). Co-owners in apartment buildings had built individual succahs on their balconies, in contravention of building rules. As Orthodox Jews, they invoked their personal, sincere belief that individual succahs were necessary for Jewish observance. A rabbi testified that a community succah satisfied Jewish rules.

125 *R v Keegstra* [1990] 3 SCR 697; *Canada (Human Rights Commission) v Taylor* [1990] 3 SCR 892. See also *Ross v New Brunswick School District No 15* [1996] 1 SCR 825.

126 *Keegstra* (n 125) 757 (Dickson, CJ).

127 Ibid.

128 *Multani* (n 50) [78] (Iacobucci, J).

However, as a counterpoint to a liberal-social perspective centred on individual self-fulfilment and 'participation in society' (using the *Oakes* phraseology), a distinct strand has also emerged, where group belonging seems to be an end in itself, rather than a vehicle for individual development. Evidence of this could be found in *Caldwell* (1984), a pre-Charter discrimination case, where a Catholic schoolteacher had married a divorcee in contravention of Church rule and lost her job.[129] The Court had ruled in favour of the school, relying on the Catholic school's educational philosophy: 'in imitation of Christ', teachers were required to 'reveal the Christian message in their work as well as in all aspects of their behaviour'.[130] That case has been criticized for not adequately taking into account the right to respect for one's private life and one's individual freedom.[131] In the more recent *Trinity Western University* case (2001), the Court forced the state to accredit a university program for future teachers. The university was affiliated with a Christian church and required prospective students to sign a declaration under which they would not engage in activities condemned by the Bible, including homosexual activities. The Court had to decide whether the state, in granting accreditation in the public interest, could consider the university's practice of discriminating against homosexuals. It gave priority to the private university's Christian world view. What mattered was the actual behaviour of teachers after they graduated from the program (it should be free from discrimination against homosexuals), not the discriminatory teachings in the program.

Allowing organisations to judge the private behaviour of individuals, whether staff or students, can be difficult to reconcile with a liberal paradigm and the sphere of personal autonomy. *Trinity Western* does not deal satisfactorily with the rights and freedoms of students in the program, except to say that 'while homosexuals may be discouraged from attending TWU […], they will not be prevented from becoming teachers'.[132] Perhaps this points to an untold communitarian paradigm. In both *Caldwell* and *Trinity Western*, the possibility of dissenting views within a religion is denied: this can be seen as a reification of official religious doctrine. *Trinity Western*, for example, made no mention of the possibility that a TWU student might adhere to the basic teachings of Christianity but not necessarily share those aspects that deal with sexual morality; religious doctrine was a package deal with no opt-out possibility. Purely personal interpretations of religion are themselves

129 *Caldwell v Stuart* [1984] 2 SCR 603.
130 Ibid 608.
131 See Pierre Bosset, 'Pratiques et symboles religieux: quelles sont les responsabilités des institutions?' in *Les 25 ans de la Charte québécoise* (Yvon Blais 2000) 43-44; Coutu (n 109) 189.
132 Ibid [35].

risky – including the risk of opportunistic interpretations, or instrumentalising for political purposes – but individual self-determination within a group is a crucial aspect of freedom in a multicultural society.[133] Cases such as *Trinity Western* show a subterranean tendency in Canadian law to analyse the relationship between individuals and groups in terms of subordination of the former to the latter. This might reflect a broader incapacity to conceptualise freedom in a multicultural society. The coexistence of multiple and competing paradigms suggests that, in Canada, determining the meaning of freedom in a multicultural context remains a work in progress.

V. Conclusion

Canada is usually proud of the way it manages cultural diversity, and likes to see itself as a model to other societies. Recently, the Supreme Court of Canada noted that the country was advertising that record of respect for cultural diversity. The Court wrote that Canada was 'in many ways an example […] for other societies':[134] an idyllic view that, to a large extent, is also shared internationally.[135]

Models remain models, however, and should be seen in light of their context and history. In the case of Canada, plurinationality, immigration, linguistic and legal duality, the immemorial presence of aboriginal peoples and a federal structure are all elements that should be taken into consideration abroad when pondering the relevance of the model. Nevertheless, Canadian experience in the legal treatment of diversity provides a number of lessons, positive and negative, that may be of benefit to other multicultural and plurinational societies.

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133 Amartya Sen, *Identity and Violence: The Illusion of Destiny* (Norton 2006). The 2004 World Report on Human Development, inspired by Sen's views, defined cultural liberty as allowing people the freedom to choose their identities without being excluded from other choices important to them (such as education, health or career): UN Development Program, *Human Development Report 2004 – Cultural Liberty in Today's Diverse World* (UNDP 2004) 6.

134 *Syndicat Northcrest v Amselem* (n 97) [87] (Iacobucci, J).

135 See eg, the remarks by the UN Independent Expert on Minority Issues: 'Canada is a society open to and accepting of cultural, religious and linguistic differences, where minorities can express their identities, speak their languages and practice their faiths freely': UN Independent Expert on Minority Issues (Ms McDougall), 'Report of Mission to Canada' (8 March 2010) UN Doc A/HRC/13/23/Add.2, 2 (Summary). Nevertheless, Canada's record in treating minorities is far from perfect. The Expert also singled out unemployment, poverty, racial profiling and anti-Muslim attitudes.

Lesson 1 is of special import to lawyers and human rights specialists. It concerns the capacity of legal concepts to balance recognition of cultural and religious diversity with other fundamental rights. Canadian debates have tended to focus on the impact reasonable accommodation would have on equality between the sexes. As we noted, hierarchising rights in order to give precedence to gender equality was even contemplated as a possible approach. This would run contrary to the basic principles of indivisibility and interdependence of rights affirmed in the 1993 Vienna Declaration, and to current theories of discrimination. Issues of intersectionality are now a growing concern in human rights literature,[136] and they have influenced recent normative statements on equality and non-discrimination.[137] Thus, in its recent General Comment on non-discrimination, the UN Committee on Economic, Social and Cultural Rights stressed the importance of recognizing the 'unique and specific impact' of multiple discrimination, namely individuals facing discrimination on more than one prohibited ground – for example, women from ethnic or religious minorities.[138] The comment emphasised the need for corrective measures including affirmative action and reasonable accommodation.[139] As Canadian experience suggests, this need not conflict with women's rights. Ironically, creating hierarchies among human rights (such as between gender equality and religious freedom) might achieve just that, by artificially separating elements of a person's identity and sense of dignity.

Lesson 2 is political. It concerns the relationship between human rights and the recognition of national identities. Inscribing Aboriginal rights in the Canadian Constitution was a positive step, especially now that the UN Declaration on the Rights of Indigenous Peoples links aboriginal rights with human rights (Canada's decision to vote against the Declaration was disappointing, although Canada later announced its support for the declaration). Constitutionalising aboriginal

136 Eg, Ontario Human Rights Commission, '*An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Discrimination Claims' (Discussion paper,* Toronto 2001) <http://www.ohrc.on.ca/en/resources/discussion_consultation/DissIntersectionalityFtnts/pdf>. Institutional concern for intersectionality is more recent in Québec and still embryonic. See Pierre Bosset, 'Les mesures législatives de lutte contre la discrimination raciale au Québec: un bilan institutionnel' (2005) 12(2) Nouvelles Pratiques Sociales 24.

137 See eg: Equal Rights Trust, 'Declaration of Principles on Equality', <http://www.equalrightstrust.org/ertdocumentbank/Pages%20from%20Declaration%20perfect%20principle.pdf>. The Principles were agreed by a group of international experts after stages of consultation. The Declaration 'reflects a moral and professional consensus among human rights and equality experts'.

138 UN Committee on Economic, Social and Cultural Rights, UN Committee on Economic, Social and Cultural Rights, 'General Comment 20, Non-Discrimination in Economic, Social and Cultural Rights' (2009) UN Doc E/C.12/GC/20 [17].

139 Ibid [9].

rights went some way towards recognizing the plurinational nature of Canada. However, in some quarters, the very existence of an inherent right to aboriginal self-government is still debated; and so is the exact meaning of the right.[140] So far, political negotiations on aboriginal self-government have taken place on a piecemeal basis and at excruciatingly slow pace. In other words, the lofty Canadian rhetoric of aboriginal rights has yet to be matched by significant, long-term achievements.

Regarding Québec, the province enjoys no specific status under the Canadian Constitution, despite recognition by the Supreme Court that 'much of the Quebec population certainly shares many of the characteristics'[141] of a people. Legal recognition of Québec as a nation remains a crucial element in its relationship with the rest of Canada. The lack of progress on this point[142] clearly accentuates Québec feelings of alienation and cultural insecurity, which have been factors in the backlash against reasonable accommodation and its alleged link to Canadian multiculturalism observed in certain quarters. Canadian and Québec experience strongly suggests that progress in managing cultural diversity in plurinational societies should go hand in hand with legal recognition of plurinationality.

Lesson 3, a final one, concerns the relationship between the individual and collective dimensions of human rights. As shown when discussing the liberal and social approaches to freedom, distinct paradigms are used by Canadian courts in this respect, a judicial inconsistency that illustrates the tensions between the two dimensions. A third paradigm, communitarian in essence, blurs the line between both approaches and also risks compromising both, by relegating individuals to the narrow confines of their group, denying their individual agency and hindering their participation in the broader society. I submit that the concept of cultural rights might allow for a more holistic relationship between the individual and collective dimensions of human rights, and better respect the principles of indivisibility and interdependence of rights.

Cultural rights are crossroads for a vast array of rights that have culture as

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140 See Bradford W Morse, 'Aboriginal and Treaty Rights in Canada' in G-A Beaudoin and E Mendes (eds) *Canadian Charter of Rights and Freedoms* (n 7) 1169, 1218-1230.

141 Reference on Quebec Secession (n 13) [125].

142 An attempt to have Québec constitutionally recognized as a 'distinct society within Canada' failed to obtain sufficient support in the provinces, despite being supported by Québec and the federal government. The 1987 Constitutional Accord (or Meech Lake Accord) did not get a sufficient number of ratifications in the provinces and was abandoned in 1990. In 2006, the Canadian House of Commons passed a motion declaring that 'the Québécois [not Québec] form a nation within a united Canada': Hansard (27 November 2006). The motion carries no legal weight.

their object; those rights are civil, political, social and cultural in nature.[143] They require cultural freedom, respect for cultural identity, and access and participation to culture.[144] The identity requirement is exemplified in article 27 of the UN Covenant on Civil and Political Rights, which guarantees the right of persons belonging to ethnic, religious or linguistic minorities, 'in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'. The rights guaranteed in article 27 can be claimed individually.[145] Nevertheless, respecting cultural rights will often depend on the capacity and will of minority groups as such to maintain their culture, language or religion, and this will entail positive obligations for states to take group specificities into account when developing public policies. Canada was recently reminded of this by the UN Human Rights Committee, in respect of the cultural rights of aboriginal peoples.[146]

Respect for cultural identity is not incompatible with a social conception of freedom. However, the communitarian paradigm that seems to emerge from

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143 Cultural rights can be found in several international human rights instruments. See: Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 27; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 13 (arts 13-15); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 27; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) UNTS 660 (arts 1-2; 5); International Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) UNTS 1249 (arts 1-3; 5; 10); International Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) (art. 17; 28-30); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) (art. 17, 31); Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) (art. 24, 30).

144 UN Committee on Economic, Social and Cultural Rights, 'General Comment 21, The Right of Everyone to Take Part in Cultural Life' (2009) UN Doc E/C.12/GC/21. See: Stephen A Hansen, 'The Right to Take Part in Cultural Life: Toward Defining Minimum Core Obligations' in A Chapman and S Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002).

145 For a case involving Canada, see *Lovelace v Canada* (1981) 1 Selected Decisions of the Human Rights Committee 83. A native woman had married a non-Indian. Under Canadian law at the time, she had lost her status as an Indian, which meant that she no longer had the right to reside on the Indian reserve she belonged to. The Committee ruled that by denying her Indian status, Canada had violated her right to take part in the cultural life of her community.

146 UN Human Rights Committee, 'Examination of Reports of States Parties under Article 40 of the Covenant – Concluding Observations – Canada' (n 19) [10] [measures to be taken by Canada to preserve and promote aboriginal languages and cultures].

certain decisions of the Supreme Court of Canada suggests that respect for cultural identity may, at times, go beyond empowering communities and actually deny the rights of individuals. To borrow once again from the UN Committee on Economic, Social and Cultural Rights, it is crucial, therefore, to emphasise that the right to take part in cultural life should 'be characterized as a freedom'.[147] This necessarily includes the right for individuals to claim belonging in more than one cultural group, and to change such a choice over time.[148] From such a perspective, cultural rights are not so much a negation but a reaffirmation of the liberal ideal.[149]

Cultural rights are still underdeveloped in Canada, just as they are globally.[150] In the Canadian Charter, they take the limited form of a right of access to education in English or French (a right, furthermore, that is available only to Canadian citizens). The Québec Charter goes somewhat further, in recognising a right for members of ethnic minorities to maintain and develop their own cultural interests; however, linguistic and religious minorities are not mentioned, and the view of culture that is put forward in the Charter is apparently an essentialist one that ignores the importance of cross-influencing and cross-fertilisation in the development of culture.

Nonetheless, it would be unfair to say that Québec and Canada are unreceptive to the notion of cultural rights as freedom rather than frozen identities. Positive elements may be found in the intercultural model adopted in Québec, which explicitly encourages cross-cultural interaction and the development of a shared culture based on the initial cultural identities, but also transcending them. What is missing, perhaps, is a legal conceptualisation of such models in terms of human rights. The added value of cultural rights, where freedom, equality and diversity complement (not contradict) each other, may be as a key to a global understanding of human rights. In other words, while they respect the fluid nature of culture, cultural rights also integrate the individual, social and identitarian dimensions of

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147 Committee on Economic, Social and Cultural Rights, 'General Comment 21' (n 144) [6].

148 See 'Fribourg Declaration on Cultural Rights' <http://www.unifr.ch/iiedh/assets/files/declarations/eng-declaration.pdf> art 4.

149 See P Meyer-Bisch, 'Les libertés culturelles, dépassement ou accomplissement du libéralisme?' in G Vincent (ed), *La partition des cultures: droits culturels et droits de l'homme* (Presses Universitaires de Strasbourg 2008) 349-370.

150 The underdeveloped state of cultural rights globally is a recurring theme. See eg: Patrice Meyer-Bisch (ed), *Les droits culturels, une catégorie sous-développée des droits de l'homme* (Presses de l'Université de Fribourg 1991); Asbjørn Eide, 'Cultural Rights as Individual Human Rights' in A Eide, C Krause and A Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (Nijhoff 1995) 229.

human rights. They should therefore be considered as a useful conceptual tool in giving meaning to human rights in a plural society. This is something that most plural societies, including Canada and Québec, have yet to realize.

Freedom of Religion in Multi-Faith Europe

Protecting Universal or Western Sensibilities?

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Abstract: Human rights are often thought to provide us with neutral, objective and unpolitical guidance in multi-faith societies. Even though we have great trust in human rights, this should not prevent us from looking at their practical operation critically. This article explores some of dilemmas regarding the application of the freedom of religion or belief in Europe. The paper argues that in practice the freedom of religion as a human right does not set clear standards but derives its meaning through balancing different kinds of political, strategic, Christian and Western interests. In this article, this is made visible by claims of Muslim applicants asserting their rights in the European Court of Human Rights. It is argued that the human rights community should be more sensitive and reflective to the many pragmatic uses of human rights, in other words, the politics of human rights.
Keywords: Freedom of Religion or Belief; European Court of Human Rights; Minorities; Islam in Europe; Human Rights Pragmatism; Politics of Human Rights; European Universalism.

I. Introduction

In the modern world there is a growing appeal for human rights, which are often thought to provide us with humanitarian, fundamental, universal and non-poli-

1 The views expressed are solely those of the author. This paper is based on a speech delivered at the European Conference of the International Ombudsman Institute in Barcelona on 4 October 2010.

tical guidance in an unpredictable and multi-faith world.[2] Jack Donnelly has claimed that human rights are the highest moral rights and they regulate 'fundamental structures and practices of political life, and in ordinary situations take priority over other legal, political and moral claims'.[3] Rights are sometimes seen as a kind of 'trump card' that can set limits to the policy choices of states to the benefit of individual freedoms.[4] The appeal to rights language is a means through which many lawyers and activists attempt to constrain the power exercised by states over individuals. Referring to human rights against states contains a paradox, however, as it is precisely states and state institutions that are the guardians of international law, including human rights.[5]

One of the fundamental rights in democratic society is the freedom of religion or belief: the freedom to entertain and manifest any thought, moral conviction or religious view.[6] Human rights like freedom of religion are seen as significant as they are individual rights that are said to apply to all human beings by virtue of their humanity, without distinction on such grounds as religion, sex, political opinion, language, or national or social origin. Human rights are considered to be universal, meaning that they are applicable to every human being, at all times

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2 It is clear that these concepts are overlapping and also open to different kind of interpretations. Human rights are often understood as rights that derive from the 'inherent dignity' of the human person. Rights are said to be 'universal, inherent and inalienable'. Human rights are claimed to be fundamental or non-political in the sense that 'they are neither obtained, nor granted'. Human rights are sometimes described as the 'birthright of all human beings'. Equality is another traditional element of the conception of human rights. For more detailed analysis on the claimed properties of human rights see Marek Piechowiak, 'What are Human Rights? The Concept of Human Rights and Their Extra-Legal Justification', in Raija Hanski and Markku Suksi (eds) *An Introduction to the International Protection of Human Rights: A Textbook* (Institute for Human Rights, Åbo Akademi University 1999), 3-14. See also Grand Chamber judgement in the case of *Lautsi and Others v Italy* (App no 30814/06) where it is stated that the freedom of religion imposes on Contracting States a duty of 'neutrality and impartiality' (60).

3 Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press 2003) 1.

4 On rights as trumps, see Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978).

5 Anne Orford, 'Biopolitics and the Tragic Subject of Human Rights' in Elizabeth Dauphinee and Christina Masters (eds) *The Logics of Biopower and the War on Terror* (Palgrave 2007) 205.

6 According to art 9 of the European Convention of Human Rights 'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance'. Freedom of religion includes 'forum internum' (eg protection against religious indoctrination) and the 'forum externum', eg the right to manifest ones religion, which could in some situations be legitimately limited. Generally on freedom of religion in human rights law, see, eg, P van Dijk and GJH van Hoof, *Theory and Practice of the European Convention on Human Rights* (Kluwer Law International 1998) 541-557.

and in all places. These universal rights thus should not only applicable to human beings living in the West or to people of Western or Christian descent, but also to Muslims and other non-Christian minorities. Today the contestation of the universality of human rights standards in Europe is mainly focused on the tension between the promotion of human rights and the recognition of religious differences.

Even though we have great trust in human rights commitments at an abstract level, this should not prevent us from looking at their practical operation critically. While we increasingly refer to rights as non-political, universal and neutral standards in democratic multicultural societies, it is necessary to ask if we always *can* and *should* follow their guidance. Arguably, they sometimes obscure our understanding of how power operates in modern societies. Anne Orford, for example, has queried whether human rights really offer resistance against the power of states or whether instead the invocation of human rights constrains our capacity to think about and counter the ways in which power circulates in global politics.[7] In her view, human rights is a 'speech of state', another way to control and manage human life. Another type of critique comes from cultural relativists, who have claimed that human rights are not universal, as the Western human rights movement views its own Christian views and forms of life as universal.[8] Some observers have argued that human rights are a Western concept with limited universal applicability.[9]

Surprisingly, both of the above critiques regarding the operation of human rights seem to be relevant in present-day Europe. It has been claimed, for example, that the European Court of Human Rights (ECHR) does not provide a non-political or neutral basis for freedom of religion but gives special protection to Western and Christian ways of life and religion, paying lesser heed to non-Western religions and values.[10] Christianity is the dominant religious tradition in Europe and one can argue that the European understanding of freedom of religion as a human right reflects this heritage. It has likewise been stated that article 9 of the European Convention on Human Rights has been interpreted inconsistently

7 See Orford (n 5) 206.

8 On the discussion on universalism and relativism see Jari Pirjola, 'Culture, Western Origin and the Universality of Human Rights' (2005) 23 Nordisk Tidsskrift for Menneskerettigheter (Nordic Journal of Human Rights) 1.

9 Adamantia Pollis and Peter Schwab, 'Human Rights: A Western Construct with Limited Applicability' in Adamantia Pollis and Peter Schwab (eds), *Human Rights: Cultural and Ideological Perspectives 1* (New York, 1980) 12.

10 Carolyn Evans, 'The Islamic Scarf in the European Court of Human Rights' (2006) 7 Melbourne Journal of International Law 22.

in view of the mandate of the ECHR to protect the freedom of religion of all. Bodies responsible for protecting freedom of religion have generally been more favourable to states than to those whose freedom of religion has been denied.[11] There is also a general danger that those who apply a concept as controversial as freedom of religion or belief will simply draw on their understanding as to what freedom of religion consists of and fail to protect what seems strange.

The implementation of religious freedoms can also pose serious dilemmas for secular countries when Muslim minorities, for example, demand the application of Islamic law (*sharia*) to family matters such as divorce, inheritance and custody.[12] There has been controversy whether freedom of religion protects the wearing of a headscarf (*hijab*), or whether school uniform is strict enough for Muslims, or whether a Muslim witness can give evidence in court while wearing a veil covering her face, for example.[13]

This article examines, both from theoretical and practical perspectives, some of the dilemmas regarding the application of freedom of religion in Europe. I will first look briefly at the nature and scope of the freedom of religion as a so-called universal human right in international human rights law. I will then discuss why this claimed universality in professional practice often turns out to be a politics of the particular: a kind of European universalism.[14] I try to show that the freedom of religion or belief as a human right does not set us clear standards but receives its meaning through balancing different kinds of political, strategic, Christian and Western interests. [15] I argue that even though freedom of religion is in theory

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11 See Carolyn Evans, *Freedom of Religion under the European Convention of Human Rights* (Oxford University Press 2001) 2.

12 This applies also to Jewish religious laws. Muslim Arbitration Tribunals offer dispute resolution services in half a dozen British cities (The Economist, 16 October 2010). Dominic McGoldrick has observed that the real practice of multiculturalism is found in the way hundreds of aspects of daily life are resolved. Among the practical issues are the application of personal religious laws concerning families, children and property, the application of employment and health and safety law to religious groups, the dissolution of Islamic political parties (for example, in Turkey), the regulation of Islamic clothing in the workplace or in educational facilities (for example, the *hijab* debate) and the control of burials. See Dominic McGoldrick, *Human Rights and Religion: Islamic Headscarf Debate in Europe* (Hart Publishing 2006) 29.

13 Evans (n 11) 2.

14 On universalism and particularism in human rights protection, see also Jari Pirjola 'European Asylum Policies – Inclusions and Exclusions under the Surface of Universal Human Rights Language' (2009) 11 European Journal of Migration and Law 347. See also Immanuel Wallerstein, European Universalism. The Rhetoric of Power (The New Press 2006).

15 Martti Koskenniemi, 'Human Rights, Politics and Love' (2001) 4 Mennesker & Rettigheter (Nordic Journal of Human Rights) 36.

said to be a universal right, in practice it protects particular and European ways of understanding freedom of religion. In this article, this is exemplified by the claims of four Muslim applicants asserting their rights in the ECHR. A critical analysis of human rights is crucial as it forces us to ask if the right to freedom of religion as a human right can really provide us with objective or non-political guidance, or whether we should be more sensitive to the many uses of human rights, in other words, the politics of human rights. In my view, this type of analysis can advance the liberating potentials of human rights. The modern multicultural state whose operation is very much based on 'human rights talk' should not be blind to the many paradoxes and limitations of rights.

I agree with Florian Hoffman that if human rights practitioners desire to avoid a 'cliché concept of rights' they have to look at human rights critically and pragmatically.[16] A pragmatically oriented perspective on human rights aims to comprehend human rights not in terms of what they could be on an abstract level (for example, freedom of religion for all) but what they actually are in practice (for example, Europe protects Christian values). To understand the operation of human rights it is necessary to ask what kind of strengths and weaknesses rights language offers, and who are included and who are excluded under the noble promise of freedom of religion.[17]

II. Freedom of Religion as a Human Right: the Right to Manifest your Religion

At the outset it is necessary for the purpose of this article to define briefly freedom of religion or belief as a human right. According to article 9 of the European Convention on Human Rights, 'everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance'. A rather similar definition is included in article 18 of the United Nations Covenant

16 Florian Hoffman, 'Human Rights, the Self and the Other: Reflections on a Pragmatic Theory of Human Rights' in Anne Orford (ed) *International Law and its Others* (Cambridge University Press 2006).

17 On the problematic concept of culture in human rights debate, see Jari Pirjola, 'Culture, Western Origin and the Universality of Human Rights' (2005) 23 Nordisk Tidsskrift for Menneskerettigheter (Nordic Journal of Human Rights) 1.

on Civil and Political Rights (ICCPR). It states that: 'Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching'.

From a practical point of view there are obviously a wide variety of conceptions as to what this freedom entails. These conceptions may vary between individuals, cultures, religions and states.[18] One starting point for the interpretation of the freedom of religion is the Vienna Convention on the Law on Treaties which stipulates that the words of conventions should be interpreted in good faith, in light of the objective and purpose of the convention. Carolyn Evans has written that in some cases regarding freedom of religion the ECHR has indeed emphasised the 'purpose and the objective' of the Convention, and has also recognised the importance of applying the Convention in such a way as to ensure that rights granted are 'practical and effective' and not merely 'theoretical and illusory'.[19]

The ECHR has stated that freedom of religion or belief entails the freedom to hold or not to hold religious beliefs and to practice or not to practice a religion. While religious freedom is primarily a matter of individual conscience, it also implies freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares.[20]

In *Kokkinakis,* the ECHR recalled that 'as enshrined in Article 9 freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention'. It is, in its religious dimension, one of the most vital elements that go to constitute the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The Court stated that the pluralism indissociable from a democratic society; that it has been dearly won over the centuries, and is dependent on the latter. While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to 'manifest one's religion'. Bearing witness in words and deeds is bound up with the existence of religious convictions.[21]

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18 Manfred Nowak, *UN Covenant of Civil and Political Rights: CCPR Commentary* (Kehl am Rhein 1993) 310.

19 Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP 2001) 52

20 See *Leyla Sahin v Turkey* (App no 44774/98) ECHR 10 November 2005, 104. As the court often recalls, however, art 9 'does not protect every act motivated or inspired by a religion or belief'; see also, for example *Kalac v Turkey* ECHR 1997-IV 1199, 1209.

21 See *Kokkinakis v Greece* (App no 14307/88) ECHR 25 May 1993, 31.

The United Nations Human Rights Committee has underlined that 'the terms belief and religion are to be broadly construed'. The terms 'religion' or 'belief' include theistic, non-theistic and atheistic beliefs, as well the right not to possess any religion or belief. Private freedom of religion is generally distinguished from the public manifestation or practice of the religion. Whether religion is practiced alone or in community with others, in public or in private, is a matter of choice for the believer. The term practice, for example, includes putting into action all the dictates and teachings of one's religion or belief. [22]

The Committee has stated that the freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a 'broad range of acts'. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as to various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest.[23] The right to wear religious clothing or the Islamic headscarf, or the right to slaughter animals according to religious doctrines, could be examples of the right to manifest one's religion.[24]

The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of head coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group.[25] Manfred Novak has written that 'by worship is meant the typical form of religious preaching, i.e., freedom in ritual'. Observance covers processions, beards, circumcision,

22 See UN Human Rights Committee (HRC), 'CCPR General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)' (1993) UN Doc CCPR/C/21/Rev.1/Add.4.

23 For example, in the case of *Lautsi v Italy* (App no 30814/06) ECHR 3 November 2009, the Chamber considered that the compulsory display of a symbol of a particular faith in the exercise of public authority in relation to specific situations subject to governmental supervision, particularly in classrooms, restricts the right of parents to educate their children in conformity with their convictions and the rights of schoolchildren to believe or not to believe (57).

24 *Leyla Sahin v Turkey* (n 20) where the court stated that (point 71): 'The applicant said that, by wearing the headscarf, she was obeying a religious precept and thereby manifesting her desire to comply strictly with the duties imposed by the Islamic faith'. In the case of *Cha'are Shalom Ve v France* (App no 27417/95) ECHR 27 June 2000 the Court stated that: '… Article 9 lists a number of forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance. It is not contested that ritual slaughter, as indeed its name indicates, constitutes a rite or '*rite*' whose purpose is to provide Jews with meat from animals slaughtered in accordance with religious prescriptions, which is an essential aspect of practice of the Jewish religion.'

25 In *Singh Bhinder v Canada* (Comm no 208/1986) (1989) Human Rights Committee, a Sikh who wears a turban in daily life claimed that the requirement to wear a safety helmet during work violated his right to manifest his religion. The Human Rights Committee found that this limitation was justified by reference to the grounds laid down in art 18(3).

prayer and all other customs and rites of the various religions.[26] In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as, *inter alia*, the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.

In practice it is important to note that the freedom of religion includes the recognition of the right to change one's religion or belief. This is explicitly stated in article 9 of the European Convention on Human Rights but the ICCPR refers only to the right to adopt a religion. This aspect of the freedom of religion has been opposed by some Islamic states, which have feared that the right to change one's religion could encourage missionary and atheistic activities. For this reason the formula of the ICCPR uses the wording 'to have or to adopt a religion or belief of his choice'. [27]

III. From Theory to Professional Practice: Freedom of Religion as a Controversial Right

Even though freedom of religion or belief at an abstract level provides wide and comprehensive protection to practice and manifest one's religion on a practical level, there is wide variety of conceptions as to what this freedom entails. Human rights do not receive their meaning from rights themselves but from the circumstances outside rights. This is the reason why human rights must be approached not only as a commitment but also as a professional practice. This type of pragmatic perspective aims to comprehend human rights discourse not in terms of what it could be or ought to be but in terms what it arguably is, 'namely a plural polycentric and ultimately indeterminate discourse amenable to use by everyone (nearly) everywhere'.[28]

On an abstract level, freedom of religion is to the benefit of all in Europe but on a practical level this right is sometimes seen as matter of private belief rather than something that is happening in the public sphere. This interpretation of religion might have negative practical consequences, at least to some Muslims

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26 Novak (n 18) 321.
27 Ibid 313.
28 See Hoffman (n 16) 225.

who might feel that freedom of religion is not a state of mind but is manifested by public activity in the world. For some Muslims, for example, it is important to manifest their religion in the public sphere by wearing certain types of clothing. So it is not enough just on a theoretical level to enjoy a 'fundamental and universal human right' but to look carefully at how this right in applied in practice, who is included and who is excluded from the enjoyment of freedom of religion, and what kind of factors are involved in this process.

In practice there is no single correct use of human rights but many context-specific uses of human rights. Martti Koskenniemi, for example, has examined how human rights often defer to politics in their practice and application.[29] First of all, human rights are written in an indeterminate language which in practice requires interpretation and prioritization.[30] The content of rights – for example freedom of religion or belief – or their implementation does not logically follow from their formulation. As rights are drafted in open language in concrete situations, we have to ask what it means on a practical level when someone has freedom to manifest his or her religion or belief, in worship, teaching, practice and observance. Is a person entitled to wear a *burqa* in public places, or to have free time from work to pray, or to follow particular religious laws in family matters?[31] Referring to human rights does not help us on a concrete level to make decisions related to these questions. Thus, even though rights are said to be fundamental and outside politics, in practical legal life it is precisely the opposite. Human rights do not give answers to the questions emerging from multicultural societies, but also good policies are needed to give meaning and limits to increasing references to rights.[32]

Second, even though there is a broad theoretical understanding among human rights lawyers on the rather wide right to manifest one's religion or belief in the form of teaching, practice, worship and observance, as discussed above, this right is subject to possible restrictions by states. According to article 9(2) of the Euro-

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29 See Martti Koskenniemi, 'The Effects of Rights on Political Culture' in Philip Alston (ed) *The EU and Human Rights* (OUP 1999). I found his analysis useful also in the context of freedom of religion.

30 On indeterminacy in refugee law, see Jari Pirjola, 'Shadows in Paradise – Exploring Non-Refoulement as an Open Concept' (2007) 19 International Journal of Refugee Law 639-660.

31 One example regarding the right to pray during work was that of a Muslim schoolteacher who was dismissed for taking 45 minutes away from his job on Fridays on order to attend a local mosque. The European Commission of Human Rights held that in accepting the job as a teacher without mentioning his religious requirements he had chosen to take employment on the conditions offered, which did not include time off for Friday prayer, see *X v United Kingdom* (App no 8160/78) (1969) 12 YB 288. See Evans (n 19) 130.

32 See Koskenniemi (n 29) 112.

pean Convention on Human Rights, 'freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others'. The ECHR has stated that, 'It may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interest of the various groups and ensure that everyone's beliefs are respected'.[33]

How do we, in a concrete situation, decide when to follow a rule and when to allow exceptions? When are Muslim women, for example, allowed to wear a headscarf in educational facilities or during school physical education classes, and when it is prohibited? It has been stated that there is no non-political rule or standard that would provide an answer to this question. In real life rights do not exist outside or above politics or ideology. To decide when exceptions are needed, the ECHR has developed a balancing practice that uses abstract notions such as 'reasonable', 'proportionate' 'public order', 'morals' and 'perspective' to justify reference either to the right or the exception. When questions concerning the relationship between the state and religion are at stake, 'the role of national decision maker must be given special importance'.[34]

The justification of the so-called 'margin of appreciation' also lies in the wishes of the Court to recognize that the cultural, historic and philosophical differences between states party to the European Convention on Human Rights may justify different interpretations of the Convention. This doctrine makes it easier for the Court to take into account policy and other arguments of governments regarding what is 'necessary' when freedom of religion is interpreted in practice.[35] It is a doctrine designed to balance state sovereignty with the need to ensure observance of the Convention and thereby avoid confrontations between the ECHR and states parties. In this way human rights (or freedom of religion) become conditioned by policy choices of European state institutions which are justifiable by reference to alternative conceptions of a just society. Therefore it is not insignificant who decides what the freedom of religion entails and when restrictions are needed.

Different rights can also be in conflict and both sides refer to their rights. Freedom of speech can be in conflict with the right to security, for example. The *Jyllands-Posten* Muhammad cartoons controversy that took place in Denmark in

33 *Leyla Sahin v Turkey* (n 20) [106].

34 See, eg *Wingrove v United Kingdom (App no 17419/90) ECHR* 1996-V 1957-1958. See also Koskenniemi (n 29).

35 See, eg *Lautsi v Italy* (n 24) Request for third party intervention (art 44.2 of the Rules of Court) by the European Humanist Federation (23 May 2010) <www.humanistfederation.eu>.

2005 was also about freedom of religion and freedom of speech. The supporters of the cartoons felt that they were a legitimate exercise of the freedom of speech. The critics felt that the cartoons were blasphemous and insulting, infringing the freedom of religion. Can either freedom of religion or freedom of speech provide us with neutral and objective ground to solve such conflicts? Should freedom of speech always prevail in spite of the consequences? As I see it, rights have their role to play in directing our thinking towards justice but conflicts cannot be solved by resorting to rights but to circumstances beyond rights, to culturally conditioned and politically agreed ways of deciding what is appropriate in European society, for example. But this is of course the kind of political balancing that human rights are supposed to limit as they are said to 'take priority over moral and political claims', in the words of Jack Donnelly quoted at the outset of this article.[36] Do we want to live in a society that can freely make jokes about religions even though somebody gets offended, or should religions be left outside critical debates? The answer to this question depends on whom you ask. There is no correct solution for rights conflicts, no single vision for the good life that rights would express.

Yet another means by which the individual enjoyment of the freedom of religion can be infringed is when religions are approached in an essentialist or stereotypical way.[37] The essentialist concept of religion views rights and cultures as rather static, something one *has* rather than something one *makes*. This concept assumes that minority communities are homogenous or monolithic entities with no internal differences. In this approach, differences are constructed in a stereotypical and essentialist manner following the lines of a certain religion or tradition.[38] The essentialist approach may have some tempting features in daily life. It may help us to make common sense predictions and judgments, right or wrong, on the world around us. But it can also lead to the denial of another's freedom of religion because they are seen as a member of a larger group instead of as an individual.

Thus, another way to see religions in the human rights context is not to consider religions as essentialist or finished objects but as something in constant

36 See Donnelly (n 3).

37 See Gerd Bauman, *The Multicultural Riddle: Rethinking National, Ethnic, and Religious Identities* (Routledge 1999) especially 81-89.

38 Pragna Patel, 'Faith in the State? Asian Women's Struggles for Human Rights in the UK' (2008) 16 Feminist Legal Studies 12. Gerd Bauman has similarly observed that the present-day challenge, both political and theoretical, is about three concerns regarding multiculturalism: nationality as culture, ethnicity as culture and religion as culture and, as he puts it, all of these 'crumble as soon as one scratches the surface'. All three versions of culture share the same choice: whether culture is comprehended as a thing one has, or as a process one shapes. This choice has a direct link to the protection of 'culture' or freedom of religion as a human right.

making and remaking and an object of critical review and dialogue. One may be a Christian or a Muslim, but that particular part of one's identity does not necessarily determine how one behaves, thinks or practices the religion. One's interpretation of the religion may not be the same as the interpretation of the religious authorities or the judges of the ECHR, for example. Both essentialist and non-essentialist concepts of culture or religion bring the concept of power into the centre of the implementation of human rights in a multi-faith society. In the previous case we have to ask who defines imposed cultural or religious identities or the real substance of culture. In the latter case, the key question is who defines what it should be (as there are no real or ready or uncontestable essentials for the culture of religion).[39]

IV. Freedom of Religion as Politics of the ECHR

To what kind of context-specific uses has freedom of religion or belief been applied to by the ECHR? In this article I can give just a few examples to provide support to the more theoretical observations that I have tried to outline above. The wearing of particular clothing and religious symbols has, for example, become the source of an interesting legal and political debate in Europe. These debates have also found their way into the ECHR, at least in the following important decisions: *Dahlab v Switzerland* (2001), *Leyla Sahin v Turkey* (2005) and *Dogru v France* (2008).[40] Freedom of religion and the rights of Muslims were also involved in *Refah Partisi (The Welfare Party) and Others v Turkey*.[41] There is no reason to repeat the substance of these four well known cases, but we will discuss them in the framework of this article outlined above addressing the universal and particular nature of the freedom of religion.

The *Dahlab* case involved a school teacher who was banned from teaching in a primary school because she dressed in the modest female attire traditional to

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39 On the concept of 'culture' in human rights discussion, see also Pirjola (n 17).

40 *Dahlab v Switzerland* (App no 42393/98) ECHR 2001-V and *Leyla Sahin v Turkey* (n 20), Dogru v France (App no 27058/05) ECHR 4 December 2008.

41 *Refah Partisi (The Welfare Party) and Others v Turkey* (App no 41340/98, 41342/98, 41343/98 and 41344/98) ECHR 13 February 2003. See also Jarna Petman, 'Euroopan ihmisoikeustuomioistuimen puolustuspolitiikkaa: islam eurooppalaisessa "demokratiassa"' [Defence policy of the ECHR: Islam in the European democracy (In Finnish)], in Kristiina Kouros and Susan Villa (eds) *Ihmisoikeudet ja Islam* (Human Rights and Islam) (Like 2004).

her culture and wanted to cover her hair by using a headscarf. The Swiss Director General of Public Education issued a direction that she must cease wearing religious clothing at school. She refused and challenged this decision in the ECHR in Strasbourg. The Court decided that the case was 'manifestly unfounded' and upheld the decision of the Swiss authority. The Court stressed, among other matters, the 'powerful external symbol' which her wearing of a headscarf represented and questioned whether it might have some kind of proselytising effect, seeing that it appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality. The Court noted that it appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.[42]

The *Leyla Sahin* case involved a fifth-year student at the University of Istanbul who was prohibited from studying because she wished to wear a headscarf in her lectures. The Court agreed that the regulations of the University interfered with her right to manifest her religion under article 9 but held that in a democratic society the state was entitled to place restrictions on the wearing of the Islamic headscarf if it was incompatible with the pursued aim of protecting the rights and freedoms of others, public order and public safety. The court referred to the the principle of margin of appreciation, according to which states – or in Sahin's case university authorities – are said to be in a better position to decide in complex or sensitive cases. The Court concluded that the prohibition of the headscarf in this case was justified in principle and proportionate to the aim pursued.[43]

The *Dorgu* case concerned the applicants' exclusion from school as a result of their refusal to remove their headscarves during physical education and sports classes. In this case, the Court considered that the conclusion reached by the national authorities that the wearing of a veil, such as the Islamic headscarf, was incompatible with sports classes for reasons of health or safety was not unreasonable. The wearing of the scarf was incompatible with the principle of secularism in schools. Thus there had not been a violation of the freedom of religion.

In the case of *Refah Partisi* the Court examined whether the dissolution of the popular Islamic Refah Partisi (Welfare Party) violated the European Convention on Human Rights (eg arts 9 and 11). The Refah Partisi was part of a coalition government in Turkey and might well have won the coming elections if it had been allowed to contest democratic elections. In its judgment, the Grand Chamber up-

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42 *Dahlab* (n 40).

43 See *Leyla Sahin v Turkey* (n 20).

held the ban on the largest political party in Turkey on the basis that its activities violated the constitutional principles of secularism and democracy. The Welfare Party was 'found to have established a regime based on sharia within the framework of a plurality of legal systems for citizens of different religions and certain statements of the party leaders were said not to rule out the use of force to achieve these aims. Even in the absence of such a threat, however, the Court found that both sharia and plural religiously-based legal system were – even if democratically adopted – inherently incompatible with the ECHR and its concomitant notions of democracy and rule of law.'

All these four cases are good examples of the fact discussed above, that rights do not operate outside policy considerations, as claimed by Donnelly, but receive their meaning by balancing different kinds of political, religious, moral, strategic and cultural interests and perspectives which mainly operate outside of rights. Even though religious clothing, for example, is included in the definition of freedom of religion or belief as stated in the cases of *Dahlab* and *Sahin*, the ECHR was of the opinion that states had not breached the applicants' freedom of religion when they prohibited the wearing of the headscarf. So, at least in the light of the above-mentioned cases, we have to ask if human rights as such can provide us with a neutral, objective and unpolitical basis for deciding contesting demands, or do human rights in these cases mainly protect Christian ways of interpreting freedom of religion?

Carolyn Evans has stated that both the *Dahlab* and *Sahin* judgments not only deferred to policy requirements but relied on contradictory and essentialist stereotypes of Muslim women as the basis for the decisions.[44] According to Evans, the stereotype is that of victim – the victim of a gender-oppressive religion, needing protection from abusive, violent, male relatives, and passive, unable to help herself in the face of a culture of male dominance. The Court failed to understand the complexity and many meanings regarding the wearing of the Islamic scarf.[45] Dominic McGoldrick has likewise observed: 'Of course, a veiled woman is not necessarily "this" or "that". She might shift from one position to another. At times colourful, other times bland, seductive and prudish, publicly and privately. A veiled women's subjectivity appears to be much more complicated than any meaning the word "veil" could possibly convey.'[46] Some observers have claimed that some

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44 Evans (n 10) 22.

45 Ibid 19.

46 Dominic McGoldrick, *Human Rights and Religion: Islamic Headscarf Debate in Europe* (Hart Publishing 2006) 7.

Muslims regard themselves more as claimed by a religious community they have not chosen. In this sense, Islamic notions of religious belonging and community define for many Muslims a way of life in which the individual does not own herself. This can have profound implications as to how the operative meanings of ritual and symbol are understood in different religious traditions. In addition many religions, like Islam, do not make the same distinction between the domains of the secular and sacred.[47]

Thus, something that in theory is said to be a universal right can in practice turn out to be something non-universal, excluding some religious practices outside human rights protection. What is in theory said to be beyond politics can in the practical context turn out to be something rather prone to manipulation and political: a kind of institutionalised rights language. In other words, a popular universal human rights discourse to which states, non-governmental institutions and individuals are resorting to demand justice might also be used to promote non-universal interest, depending on the perspective of the matter. There is necessarily nothing wrong about this but particular policy goals of states should not be promoted under the surface and guise of universal human rights language.

It must also be noted in this context that the ECHR has, on the other hand, been rather favourable towards Christianity and the religious feelings of Christians. In the case of *Otto Preminger Institute v Austria*, the Court 'could not disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans'. The Court stated that the actions of the Austrian authorities were necessary to ensure religious peace in that region and to prevent some people from 'feel[ing] the object of attacks on their religious beliefs in an unwarranted and offensive manner'.[48]

In *Wingrove v United Kingdom* the ECHR determined in favour of protection against seriously offensive attacks on matters regarded as sacred by Christians.[49] The court stated that 'whereas there is little scope under Article 10 para. 2 of the Convention for restrictions on political speech or on debate of questions of public interest, a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend "intimate personal convictions" within the sphere of morals or, especially, religion'. The Court felt that the state authorities are in principle in a better position

47 Peter G Danchin, 'Islam in the Secular Nomos of the European Court of Human Rights', University of Maryland School of Law <http://ssrn.com/abstract=1670671> accessed 14 October 2010.

48 *Otto Preminger Institute v Austria* (App no 13470/87) ECHR 20 September 1994 [55].

49 *Wingrove v the United Kingdom* (App no 19/1995/525/611) ECHR 25 November 1996.

than the international judges to form an opinion on the exact content of these requirements with regard to the rights of others as well as on the 'necessity' of a 'restriction' intended to protect from such material those whose deepest feelings and convictions would be seriously offended.

Christian and European values were protected also in the *Lautsi and Others v Italy* where the ECHR held that placing of Christian crucifixes in public classrooms did not violate the European Convention on Human Rights.[50] The Court took the view that decision whether to perpetuate a tradition falls within the margin of appreciation of the respondent State. The Court agreed that beyond its religious meaning the crucifix symbolises the principles and values which forms the foundation of democracy and western civilisation, and that its presence in classrooms was justifiable on that account. The crucifix on the wall is an essentially passive symbol and this point was of importance in the Court's view particularly having regard to the principle of neutrality.

V. Concluding Observations

I wrote at the beginning of this paper that in the modern world there are growing calls for human rights as rights are often thought to provide us with humanitarian, fundamental, universal and non-political guidance in an unpredictable and multi-faith world. In my analysis I have tried to show that this is a rather problematic approach to the practical operation of human rights. Neither the ECHR nor states are neutral and impartial organizers of the free exercise of various religions, faiths and beliefs in a democratic society. It has been claimed that cases like *Leyla Sahin* and *Dahlab* can even 'do harm to the very notion of neutrality that the Court claims to be central to proper adjudication in these areas'.[51]

As human rights do not provide a non-political or equal basis for justice, it is always necessary and interesting to explore the practical operation of human rights, as no particular use or meaning given to human rights can have a final monopoly on expressing the essential concept of the freedom of religion or belief. This approach calls for further questions: how is the substance of the free-

50 See Grand Chamber judgement of 18 March 2011 (App no 30814/06) reversing the judgement of the lower chamber. The question at issue was whether an Italian law requiring the placing of crucifixes in *public* classrooms violates art 2 of Protocol no 1 taken together with art 9 of the European Convention on Human Rights.

51 Evans (n 10) 22.

dom of religion or belief produced and why are certain worldviews privileged?

Thus, we should not rush to celebrate the decisions of the human rights bodies but look at them as policy decisions that include strengths and weaknesses depending on one's perspective of the matter. Even from a liberal standpoint, the worst that can happen, in my view, is that the human rights community starts taking human rights or decisions of the human rights bodies as a kind of given human rights theology, something taken for granted and operating outside moral and political contestation. Few of us want human rights language to degenerate into a sort of lingua franca in which moral and political values of all or any kind may be expressed.[52]

Human rights are instruments of emancipation but they can also be a bureaucratic practice and institutionalized state language that sometimes serves and protects existing powers and privileges rather than challenging them. All institutions can also do harm and have costs. The challenge with freedom of religion as a human right lies not least in a quality inherent in many religions and beliefs themselves. Different religions frequently imagine themselves to be in sole possession of 'absolute truth' and thus tend not to respect the freedom of those holding different world views. For this reason freedom of religion can also lead to misuse by influential religious authorities or communities and thus to suppression of the rights of the others.[53] Freedom of religion or belief is a universalising discourse – 'everyone' has right to freedom of religion – while multiculturalism or the social norms of a religion, say Christianity or Islam, can appear to be a localizing doctrine.[54] These two discourses can be in tension with each other.

The vocabulary of rights is designed to protect the less mighty, and often human rights language represents the interests of the powerless and marginalised, like minority women in conservative communities. The global appeal of human rights is precisely based on their promise to end domination and oppression. This is not always the case, however, as reference to rights or freedom of religion can also be used to promote authoritarian and faith-based agendas that can be detrimental to the human rights ideals of equality of all, for example. In this type of

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52 On dark and bright sides of human rights see David Kennedy 'The International Human Rights Movement: Part of the Problem' (2001) 5 European Human Rights Law Review 250.

53 Pragna Patel has noted that in an effort to appear 'culturally sensitive' and 'tolerant of diversity', state institutions often ignore the rights of more marginalised groups and individuals within our communities. Nowhere has this been more apparent than in the response to women and children escaping violence and abuse from their partners and families. See Pragna Patel (n 38) 12.

54 Dominic McGoldrick 'Multiculturalism and its Discontents' (2005) 5 Human Rights Law Review 27.

conservative or authoritarian religious context it can be difficult to challenge the authority of religious leaders by drawing on a liberal rights tradition.[55] At a formal level, when so-called universal human rights standards and religious practices are in conflict, human rights treaty obligations prevail over the customary practices and set limits to the 'traditional, historical, religious or cultural attitudes' that might violate equal enjoyment of human rights by women, for example.[56]

But in practical level the claimed universality of freedom of religion, for example, might reveal a Western bias or be conditioned by certain cultural or Christian ways of thinking of the good life. Western human rights institutions and judges might be more eager to protect the imagined West (Christianity, secularism, rationalism) than the imagined Islam (fundamentalism, irrational, abusive). Thus the politics of human rights might turn out to protect particular interests instead of claimed universal interests. Institutionalised human rights jargon can lose its capacity to make any difference at all and collapse into cynical human rights bureaucracy.

These are some of the challenges the human rights community must take seriously when we examine the operation of freedom of religion or belief in multi-faith societies. Even though human rights and human rights bodies are valuable institutions they should not be viewed as beyond critical reflection. It is necessary not to silence critical views in order to avoid a clichéd concept of human rights and to advance the many potentials included in the human rights language. As I see it, the main task of the pragmatic approach to human rights is to keep visible the circular relationship between rights and politics that is always involved in the application of human rights norms.

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55 See eg Patel (n 1138) 21.

56 See UN HRC, 'CCPR General Comment No 28: Article 3 (The Equality of Rights Between Men and Women)' (2000) UN Doc CPR/C/21/Rev.1/Add.10) [21].

Waiver of Human Rights

Waiver of Substantive Rights (Part II/III)

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Abstract: In the present Article the application of the general principles governing waiver of rights (as previously outlined) to substantive Convention rights, such as the right to life and the freedom of expression, is investigated. The study confirms that self-determination plays a role, while at the same time core elements of substantive rights cannot be waived since they reach beyond the individual right-holder's sphere. This applies to both derogable and non-derogable rights. Whether validity of the right-holder's decision in a narrower sense – his free, informed and continued determination to waive – or the conformity of his waiver with important public interests is at the centre of attention varies with the circumstances and the right involved. Such sensitive matters as are covered by the most 'sacred', non-derogable, rights: life, integrity and personal freedom, at the centre of the right-holder's self-determination. As a consequence the right-holder's consent to or call for a particular treatment, may remove the issue completely from the ambit of the protection. When it comes to derogable substantive rights (typically those in ECHR articles 8 – 11) the consideration connected to the core-periphery-dimension finds a reflection in the parallel to the ordinary conditions for interference, most often set out in the second paragraph of the relevant article (law, purpose and necessity). However, where waiver of a derogable right is substantiated, the state has more leeway. Not insignificantly, a right-holder can in a number of cases even claim the opposite of what a particular article expressly grants him. Such 'negative rights' are evident *inter alia* in relation to the substantive 'positive rights' expressed in articles 10 and 11. Even the opposite of a right to marry (art 12), a right to divorce, may in certain cases develop, eventually on the basis of a 'preferred right'.

Keywords: Waiver of Rights, Self-Determination, Right to Life, Torture, Inhuman Treatment, Forced Labour, Deprivation of Liberty, Retroactive Criminal Law, Private and Family Life, Marriage and Divorce, Thought and Religion, Freedom of Expression, Assembly and Organisation.

1 Introduction

In the first article (published in Joint Issue 3&4 2010 of this Journal) the general principles governing waiver of rights according to ECHR were analysed: if there is *sufficient proof for a valid and societal acceptable waiver*, there is a *freedom, and may even be an obligation, for the state* to respect it. In the present article I will investigate the application of these general principles to substantive convention rights.

The substantive rights of ECHR may be divided into derogable and non-derogable rights.[1] To a certain extent whether or not one will label a right derogable or non-derogable is a matter of definition. Article 3 (freedom from torture) is a classical example of a non-derogable right. Typical derogable rights are those in articles 8-11, where 'necessary' exceptions may be made for certain purposes. Other rights appear more unreserved. Some of them may nevertheless, although they are construed differently, open for modifications. Article 4 prohibits forced labour in the second paragraph, but in the next paragraph is listed several intrusive measures not included. Articles 5 and 2 are special too, in that they define the limitations from the respective rights by listing more specific categories of accepted exceptions.

2 The right to life (Article 2)

2.1 General

According to article 2, life shall be protected by law. There are four exceptions to this imperative, among which waiver is not mentioned.[2] In addition it must be presumed that the taking of a life in self-defence by a private person must be

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1 The term 'derogable' is here used in a wide sense: as synonymous with 'open to ordinary exceptions' or limitations 'necessary in a democratic society' (according to art 8(2)).

2 Deprivation of life is in conformity with art 2, cf second paragraph: 'when it results from the use of force which is no more than absolutely necessary … in defence of any person from unlawful violence; … in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; … [and] in action lawfully taken for the purpose of quelling a riot or insurrection'. In addition art 2, first paragraph, second sentence allows intentional deprivation of life in the execution of a lawful death sentence. This exception is now without any effect, as the 6th and 13th Protocols to the Convention complete the total abolition of death penalty, even in wartime.

considered lawful, so that there is no obligation,[3] and arguably no right, for the state to criminalize it. These alternatives show that life, although in a sense the supreme human right is not without exceptions. The question to be addressed here is whether or not the state can refer to a waiver as an excuse for, or even obligation to, respect a right-holder who (if necessary) chooses death before life. This question is relevant both in a state-individual context and in relation to state responsibility for private actors ('*Drittwirkung*'). A diversity of situations comes to mind: duel, suicide, fatal hunger strike and mercy-killing are only examples that indicate the variety.

The point of departure is the state's obligation according to article 2 that 'everyone's right to life shall be protected by law'. Among the instruments necessary to comply with the obligation, criminal law and enforcement are essential. But the obligation to protect life will have to be balanced against respect for the right-holder's self-determination (under the circumstances supported by additional preferred rights). It is this balancing act that the following examples are meant to illuminate.

2.2 Duel

Duel is a dramatic (and hopefully not very practical) example of waiver between individuals. Except for the fact that a person committing himself for a duel will not always have free will, duel is characterised by the right-holder's consent to be killed by his opponent (although he hopes to be the winner – the killer). The institution represents a rather bygone view on individual autonomy.

The European Court of Human Rights (ECtHR) has underlined that 'Article 2 … ranks as one of the most fundamental provisions in the Convention'.[4] This probably implies that in a contemporary society the state is under an obligation according to article 2 to 'protect life' by criminalizing duel. If a duel has taken place, the winner ought to be prosecuted for manslaughter. Even if no harm is inflicted, there should be an obligation to prosecute, for attempted murder. The positive obligation to secure life means that the authorities must act ex officio, without being dependent on a private application for prosecution.[5]

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3 Cf David J Harris and others, *Law of the European Convention on Human Rights* (Oxford 2009) 38.

4 See *McCann and others v UK* (App no 18984/91) (1996) Series A no 324 [147].

5 Compare *X and Y v Netherlands* (App no 8978/80) (1985) Series A no 91 where the Court states that the positive obligations 'may involve the adaption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves' [23].

Under certain circumstances the state may even be responsible for not having prevented a duel from taking place. I recall the *Osman*-judgment[6] that dealt with the possible state-responsibility for murder and attempted murder committed by an unstable person, according which the decisive factors are whether:

> [T]he authorities *knew or ought to have known* at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party, and that they *failed to take measures* within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[7]

Applied to a duel-situation, already the first criteria calls for caution. The state's obligation:

> [M]ust be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources….[8]

Unless there are specific pieces of information available (an announcement, notification, reliable rumours or the like), the state cannot reasonably be blamed for neglect and for having failed to take action.

It could perhaps be argued that a more lenient sanction for participation in a duel, as compared to ordinary murder, is in contravention with the state's obligation to secure life in this context. It must, however, be considered reasonable to take the victim's consent into consideration when measuring the sanction. This principle is common among the Convention States,[9] a factor which tends to widen the state's margin of appreciation.

2.3 Compulsion to Risk Life

It is clearly within a person's right to self-determination to put his own life at risk

6 See *Osman v UK* (App no 23452/94) ECHR 1998-VIII 3124.
7 See ibid [116].
8 See among other authorities, the the *Keenan v UK* (App no 27229/95) ECHR 3 April 2001 [90] concerning suicide.
9 See for example the Norwegian criminal code, s 235 2nd para.

to save others'. If the life-saver's life is lost, it is due to his self-determination, and there will normally be no question of a subsequent state-responsibility for the failure to secure his life.

The situation is different if the rescuer is risking his life due to a (state-imposed) compulsion to act. True enough, both ethical and legal norms addressed to certain professions may be in the direction of an obligation to risk one's own life (military personnel's performance of rescue-operations, Captain's obligation to be the last man to abandon ship, and similar). However, these situations should be viewed from the angle of an employee's contractual acceptance of a certain job related risk.

Legal norms addressed to the citizens at large have a different character. They may take the form of duress in contravention with will and the states' obligation to secure life.

A law-provision criminalizing omission to help a person in mortal danger is, as a point of departure, a loyal implementation of the obligation to secure the life (of the person potentially rescued). On the other hand: if the relevant provision is without any reservations related to the risks the rescuer might expose himself to, this may entail different legal consequences, depending on the circumstances.

If the rescuer dies as a consequence of a risky operation to which he has been coerced by criminal law, the death does not rest on his free (and valid) waiver of life, but rather on compulsion attributable to the state. Even if the rescuer fortuitously emerges from a highly risky operation without injuries, state responsibility may be activated.[10]

Consequently law-provisions placing any obligation to save the life of others should make exceptions for situations where the rescuer, or any other, is exposed to risk.[11]

2.4 Suicide: General Considerations

While duel is characterised by the risk of harm and death to two persons both with a desire to stay alive, suicide is different: it is the right-holder's desire to end life. This is a more clear-cut waiver situation. Naturally, if waiver is not valid, typically if the right-holder is mentally ill (see part 3 of the first article), the state

10 As a consequence of the positive side of the obligation to secure life, art 2 can be violated if the applicant lives. In *Makaratzis v Greece* (App no 50385/99) ECHR 20 December 2004 the provision was violated as a consequence of a police action that was out of control and that undoubtedly placed the applicant's life at risk. In reality it was only 'good fortune' that he was still alive.

11 Cf Norwegian criminal code art 387.

will be under an obligation to make efforts to prevent the attempt. This may take the form of deprivation of liberty or, if the right-holder is already deprived of his liberty, additional security measures. Supposing that there is a valid waiver, the question arises whether any 'important public interests' oppose respecting this desire.

In the *Pretty* case[12] the Court held that:

> [Article 2] is unconcerned with issues to do with the quality of living or what a person chooses to do with his or her life.[13]

However, this statement cannot be interpreted such that the state can meet attempts to *end* life with indifference. To the contrary, in line with the general principles governing the state's positive obligations, it is expected at least to *make efforts* to preserve life, including preventing suicide.

At the general level an adequate effort is to criminalise suicide, to which the state probably is entitled. But, due to the sensitive character of the matter and the absence of any uniform standard among the Convention States, there is no obligation to criminalize.[14] For the same reason there may be instances where the state should refrain from enforcing criminal law.

Irrespective of whether suicide is criminalised or not, there is an obligation on the state to respond if it has or should have had knowledge of a real and immediate risk of suicide, typically in a prison or hospital. In *Sergey Shevchenko*[15] the Court modifies it's, apparently, rather unreserved rulings in *Pretty* by making it clear that:

> [I]ts findings in the Pretty case cannot be construed as a general exclusion of the application of Article 2 in suicide cases. It is to be noted that in a number of cases the Court has considered the Contracting States' positive obligations flowing from this provision as regards the risk to a person derived from self-harm, including the procedural obligation to carry out an effective investigation into the circumstances of what appears to be a suicide (cf.

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12 *Pretty v UK* (App no 2346/02) ECHR 2002-III.

13 See ibid [39].

14 Cf Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev edn, NP Engel 2005) 155-156, who in relation to CCPR art 6 holds that there is no obligation to sanction attempted suicide with criminal law, and that as a result of the accessory character, this conclusion is also applicable to the offence of aiding suicide.

15 See *Sergey Shevchenko v Ukraine* (App no 32478/02) ECHR 4 April 2006.

Keenan v. the United Kingdom, no. 27229/95, § 90, ECHR 2001-III, and Trubnikov v. Russia, no. 49790/99, § 89, 5 July 2005).[16]

In other words, there is an obligation to *make efforts* to prevent suicide. But there can hardly be any more than an obligation to make serious efforts, for example by preventing prisoner's access to potential lethal tools. Ultimately, if the right-holder is determined to end his life, the state is entitled to resign: 'Under the Convention there is only a right to life, but no duty to live'.[17] Neighbouring article 3 may even oblige the state to abstain from any such efforts (see below).

2.5 Religiously Motivated Suicide

As a starting point, it is perhaps fair to assume that the right-holder's self-determination (anchored in art 8) to end life carries more weight if it in *addition* is religiously motivated (art 9). However, such a motivation may give rise to special concern as to the validity of waiver, for example where elements of mass(ive) suggestion or similar factors are evident or may be present.

Even presuming that waiver is valid (in a narrow sense) it would run contrary to 'important public interests ('morals' or even '*ordre public*') if the state, with reference to any waiver of the right to life combined with the rights to self-determination (art 8) and religious manifestations (art 9), displayed passivity despite knowledge of instances of religiously motivated mass suicide.[18] Similarly, the state is under an obligation to make efforts to prevent such 'events' as a suttee. If such acts are conducted publicly the state most likely 'has or should have had knowledge', so that its obligation is sharpened.

2.6. Euthanasia

2.6.1 Introduction

It may be that a right-holder wishes to take his life, but is unable to do so by his own hand. Then the question of assisted suicide and mercy killing (euthanasia)

16 See ibid [56].

17 See Torkel Opsahl, 'The Right to Life' in R Macdonald, F Matcher and H Petzold (eds), *The European System for the Protection of Human Rights* (Kluwer Academic Publishers 1993) 207-225, 223.

18 Similar to the sect 'Peoples Temple' that was behind Jonestown, USA, in 1978. Similar cases were the mass self-murders in San Diego March 1997 where 39 died and in Japan October 2004 where nine died.

is brought up. As for suicide, the state's obligation to secure life is the point of departure. This indicates that both assisted suicide and euthanasia, as a main rule, should be criminalised.[19]

In cases where the state is directly involved in euthanasia, typically where it is administered in a public hospital or by delegation in a private hospital, the point of departure is a strict obligation to secure life. Naturally, euthanasia may be conducted in a private party-context. Then the *Osman*-test is relevant, allowing for an appreciation of the state's knowledge of risk and, eventually appropriate response to it.[20] An important distinction, at least in principle, is to be drawn between passive and active euthanasia: while active euthanasia entails an *interference* with human life, passive euthanasia activates the question of the range of the states' *positive obligation*.

2.6.2 Active euthanasia: A Negative Right to Life?

The leading precedent concerning active euthanasia is *Pretty.* The judgment highlights the status of ECHR-law, particularly with respect to the right to life as a *negative right*, but also, more implicitly, with respect to the importance of *waiver* and *preferred* rights.

Due to the facts of the *Pretty* case, the prime focus was on the *negative* aspect of the right to life. The case concerned a terminally ill woman who was unable to commit suicide herself, and therefore wanted assistance from her husband. The husband who was willing to fulfil her wish, provided that a declaration on immunity from the competent authorities was given. But he was unable to obtain such a declaration. ECtHR concluded that the right to life (art 2), unlike some of the other Convention rights, is not subject to a negative interpretation:

> Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life.[21]

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19 See Council of Europe, *Euthanasia Vol I and II* (Council of Europe Publishing, Strasbourg 2003 and 2004). See also for example Erling Johannes Husabø, *Rett til sjøvvalt livsavslutning [Voluntary Life termination]* (Ad Notam 1995) with a summary in English 557-568; and John Griffits, Helene Weyers and Maurice Adams, *Euthanasia and Law in Europe* (Hart 2008).

20 Cf Nowak (n 14) 185 in relation to CCPR art 6.

21 See *Pretty* (n 12) [39].

A right to die with the active assistance of others cannot be based on article 2. Hence, the state is at *liberty* to criminalise and punish such acts.[22]

2.6.3 Active Euthanasia: Waiver of the Right to Life?

Whether or not the states are under an *obligation* to criminalize the mentioned acts – in other words, whether the right is mandatory or allows the state to respect a waiver – remains unresolved in case law.

Whether or not article 2 opens up for the legalisation of active euthanasia is sensitive and depends on complex considerations. The practice among the Convention states, and within their populations, is not homogenous. At the same time the question is dynamic in the sense that the views (of the majority of the population) of the contracting states may change over time.[23] Again these factors indicate that ECtHR will maintain a reserved attitude towards the states in deciding the material question. It is more likely that the Court will recognize the opportunity to put its foot down if an application reveals shortcomings in relation to the national procedure connected to euthanasia: *inter alia* there ought to be a thorough *medical examination* confirming a stable conviction on the part of the right-holder to end life (see below on the situation where it at the crucial point is impossible to obtain the right-holder's view); professional guidance (medical or similar relevant expertise); and last but not least, a terminal illness.[24]

2.6.4 Active Euthanasia: Preferred Rights?

(a) In the extension of the last-mentioned criteria lies a possible basis for a legal development, although rejected by the Court in *Pretty*[25]: if the disease is not only fatal, but in addition causes *unbearable pain*, it may arguably be considered *inhuman* to deny the patient a right to die. Naturally, the state's ability to provide effective palliative (pain relieving) treatment will be of importance. The less effective the treatment (in relation to this particular patient), there will be more weight in the argument that the patient is left in an inhuman situation. In such situations it is open to discussion, at least *de lege ferenda,* whether article 2 should, under

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22 Neither was the applicant's argument that there was a violation of art 3 accepted, see 2.6.4 below. Art 8 was considered applicable, but not violated.

23 Today only the Netherlands and Belgium permit active euthanasia.

24 Cf Nowak (n 14) 185, who in relation to CCPR art 6 assumes that a national legislature which limits criminal responsibility in relation to euthanasia 'after carefully weighing all affected rights and takes adequate precautions against potential abuse, … is within the scope of the legislature's discretion in carrying out its duty to ensure the right.'

25 *Pretty* (n 12).

all circumstances, prevail over the *preferred right* not to be exposed to inhuman treatment (art 3) in an active euthanasia context.

(b) A similar situation, with special challenges, is where the right-holder has regulated a future situation which he considers to be *degrading* in advance by a 'living will': typically, that there shall be a termination of medical treatment if he contracts certain diseases, such as Alzheimer's. Arguably, just as *pain* may justify a claim to be helped to die, so also may *dignity* (see below on passive euthanasia). It is imaginable that such wills may be extended to active euthanasia. But will the state have an obligation to respect them?

Since qualified indignity may be said to implicate that the right-holder is unable to experience his own indignity, it may be argued that he is not humiliated if he is left to live. However, this line of reasoning may be met with counter-arguments. One can adopt an overall perspective on the right-holder's life, and focus on his desires and convictions when conscious and capable. Still, what the right-holder's preference is today, when the situation he formerly hypothetically has considered in contravention with dignity, has materialised, one cannot know for sure. But one can assume that there is a desire not to be forced to live such an undignified life. Such an assumption is based both on the right-holder's premeditated conviction as expressed by his will (a subjective element) and on the basis of a common interest in upholding respect for dignity as a 'critical interest', an intrinsic value, for human beings generally.[26] However, although the difference between active and passive euthanasia may become theoretical and tenuous when it comes to patients that at the outset are totally dependent on assistance (food and medicine), a right to active euthanasia can hardly – *de lege lata* – be based on a state of indignity.

2.6.5 Passive Euthanasia: Waiver

In principle distinct from active euthanasia is the passive variant. While active euthanasia is characterised by the fact that a human action is bringing the life to an end (a relative or a doctor injecting the lethal dose), a 'natural' cause of death (typically the fatal disease) is the key point when it comes to passive euthanasia. The crucial legal question here is the range of the state's positive obligations to protect life and to what extent obligations exist in this respect in contravention with the right-holder's wish: what efforts should be invested in sustaining a life

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26 Cf Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (Knopf 1994) 233-237.

that the right-holder wants to end, and that without the efforts is without any prospects of improvement.

For the assessment in relation to the Convention the point of departure ought to be that there is a presumption against positive obligations on the part of the state in contravention with the right-holder's wish. In the *Widmer* case[27] absence of prosecution in case of termination of medical treatment was found not to violate article 2; in this respect article 2 can be waived. The state is at liberty to let a person die of natural causes if he so wishes.

The *Glass* case[28] indicates that the liberty extends further, towards a border zone between passive and active euthanasia. In the case there was not only a termination of the efforts to cure the disease, but in addition actions not unlikely to be capable of provoking death, namely palliative medication, *in casu* heavy injections with morphine. The Court was, however, convinced that the doctors' *motivation* for giving morphine was to ease the patient's pain. The (possible) acceleration of death apparently was considered as merely a side effect to this main purpose. Hence, it is legitimate to prioritise life quality before length. [29]

2.6.6 Passive Euthanasia: a Right?

(a) But is the state at liberty to force medical treatment upon a patient, or is there, phrased differently, a right to die of natural causes? The *Pretty*[30] Court's rejection in broad terms of a negative interpretation of article 2 makes it natural to consider the question from the angle of preferred rights. Articles 8, 9 and 3 seem most relevant.

(b) The right to self-determination (art 8) constitutes a right to be left in peace with one's disease. Arguably, as long as the right-holder validly expresses that he

27 *Widmer v Switzerland* (App no 20527/92) ECHR 10 February 1993.

28 See *Glass v The United Kingdom* (App no 61827/00) ECHR 9 March 2004.

29 It can be argued, at least *de lege ferenda*, that the combination of effects – pain- and lifetime-reduction – secures a dignified death in conformity with the serious wish of the holder of the right to life, and hence ought to be considered equal for legal purposes. One will have to admit that it is no big step to recognise a combination of the two purposes as legal. But is it advisable to go one step further: to admit, or even require, terminal medication in the last phases of a life in severe pain without relying on pain relief (remaining part of life)? Palliative medicine has become quite advanced; the focus and efforts should be placed on further sophistication. But there are instances where medication seems to be without substantial relief. If that is the case, it is not obvious that it is less dignified – or less in conformity with 'an important public interest' – to let the right-holder to be spared from weeks or months in pain, compared to 'forcing' him to live that rest of his life under, to his mind, unbearable conditions.

30 *Pretty* (n 12).

does not want to receive (any further) medical treatment, this ought to be respected. However, the sparse case law on the topic indicates a right for the state to overturn the right-holder's will on certain conditions. In *Nevmerzhitsky,* [31] which directly concerned forced feeding (see below), the Court pronounced generally that:

> [A] measure which is of therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading.[32]

The statement indicates that the right-holder has no *right* to reject medical treatment necessary to keep him alive. This position is debatable, and seems to be at variance with current trends in the Convention States.[33] In relation to forced feeding, which is comparable, The World Medical Association has recommended that:

> Where a prisoner refuses nourishment and is considered by the doctor as capable of forming an unimpaired and rational judgment concerning the consequences of such voluntary refusal of nourishment, he or she shall not be fed artificially. The decision as to the capacity of the prisoner to form such a judgment should be confirmed by at least one other independent doctor. The consequences of the refusal of nourishment shall be explained by the doctor to the prisoner.[34]

It might appear a plausible prediction that this statement (eventually through its influence on state practice) is capable of moving ECtHR practice.[35] However, there are no clear signs in that direction so far. And, given the importance attached to the right to life, it is likely that the Court will still allow the Convention States a wide margin of appreciation in administering these highly moral issues. Consequently, article 8 is not a sufficient basis for a *right* to die, even if by natural causes.

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31 *Nevmerzhitsky v Ukraine* (App no 54825/00) ECHR 5 April 2005.
32 Ibid [94].
33 See as examples Norwegian Social Services Act 1991 [4-5a] and British Mental Health Act 1983 s 63.
34 The Tokyo Declaration 1975. Referred to by Philippe Frumer, *La renunciation aux droits et libertés* (Brucelles 2001) [387].
35 See *Frumer* (n 34) [387].

(c) Not infrequently, the refusal to receive medical treatment is religiously motivated (art 9): for example, a member of Jehova's witnesses claims respect for his belief that the Lord will take care of his disease, so that medical treatment, a blood-transfer for example, is unneeded and unwanted. The coming into play of article 9 arguably enhances the right-holder's right to respect for her standpoint. ECtHR has not addressed the question directly. Although there seems to be a movement in the direction of an increased emphasis on self-determination among the Convention states,[36] again we find that there is no uniform standard. This urges caution in assuming a willingness on the part of ECtHR to dictate any solution. Even if the freedom of religion is involved, it will probably be considered within the state's margin of appreciation to set aside a waiver in order to protect the right-holder's life. Hence, the state will not be in violation of article 2 if it submits to a patient's valid instructions not to give medical treatment, and nor in violation of articles 8 and 9 if it respects the right-holder's waiver.

(d) If the right-holder endures unbearable pain or is in a state of qualified indignity, the question of the applicability of article 3 is revived. We have seen that ECtHR in *Pretty*[37] found no violation of article 3 due to the fact that the applicant was denied active euthanasia. It is fair to assume that the state's liberty is more limited in case of passive euthanasia so that a right-holder in a state of qualified pain or indignity has a right to die of natural causes. Furthermore, this interpretation will fit with the related right to refuse nourishment where ECtHR has applied article 3 (see immediately below).

2.7 Forced Feeding: Direct State Responsibility

2.7.1 Waiver

Very much the same problems as in relation to forced medical treatment occur in relation to *forced feeding*. The point of departure ought to be that a hunger-strike that is motivated in the right-holder's sincere conviction deserves respect. In addition to Article 8 (right to self-determination) this point of departure is

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36 In Norway a patient has on certain conditions a right to refuse life-prolonging treatment, see the Patient's Rights Act (Pasientrettighetsloven) 2 July 1999 s 4-9. By comparison, in two 1998 cases the Administrative Appeal Court of Paris afforded priority to the protection of life over the applicants' religiously motivated refusal of transfer of blood. According to the Court, the doctors were entitled to set aside the applicants' waiver to protect their life. See Cour administrative de Paris, 9 juin 1998, Mme Senanayake; published in RDP 1999, 244; Mme Donyoh, RDP 1999, 246.

37 *Pretty* (n 12).

supported by Article 9, according to which not only religious conviction, but 'thought [and] conscience', are equally protected interest.

In relation to waiver this means that the state is at liberty to refer to the right-holder's (de facto) waiver of life, and thereby avoid responsibility. There are certain conditions, though. In cases where the right-holder is deprived of his liberty, which is a typical situation, the state has positive obligations in order to secure the right to life; to provide food and drink. Otherwise one cannot be sure that the hunger-strike rests on the right-holder's will. Probably one cannot set up further ambitious obligations to protect life in this context. [38]

2.7.2 Negative or preferred rights

But is the state at *liberty* to go further, to force-feed, or will that be a violation of the striker's *negative or preferred right*? The ECtHR's stance in *Pretty*[39], that Article 2 has no negative equivalent, is phrased in a rather categorical manner, and must be considered decisive in the context of hunger-strike as well.

But alternative (preferred) rights may be asserted. In addition to the ones already mentioned (Articles 8 and 9 and perhaps even Article 10), it is – once again – good reasons to focus on Article 3.

In *Nevmerzhitsky* the Court pronounced that:

> [A] measure which is of therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading. The same can be said about forced feeding that is aimed at saving the life of a particular detainee who consciously refuses to take food.[40]

These statements seem to give the state ample opportunity to overturn the right-holder's determination. However, they are clarified in that a pressing medical necessity has to be established. In addition it is required to demonstrate that adequate procedures are implemented, and finally a substantive limit: that the implementation does not exceed the pain threshold in Article 3. These criteria are closely connected: Whether or not medical necessity exists, can only be established through trustworthy procedures, typically after green light from a court based on

38 See Torkel Opsahl and others, *Law and Equality: Selected Articles on Human Rights* (Ad Notam 1996) 223.

39 *Pretty* (n 12).

40 See *Nevmerzhitsky* (n 31) [94]. These criteria are repeated and confirmed in subsequent case law, see *inter alia Ciorap v Moldova* (App no 12066/02) ECHR 19 June 2007.

a responsible doctor's assessment. Ultimately, the aim of the procedures is to avoid conditions in contravention with Article 3, so that a given treatment is stopped if it, by example due to resistance from the patient, cannot be completed without causing considerable pain. In the *Nevmerzhitsky-judgment,* that concluded with violation of Article 3, decisive emphasis was put on the fact that the applicant was healthy at the time of the forced feeding, and that at the same time no pressing need for the interference was demonstrated.

In short, article 3 may serve as the basis for a right not to be forcedly fed. But this right is rather limited. If medical necessity has been convincingly shown and the mentioned procedural requirements are complied with, the state is at liberty to feed a right-holder against his will. As for the limited right to refuse medical treatment this state of law is open to debate.[41]

2.8 Especially about Beneficence

2.8.1 Introduction

Special questions arise in relation to forced feeding, forced medication and passive euthanasia when it comes to situations where the right-holder is unable to dispose; someone has to care for her. Most societies solve this by arranging for the appointment of a fiduciary with an obligation to act on behalf of and in the best interest of the right-holder.

We shall discuss two distinct situations in relation to the right to life: first, where the right-holder, when capable, has determined that he does not wish to be kept alive in a vegetative state. And then the situation where there is no such prior statement from the right-holder.

In some instances the patient may have expressed his view, formally or informally, in advance that life-prolonging treatment in a given situation shall be

41 Reasoning with the basis in art 3 may lead to an obligation to respect the right-holder's determination to end life. In principle, the World Medical Association goes further, by making a more decisive point of the right-holder's self-determination: 'Where a prisoner refuses nourishment and is considered by the doctor as capable of forming an unimpaired and rational judgment concerning the consequences of such voluntary refusal of nourishment, he or she shall not be fed artificially. The decision as to the capacity of the prisoner to form such a judgment should be confirmed by at least one other independent doctor. The consequences of the refusal of nourishment shall be explained by the doctor to the prisoner.' (The Tokyo Declaration 1975). Referred to in *Frumer* (n 34) 387.

terminated. In the latter case representatives, normally close relatives,[42] are needed to assure that there is a valid waiver. If it is beyond doubt that the termination is in conformity with the right-holder's wish, that wish ought to be considered decisive in the sense that the state is entitled and arguably obliged to respect it.

2.8.2 The Situation where there is a Prior Decision from the Right-Holder

The situation may be that the right-holder, while capable has determined that if he enters into a state of loss of dignity and mental capability, any efforts to keep him alive shall be terminated. The tricky point here is that it is exactly this particular situation the right-holder has foreseen the possibility of, and is determined to avoid: an unworthy life. In this situation it can be argued that there are better reasons to consider the will of the right-holder as expressed when fully capable as decisive, compared to his 'will' as expressed or assumed when he has lost his capability to dispose over his rights. In other words: 'His former decision remains in force because no new decision by a person capable of autonomy has annulled it'.[43]

However, we would never allow the termination of life-prolonging treatment solely with reference to a previous instruction if the right-holder, no matter how generally incapable, presently expresses a desire to live on. If we agree so far, one step further is natural: even where the right-holder (due to his present condition) is unable to articulate any view, his conduct may be interpreted so as to express a present desire to live: he smiles and reaches out his hand at the sight of a close relative and shows every sign of pleasure over a good meal. We will reject killing, or more pertinently terminate efforts to keep alive, a person who apparently enjoys life.

The same result may be reached by an interpretation of the original will: the formerly expressed will to terminate life is valid only in so far as it is not revoked or invalidated by changed circumstances.

Only if there are no present indications to the contrary that can be deduced from the right-holder, a past will not to have life prolonged ought to be respected. Hence, the past will of persons who are now in permanent unconsciousness or who presently have lost every concept of a whole life (as for Alzheimer's victims in

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42 In Norway the situation where a dying patient who is unable to convey whether or not he wants treatment, is regulated by the Patient's Rights Act (Pasientrettighetsloven) 2 July 1999 s 4-9, s 2. According to this provision health personnel shall avoid treatment if next of kin express a corresponding wish, and the health personnel after an independent consideration conclude that this is the wish of the patient and that the wish manifestly ought to be respected.

43 See Dworkin (n 26) 227.

advanced stage), ought to (or, with the basis in art 3 must) be respected. Obviously, this significantly reduces the importance of a living will, and consequently the difference between the situations where such will exists and where there is no such prior decision from the right-holder: the medical and ethical assessment of the current situation is what matters.

2.8.3 The Situation where there is no Prior Decision from the Right-Holder

(a) The overriding theme is to determine what is in the best interest of the right-holder; where, due to her health condition, she is unable to take care of her interests, or express any preference, for example on whether or not to end a medical treatment. The most natural starting point for the assessment is the responsible medical doctor's decision to stop the treatment. Is it based on a thorough assessment that fully complies with the *Nevmerzhitsky* criteria?

(b) In the assessment the presumed will (waiver) of the patient forms the central theme. This is often difficult to separate from what the benefactor considers to be in the best interest of the right-holder. I recall an illustrative example from US case law:[44] an appointed guardian for the right-holder, a father of four with the mental state of a six month old baby, had recommended that he be taken off machinery necessary to keep him alive. The recommendation was to the benefit of the hospital that had transplanted his heart and, according to the right-holder's family, had caused the injury because an oxygen-supplying tube had slipped out during the operation. The hospital had huge costs caring for the right-holder, and had petitioned the courts for an allowance to discharge him to a nursing home or to his own home. The family opposed. There were no statements from the right-holder as to whether he would prefer to die rather than to live under the now present circumstances. Despite the fact that he did not seem to be in pain or unhappy, he was able to recognise familiar faces with pleasure, to smile and watch television; the guardian considered that the right-holder would prefer to die if he could decide for himself. The court, in my opinion correctly, disagreed.[45]

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44 The case is mentioned in Dworkin (n 26) 232-233.

45 Ibid.

(c) Parents' exercise of parental rights (art 8) ought to be respected to a wide extent, even when it involves rejection of medical treatment for their child. However, society's overriding responsibility to protect integrity dictates an increased vigilance proportionate to what is at stake. Certainly, if the right to life is involved, the parents' opinion is not decisive.[46] Society has an independent responsibility to secure the life of an individual who is not able to dispose over his own interests. This responsibility (according to art 2) prevails over parental rights (according to art 8): in contemporary secular society there can be no doubt that parents' refusal to receive vital health care for their child, must be overturned. Any negligent state passivity will constitute a violation of article 2.

3 The Protection against Torture, Inhuman or Degrading Treatment or Punishment (Article 3)

3.1 General view

We have already seen that article 3 can play a role as a preferred right, for example trumping article 2 (*de lege ferenda*) in relation to euthanasia. The question to be discussed in this section is whether or not the state may be at liberty or even under an obligation to respect a waiver of the protection against torture, inhuman or degrading treatment.

At first sight it seems strange that anyone would waive the protection afforded by article 3. As for the first element of the provision, torture, this first impression is confirmed on reflection. Given the character and purpose of torture, it is hard to see that the protection against such treatment under any circumstances can be waived. The UN Convention against torture and other cruel, inhuman or degrading treatment defines *torture* as 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession …'. It is evident from this definition that the pain-element will constitute invalidating coercion and additionally, that the purpose – the deliberate infliction of pain for such purposes – will render the treatment in contravention with 'important public interests', even if consented to.

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46 Cf also arts 3, 4 and 5.

True, the fundamental importance of article 3 clings, in principle, not only to torture, but to its remaining elements (inhuman and degrading treatment) as well. This is reflected by the fact that there is no exception from the protection, even in times of emergency.[47] Hence it is plausible to take as a starting point that the article 3-rights *in tote* cannot be waived. However, when it comes to inhuman and degrading treatment, the considerations may be different compared to torture because the treatment may be supported by a *legitimate purpose*. I postulate that there are situations where the right-holder's self-determination is capable of trumping, or even completely removing the matter from the ambit of the protection according to article 3.

3.2 Consent to (Otherwise) Inhuman or Degrading Conditions: Points of Departure

It must be considered common ground in the Convention states that waivers in the field of personal integrity will easily run counter to morals or even *ordre public*. But both integrity and morality are to a certain extent flexible and dynamic standards. This means that prevailing considerations in the societies at a given time are of importance.[48]

When a right-holder is waiving certain aspects of his integrity, this most often (but not always) reflects that he is in a vulnerable position. This advocates for a wide opportunity for the right-holder to revoke any waiver or consent to the treatment in question. Can the legal order ever support the enforcement of a promise to have sex? Most often (but not always) a right-holder who trades off her integrity (or dignity) will do it in return for money (commercialisation). Trading of integrity by selling human organs is one example, trading of dignity by selling sex another. Is this commercial aspect of the disposition of importance for its conformity with 'important public interests'?

It is assumed that the suggested factors will give grounds for the following

47 No interference can be made either in peace or wartime (cf art 15).

48 The attitude towards the Muslim *niqab* (and Burkha) among the Convention states vary. While a majority (still) accepts it, many have forbidden it (such as France), others consider a ban. The justifications for such interference are not always clear, but may – construed in waiver-terms – be classified in three groups: (1) although the right-holder on the surface determines to carry the *niqab*, she may be subject to a cultural constraint; (2) even assuming that her choice is free, the practice can be seen as discriminatory, and hence as running counter to important public interests; (3) others focus (additionally) on more pragmatic considerations: the *niqab* makes identification, necessary for security and a variety of other legitimate purposes more difficult, so that an interference with the right-holder's self-determination is 'necessary in a democratic society'.

subdivisions for the further presentation: instances where the agreement *as such* is in contravention with important public interests; instances where an agreement as such is in conformity with public interests, but where an *enforcement* vis-à-vis a regretting right-holder is in contravention with such interests; and instances where *commercialisation* is of importance for the consideration whether or not waiver is in conformity with public interest.

3.3 Important Public Interests: State Entitled to Set Aside Waiver

3.3.1 Serious Harm: General Considerations

Deliberate infliction of serious harm will, as a main rule, have to be regarded inhuman treatment, even if consented to (but see below on the special considerations that apply to medical operations). By example, it is difficult to imagine that a Convention-state, with reference to the freedom of religion and waiver of the right to life, can turn a blind eye to a religious community's practicing suttee without violating important public interests. Whether this is conducted publicly or not is not in itself decisive, although it may be of importance for the question whether or not the authorities have or should have had knowledge of the matter, a constituent element for state responsibility. Even if such a practice is performed more discreetly (as a secret ritual within society), but comes or should have come to the authorities' knowledge, there is a duty to interfere to save life. Obviously, then, there is a duty to interfere in instances such as the known cases where charismatic leaders encourage members to commit collective suicide.[49] The same holds true in relation to any *inhuman practice* in contravention with article 3; for example, the circumcision of girls.

3.3.2 Example: Circumcision of Girls

An interference with the genitals of a woman damaging or permanently changing it (circumcision) is widespread in certain cultural contexts. Most often it is based on the (misconceived) exercise of parental rights, performed on small girls at the parents' request.

Where culture and tradition vary among the Convention states, each particular state may be accorded a wider margin of appreciation. However, if a practice attains the level of inhuman treatment, there is, in principle, no room for the doctrine. Prohibitions of circumcision have to be seen in this light: prevailing views among the Convention States today is that circumcision of girls is a serious interference

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49 See 2 above.

with bodily integrity devoid of any rational purpose and hence cannot be accepted under the Convention.

Due to this lack of defendable purpose (cf below on medical operations), the states are probably under an obligation to combat the practice of circumcision, even if the interference is implemented on the basis of consent from the right-holder. Certainly parental consent is not capable of setting things in conformity with 'important public interests'.[50]

3.3.3 Risk for Serious Harm: General Considerations

To participate in various activities that carry a certain *risk* of damage, is clearly within the domain of self-determination. Both fighting and sports come easily to mind. The right to self-determination would be violated if lenient bruises inflicted in the course of a football match or a showdown were penalised.

Nevertheless, society will have to establish some limits in order to deter acts that run counter to important public interests. On the one hand is self-determination, hereunder the right-holder's motivation for the activity and eventually any public interest supporting his choice; on the other, the societal interests advocating for a limitation.

3.3.4 Risk for Inhuman Treatment if Extradited

(a) A particular context where the question of waiver of the protection against ill-treatment may arise is in the area of expulsion and deportation of foreigners. While there is no ordinary asylum guarantee in the Convention, two provisions may serve as asylum-surrogates; article 8 (expulsion may be an interference with family life), and article 3. The latter implies a protection against expulsion or deportation to a country where the right-holder faces a real risk of inhuman treatment.

ECtHR has underlined that the obligation to protect a foreigner under such circumstances is *absolute*.[51] This prompts the question whether this absolute obligation trumps the *wish of the right-holder*. Obviously, a person facing a real risk of ill-treatment will normally prefer to stay in a safe haven. However, exceptionally

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50 Because the practice is criminalised in most European countries, some parents send their girls abroad. A much reported case from Norway in 2007 concerned circumcision in Somalia. It was discovered that at least 185 Norwegian-Somali girls, with residence in Norway were sent to Somalia to be circumcised. According to Norwegian law circumcision of girls, is a criminal act even if it takes place abroad (though the provision has so far been dormant).

51 See among other authorities the *Chahal v The Untied Kingdom* (App no 22414/93) 15 November 1996 ECHR 1996-V.

it may appear to him as a lesser evil to leave. That may be the case for example if he encounters deprivation of liberty or similar hard conditions in the protecting state.[52]

The question whether or not the state can refer to a waiver as an excuse for deportation, depends on the circumstances. A first possible variable for the assessment is the *degree of risk*. Arguably the obligation to protect can be regarded as an either- or-obligation: if the risk attains the level of a 'real risk' – a concept that is rather narrowly construed in case law – then the obligation to protect is absolute.[53] Otherwise there is no obligation. A different and preferable perspective is to assume that a higher risk carries a stricter obligation.

Although not directly comparable, there are, as we shall see, a variety of situations where the state is at liberty to allow a right-holder to expose himself to risks (to stop medical treatment, participate in extreme-sport-activities and the like).[54] As long as the right-holder is merely facing a risk (as opposed to a certain fatal outcome), it is assumed that the state is at *liberty* to rely on his preference and let him go. The existence of article 2, second paragraph of Protocol no. 4 to the Convention, according to which '[e]veryone shall be free to leave any country …' strengthens this conclusion, even though that right, in line with the ordinary system, can be subjected to limitations. Hence, it is assumed that the state is at liberty to respect a waiver of the article 3-protection in this respect.

(a) Less certain, but probably this corresponds to a *right* for the right-holder to have a waiver respected. Given, analogously with ECtHR's stance in *Nevmerzhitsky*[55] (concerning forced feeding) it can as a point of departure be argued that the right to life and integrity is of such importance that the state is at liberty to protect those values irrespective of any waiver (so that there is no right to waive).

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52 In *Chahal* (ibid) the applicant stayed in detention awaiting extradition for more than three years; still he preferred to stay. A pending Norwegian extradition-case much discussed during the 2000s (the Mullah Krekar-case) is illustrative. Despite the fact that the right-holder was considered to be a threat to national security, Norwegian authorities abstained from expelling him because they considered that he ran a real risk of being tortured and executed. After years with restrictions (*inter alia* on employment and movement), the right-holder hinted at wish to go back to Iraq. Apparently Norwegian authorities consider the right-holder's waiver of protection irrelevant for their obligation to protect. By contrast British authorities have adopted a policy where foreign suspected 'international terrorists' can choose to leave instead of staying in Britain subjected to severe restrictions.

53 See *inter alia Chahal* (n 51).

54 See 7.3.3.7 below.

55 *Nevmerzhitsky* (n 31).

A comparison with the *Nevmerzhitsky*-situation (forced feeding), and indeed with guidance from the principles carved out in that decision, it seems relevant to discuss two distinctions: is the right-holder merely faced with a risk, or with a certain fatal outcome if he has his will ((c) below); and is the person in the state's custody so that the latter's responsibility is sharpened ((d) below)?

(b) For forced feeding to be justified, among other conditions, a pressing medical necessity is required. In other words, if there is no intervention, a fatal outcome is certain (or almost certain). By contrast, if a person decides to leave, although the state so far has protected him because of the presumed existence of a real risk for ill-treatment, he merely exposes himself to a *risk.* It is in conformity with the legal estimation of risk-situations in general, to let the right-holder decide whether or not he prefers a risky alternative (to parachute or to leave the country) to the alternative (to stay on safe, but not so challenging or otherwise attractive ground).

In line with this variable, the state-responsibility is sharpened with the degree of risk. If the risk amounts to certainty, I assume that the state will be at *liberty* to protect: the state should be at liberty to refuse extradition to the execution of a death sentence in a requesting country, even if the right-holder (exceptionally) should wish to go. But there is hardly an *obligation* to overrule the right-holder's choice.

Furthermore, it is of importance whether the right-holder is detained or free. By comparison: the liberty to force-feed, as formed in *Nevmerzhitsky,*[56] relates to a situation where the right-holder is detained in the state's custody (for other reasons than the implementation of forced feeding). If a right-holder, who wishes to leave the country, is free, the state's invitation to take positive measures to protect is already at the outset more reserved; most often the state neither will nor should have the knowledge of the right-holder's intention.

If the state has (or should have had) such knowledge, the question arises whether it is under an obligation or at liberty at all to take action to prevent the right-holder from leaving. The relevant measures are deprivation of liberty, severe restrictions on the liberty of movement or passport confiscation. The state's opportunity to implement such measures is limited. As far as deprivation of liberty is concerned the relevant exception clause in article 5(1) is the one in (b): to secure that the right-holder complies with a court order (or eventually a specific law-obligation) not to leave before conditions are safe. Admittedly this option seems somewhat strange, and is at least to my knowledge, so far untested in Europe. Cle-

56 *Nevmerzhitsky* (n 31).

arly, there is no *obligation* under the Convention to implement such measures in order to eliminate a risk that might face the right-holder, but is accepted by him.

3.3.1 The Right-Holder is Incapable of Calculating Risk

There are situations where the consenting right-holder, more or less manifestly, lacks the ability to calculate and administer his own best interests. An example from Norwegian case law follows: a man served his companion to see how much he could drink. After half an hour he had consumed three-quarters of a litre of liquor, a couple of swigs and a beer. Subsequently he collapsed and never woke up again. Evidently his waiver (consent) was both invalid (due to incapability) and in contravention with 'important public interests'. Consequently, the state was at liberty to, and arguably under an obligation to prosecute the offender for involuntary manslaughter.

3.3.2 Risk is not a Part of the Motivation: Little Weight to Self-Determination

Presumably, the state's obligation to make efforts to limit risks is most extensive when it comes to the elimination (or reduction) of *unnecessary* risks: risks that do not constitute part of the motivation for the right-holder's activity. In such cases the right-holder's self-determination is not interfered with (at least not to the same degree) by efforts to diminish the risk. If I drive without a safety belt it is most likely due to neglect, rather than any motivation to seek self-realisation and excitement. Hence, to criminalise driving without safety belts is a reasonable effort to enhance safety, no unreasonable interference with self-determination.

The extent of the state's positive obligations with regard to diminishing risk often provides cause to doubt. For example, if the authorities have or should have had knowledge of risky homosexual activities in an approved Sauna, should authorisation be revoked due to high risk of HIV-infection (cf "health" in art 8(2))? Or can the authorities refer to the fact that the Sauna is an important meeting place for the participants (and hence for their private lives), and that they have accepted the risk? I am inclined to vote for the first.

3.3.3 Risk is Part of the Motivation: More Weight to Self-Determination

If risk is an essential element of the right-holder's desire to perform a certain activity (or an unavoidable part of it), respect for this self-realisation strongly advocates against state interference. A first consideration is, naturally, the degree of risk. The higher it is and the more it can be reduced without eliminating the element of self-realisation motivating the activity, the better the reasons to allow and even demand state efforts to diminish risk. Furthermore, if the right-holder

by his activity exposes only himself for the risk, his self-determination holds a strong position, even if the risk is high and most people will consider the activity absurd. Base jumping will probably, in the eyes of many, offer an example.

Obviously, the pure 'right-holder-interest-perspective' is often an illusion. In the case of base jumping, for example, the activity is risky not only for the right-holder, but for others as well. Rescuers are exposed to a considerable risk. Even in cases where the right-holder in advance has declared that he waives the right to be rescued, a contemporary society can hardly leave him to himself, where he could have been rescued.

Naturally, rescuers should, and will take precautionary measures. Nevertheless, experience shows that such rescue operations frequently puts life and limb at risk.[57] When considering a prohibition it is clearly also relevant to look to the (economic) costs of a rescue operation. Again, truly enough in some instances the expenses can be reimbursed by the right-holder. But that option will, obviously, depend on his economic situation. Most often the major part of the expenses will have to be covered by the general public.

Hence, the right-holder's choice of activity has clear 'external' effects *legitimising* a limitation of his self-determination. It is assumed that the state has a wide margin of appreciation when it comes to limiting (or not limiting) risky sports activities,[58] so that there will be a state *obligation* to interfere only in exceptional cases.

One group of situations is where the activity (indirectly) conflicts with other protected interests (as with the base jumping-example). The nature of such interests may range from the concrete to the abstract. An example of the first is where the fight involves the destruction of property. Serious disturbance of public order offers an example of the latter. Even more in the abstract sphere is the possible conflict with morality: in contemporary society the classical *duel* will conflict with fundamental moral principles, even if it is performed in camera and, therefore, there is no direct disturbance of public order. The society is entitled, and probably obliged, to criminalize such acts, even if between consenting adults.

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57 By Norwegian legislation dated 12 June 1987 the King was empowered to prohibit base jumping and all traffic with parachute equipment within certain mountain areas (where such activities had been frequent). The background was the deaths of four jumpers and several risky rescue operations in the 'Trollveggen' mountain between 1980 to 1986.

58 Psychological science points at the negative effects of too strong limitations on self-determination in this respect. It may be an inherent personal characteristic to seek out risks; if this characteristic is prevented from realising itself in sports activities, it may materialise in a more destructive and social damaging way, such as speed driving. See among other authorities, Gunnar Breivik, 'Trends in Adventure Sports in a Post-Modern Society' (2010) 13 Sport in Society 260 et seq.

3.3.4 Commercialisation of Acceptance of Risk

(a) Related, but at the same time different considerations apply where the right-holder's motivation for performing the risky activity is money rather than the activity as such. As indicated the motivation may be mixed: a North Sea diver will presumably be attracted by the diving-challenges, the sea and the fee.

After presenting the point of departure ((b) below) I will investigate the importance of commercialisation for the validity of waiver of a protection against risk for serious harm ((c) below).

(b) The general point of departure when assessing adequate response to risk is the 'Osman-test'.[59] The *Öneryildiz*-case,[60] where the risk connected to negligent administration of a municipal refuse tip had materialised in a methane explosion that caused the death of several people, is relevant: The Court gives weight to the fact that the authorities had taken insufficient steps to inform the right-holders of the risk they ran. In that case life and limb was at stake and the degree of risk was high. The Court stated, quite generally, that the obligation to prevent loss of life resulting from dangerous activities:

> [M]ust be construed as applying in the context of any activity, whether public or private …, and *a fortiori* in the case of industrial activities, which by their very nature are dangerous.[61]

(c) Applying the traditional system for waiver-considerations a first factor is whether the right-holder is *informed* of the risk he runs. As already mentioned the Court emphasised the inadequate information of the risk in *Öneryildiz.*[62] Similarly *constraint* inherent in the desire to escape poverty is capable of rendering consent invalid. But even if we suppose that the right-holder is unconstrained, has accepted the risk and is paid for it, the situation may lead to results in contravention with 'important public interests'.

Still, the fact that the right-holder has an economic interest and his contracting party an interest in getting the job done cannot as such invalidate the right-holder's accept of risk (waiver of protection). On the other hand it is obvious that an employer should not get away with injuries caused by materialised risk-factors,

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59 See 1.2.3.3 above.
60 See *Öneryildiz v Turkey* (App no 48939/99) ECHR 30 November 2004.
61 See ibid [71].
62 Ibid.

simply by reference to an acceptance by the employee. The question is: what are acceptable limits for accepting risk in return for money. A range of factors are relevant.

The more serious and the more apparent the risk, the more natural it is to apply the '*Osman*-test'. In other words, despite any accept of working conditions, state responsibility is aggravated if more reasonably could have been expected to be done to diminish the risk of serious harm. One could never accept that injuries caused by manifestly insufficient regulations and security measures, say in a coal mine, could be justified by the fact that the conditions were accepted by the injured, even if he was well paid in return.

The consideration is more difficult where the parties are acting according to the highest obtainable knowledge and best obtainable security, but the risk still is high. Take as an example the deep sea diving activity necessary in the initial phase for the development of the North Sea oil-adventure, both in the Norwegian and British sectors. A harmed but informed and unconstrained performer will probably not be a victim of any violation if the activity pursues a legitimate aim and, as in the North Sea oil case, the risk is diminished as much as possible and does not appear unreasonable (hazardous).[63]

Consent-based risky activity motivated by money may be in conformity with the Convention even if merely supported by less vital purposes, such as entertainment. Boxing offers an example. A precondition also in such cases seems to be the efforts to minimise the risk connected to the activity.[64] If the authorities have or should have had knowledge of a match without providing for regulation, supervision and eventually termination in order to avoid serious harm to materialise, the Convention will be violated, even if the right-holder has consented to the activity. The considerations will follow the same line when it comes to hazardous performances, for example in a circus.

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63 The Norwegian Supreme Court has recently rejected deep sea divers' claim for compensation for damages caused by diving in the North Sea during the so called pioneer petroleum period. The Supreme Court held that there was not a sufficient link between the Norwegian state and the activity, neither had the control authorities been negligent (see Rt 2009 page 1237). Compare ECtHR's judgment in LCB v The United Kingdom (App no 23413/94) 9 June 1998 ECHR 1998-III where the state was found to have been sufficiently careful in relation to risks of exposing employees to radiation.

64 Presumably states are at liberty to prohibit professional boxing both with reference to 'health' and 'morals' without violating the intending boxers' self-determination. In Norway professional boxing was prohibited by law 12 June 1981 nr 68.

3.3.5 Waiver of Integrity

(a) To a large extent, similar considerations apply when it comes to the waiver of integrity: the efforts to secure the right-holder's integrity will have to find equilibrium with her right to self-determination. The Court's statement in *Erikan Bulut*[65] is symptomatic:

> The Court has recognised that the prison authorities must discharge their duties in a manner compatible with the rights and freedoms of the individual prisoner concerned. There are general measures and precautions which will be available to diminish the opportunities for self-harm, without infringing personal autonomy. Whether any more stringent measures are necessary in respect of a prisoner and whether it is reasonable to apply them will depend on the circumstances of the case.[66]

A waiver of physical integrity *may* be set aside even if it is supported by a religious conviction, sexual pleasure or similar motivations. Given the sensitive character of these matters (health/morals) and the fact that there is no uniform standard among the Convention States, an *obligation* to set aside a waiver, in terms of criminal provisions aimed at preventing the activity in question is normally out of the question (compare the variations with respect to criminalisation of suicide in Europe).

(b) However, there can still be an *obligation to make efforts* to try to prevent self-harm, especially in relation to persons in a vulnerable situation. In *Güvec*[67] the Court attached weight to a wide range of factors indicating a criticisable lack of diligence vis-à-vis a right-holder in a vulnerable situation:

> It must also be noted that no action appears to have been taken, notwithstanding the applicant's psychological problems and his first suicide attempt, to prevent him from making any further such attempts (see, in this connection, Keenan v. the United Kingdom …). Having regard to the applicant's age, the length of his detention in prison together with adults, the failure of the authorities to provide adequate medical care for his psychological problems, and, finally, the failure *to take steps with a view to preventing his repeated attempts to commit suicide*, the Court entertains no doubts that the applicant was subjected to inhuman and degrading

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65 See *Erikan Bulut v Turkey* (App no 51480/99) ECHR 2 March 2006.
66 See ibid [34].
67 *Güvec v Turkey* (App no 70337/01) ECHR 20 January 2009.

> treatment. There has accordingly been a violation of Article 3 of the Convention. (emphasis added)[68]

(c) Even if the right-holder is fully competent the state has a wide *opportunity* to overturn the right-holder's self-determination, typically with reference to the interest of health and morals. *Laskey, Jaggard and Brown*[69] is illustrative.[70] ECtHR found no violation of article 8 in the case concerning punishment for wilful participation in sado-masochistic activities. The Court considered:

> [T]hat one of the roles which the State is unquestionably entitled to undertake is to seek to regulate, through the operation of the criminal law, activities which involve the infliction of physical harm. This is so whether the activities in question occur in the course of sexual conduct or otherwise. … The determination of the level of harm that should be tolerated by the law in situations where the victim consents is in the first instance a matter for the State concerned since what is at stake is related, on the one hand, to public *health* considerations and to the general deterrent effect of the criminal law, and, on the other, to the *personal autonomy* of the individual. … The Court does not find it necessary to determine whether the interference with the applicants' right to respect for private life could also be justified on the ground of the protection of *morals*. This finding, however, should not be understood as calling into question the prerogative of the state on moral grounds to seek to deter acts of the kind in question. (emphasis added)[71]

(d) Reference to 'the prerogative of the State, on moral grounds to seek to deter acts of the kind in question', confirms that there is no right to have a waiver of the protection against inhuman or degrading treatment respected, and that the consideration of whether it should be set aside contains the same basic elements as an ordinary interference. The question is whether the interference with the right-holder's self-determination is 'necessary for the protection of … morals'. To the extent that there is a prerogative for the state to interfere, the right-holder's self-determination is correspondingly limited.

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68 See ibid [98]. Cf similar cases *Renolde v France* (App no 5608/05) ECHR 16 October 2008 and *Dodov v Bulgaria* (App no 59548/00) ECHR 17 January 2008.

69 *Laskey, Jaggard and Brown v UK* (App no 21627/93, 21826/93, 21974/93) ECHR 19 February 1997.

70 Cf *Frumer* (n 34) [896].

71 See *Laskey, Jaggard and Brown* (n 69) [50-51].

Respect for the right-holder's self-determination, could easily carve out the state's positive obligations to protect his other rights, especially the protection of his rights according to article 3. The statement in *Laskey, Jaggard and Brown*: '… the determination of the level of harm that should be tolerated',[72] indicates that a certain level of seriousness is required before state-intervention will be considered proportionate: 'The noble art of self-defence' (boxing), or football for that matter, are activities that inevitably carries the risk of bodily harm. But the risk is *accepted* by participants, hence it would hardly be considered proportionate to interfere with it too easily (but see 7.3.3.6 above on the obligation to reduce risk).

3.4 Waiver Acceptable Provided Revocability

3.4.1 Normal Intimate Relations

(a) Sexuality is probably the area where the existence of consent is of most evident importance: intimate relations and sexual activity is at the core of self-determination and private life. The partner's express or tacit 'yes' distinguishes the most desired and literally existential human interaction from serious criminal acts vis-à-vis another human being. Acts normally regulated by the provisions in the sexual offence chapter of the criminal laws are characterised either by the absence of consent from the other party (rape), invalid consent (sexual intercourse with a minor) or conflict with 'important public interests' (sexual intercourse with close relatives).[73]

(b) Given the sensitive character of these matters, the state is entitled, and under an obligation, to afford the potential victim effective protection. With reference to the first-mentioned situations (consent/rape), this means that the state is entitled and even obliged to punish for rape if the consent is later revoked, even if it is in the twelfth hour. Take for example, a woman stating: 'take me if you can', but regretting this as she experiences that the offender takes her at her words. In contemporary society there should be no doubt that the right-holder can revoke the consent, so that the state is under an obligation to invoke the criminal law against

72 *Laskey, Jaggard and Brown* (n 69).

73 See for example the Norwegian Criminal Law 1902 s 195 and the British Sexual Offences Act 2003 s 9.

an offender having relied on a bygone promise.[74]

A comparable example: marriage may reasonably be considered to imply consent to sex. But this consent (as waivers in the field of personal integrity generally), is revocable: it can at any later point – particularly or generally – be revoked, with the consequence that it is without effect and any sexual conduct vis-a-vis the victim are to be considered criminal.[75]

3.4.2 Medical Operations: General Considerations

One's own body is at the core of the right to self-determination. Consequently, the right-holder's determination is of crucial importance in relation to *medical operations.* One implication is that without a capable right-holder's informed consent, a medical treatment or interference with the right-holder's body will normally render the treatment inhuman or degrading. '[T]he will of the person in question … must weigh heavily, since in principle he must be able himself to decide about his life and body as long as the life and the health of others are not at stake.'[76]

With the right-holder's consent, and given a responsible medical assessment,

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74 Example inspired by J Andenæs, *Alminnelig strafferett [General Criminal law] (Cappelen 2004).* Cf the development from the second edition (1974), where he expresses that 'the legal estimation of such an example can be doubtful', to the fifth edition (2004) where it is stated that that 'Kjønnsfriheten må betraktes som et uavhendelig rettsgode, slik at samtykket mister sin virkning når det blir tatt tilbake' [Sexual freedom must be regarded as an inalienable right, meaning that a consent loses its effect when it is revoked] (200).

75 Compare ECtHR's judgment in *CR v United Kingdom* (App no 20190/92) (1996) Series A no 335-C where the question to be determined was whether or not an extension in the application of criminal law was in conformity with art 7 of the Convention. The background to the case was a conviction of the applicant for attempted rape of his wife. At the time he had tried to force her to have sexual intercourse a man, according to common law, could not rape his wife. In getting married, so it was considered, a woman was deemed to have generally consented to sex with her husband. Obviously both British courts and the ECtHR disliked the immunity-rule, and found that the essentially debasing character of rape is so manifest that the conviction was fully in conformity with the principle of foreseeability enshrined in art 7. This is evident from the rather fruitful expression in para 42 of ECtHR's judgment: 'The abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom'. (These considerations can stand as a comment to the newly passed Afghan legislation (March 2009) *inter alia* obliging a wife to have sex with her husband at least every fourth day).

76 See van Dijk, van Hoof, van Rijn and Zwaak, *Theory and Practice of the European Convention on Human Rights* (Antwerpen 2006) 419. The Commission expressed rather generally that 'even minor medical treatment, as long as it is compulsory, constitutes an interference with a person's right to respect for private life' (see 81 A DR 1995, 61. This line is continued by the Court (see eg *Herczegfalvy* presented immediately below).

the treatment is normally purpose-rational – to save the life of the patient or to improve his health. This must be the case even if there are great risks connected to the operation. If a right-holder lacks full mental capacity, so that his consent eventually must be presumed, the *purpose* of the treatment is of decisive importance. This implies that a request from a guardian for treatment that entails an interference with the right-holders integrity is not in itself sufficient.[77] In the absence of a valid waiver, the lawfulness of the treatment depends on the medical necessity: the prospects of a better life.

To the extent that medical necessity is established, the treatment will, as a point of departure, not contravene article 3 (or any other provision). A precondition ought to be that it is conducted in a way that does not involve *unnecessary* pain (compare the *Nevmerzhitsky*-criteria, 2 above).

Naturally, the considerations are often difficult. In *Herczegfalvy*[78] the Court went far in accepting the government's argument: that the treatment in question – forcible administration of food and medicine to a psychiatric patient on hunger strike – was necessary.[79] Notably, the Commission had concluded that the treatment went beyond what was *necessary*. The Court seems to have adopted this more critical view in *Nevmerzhitsky*[80], where forced feeding was considered disproportionate because medical necessity in order to save life had not been shown. Certainly this judgment indicates that an increased vigilance (as it had generally proclaimed in *Herczegfalvy*) will be conducted in cases involving treatment of persons in a vulnerable situation.

3.4.3 Medical Operations: Experiments

While a call for medical treatment in general is supported by a strong objective, namely *health*, this is not to the same degree the case when it comes to medical experimentation. However, consent may be of decisive importance even if the purpose is of an *experimental* character. [81] If a doctor tests a new medicine on a patient, the latter's consent is a pre-condition for the lawfulness of the operation

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77 Cf Nowak (n 14) 190 which in relation to CCPR art 7 considers that 'In view of the highly personal nature of the right to personal integrity, it appears doubtful whether the consent of the statutory guardian suffices in the case of persons not in possession of full mental capacity.'

78 *Herczegfalvy v Austria* (App no 10533/83) (1992) Series A no 244.

79 See ibid [82] et seq.

80 *Nevmerzhitsky* (n 31).

81 Without prejudice to the financing (ESCR art 11).

(waiver of integrity).[82] The lawfulness, however, will depend on a more general assessment of its reliability and the prospects of a positive effect. It is assumed that the patient cannot claim a treatment that fails to meet this reliability-test. It is not covered by the right to self-determination. The difficult question then will often be: what is reliable/rational treatment?

If the patient suffers from a serious illness, and the prospect of improvement is at least to a certain degree substantiated, the consent will serve both as a *defence* for the state (waiver) and on certain conditions even as a *right* for the individual.[83]

If a medical treatment, on the other hand, is purely experimental, devoid of any healing or relieving (palliative) purpose, *patients*' waiver (consent) will normally not make it legal. A doctor's use of a so far untested medicament *on himself* probably should be considered part of his self-determination.[84]

3.4.4 Medical Operations: Amputations

Amputation is a medical operation. This means that the right-holder's consent supported by the aim of health-improvement normally is required and sufficient as a defence for the state.

As we have seen, the threshold for sanctioning suicide and self-harm is high. Hence, in relation to the right-holder's own actions the question is primarily whether there is a freedom or even an obligation for the state to *make efforts to prevent* the disputed actions. When it comes to actions involving other actors, the picture is different.[85] Imagine for example that a father who puts his own body at the disposal of his son, a medical student, to exercise amputation techniques. Even assuming that the father is capable, there are clearly limits. While the amputation of a finger *might* be considered acceptable, the conclusion ought to be the opposite when it comes to legs or eyes.[86]

Whether or not the state, from a human rights perspective, is under an obligation to react against (and so seek to deter), the act in question, typically

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82 See CCPR art 7 that expresses: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.' Cf the Commission's decision in *X v Denmark* (App no 9974/82 32) (1983) DR 282, 283.

83 A claim for medical treatment may under certain circumstances be based on art 3. ESCR art 12 may serve as a basis for positive obligations to the same effect.

84 Several famous scientists, among those Armauer Hansen, the discoverer of the lepra bacillus, achieved break-through in the research by making tests on his own body.

85 Cf the difference between suicide and assisted suicide, chapter 7.2.6 above.

86 Example inspired by Andenæs (n 74) 198. Andenæs, who in turn is inspired by his predecessor professor Skeie, seems to be critical, though.

by way of criminal sanctions, depends on a range of well known 'waiver-factors': whether the right-holder has full insight in own situation or is particularly vulnerable; and whether the action from an objective perspective has any rational purpose or conflicts with moral or other important public interests.

3.4.5 Medical Operations: Organ Donations

(a) Organ donations, also present challenges. The characteristic here is that both the interference vis-à-vis the right-holder and its aim – the benefit for a third person – are supported by weighty reasons (health improvement and the right-holder's pleasure in helping). Obviously, 'important public interests' set limits as to the acceptable harm caused to the donor. The state is both entitled and obliged to set aside a mother's determination to sacrifice herself through the donation of her heart or another vital organ to her child. The same holds true for donations that leaves the donor with severe bodily harm.

As long as the interference is not fatal or causes the donor severe bodily harm, such as where a mother or sister donates a kidney to her son or brother, the purpose of the interference (to save the life or considerably improve the living conditions of the third person) is sufficient to make the waiver (of integrity) in conformity with important public interests. Hence, whether or not the state can refer to the *waiver* (the consent) as an excuse depends *inter alia* on the existence of a rational objective in addition to the waiver.

(b) Whether or not the right-holder can *claim* to have the operation carried out, is even more difficult to answer. A first point to be taken into consideration is that positive obligations may come heavily into play: medical competence and recourses are not available on equal footing among the convention-states. The state will have to be accorded a wide margin of appreciation when it comes to prioritising the different health services.[87]

A next relevant factor is the development of practice among the same states. New obligations can be created with the advancement in medicine: if a kidney can be transplanted (almost) without any risk to the donor, his determination to donate may amount to a claim. As improvements in medicine may reduce risks for the right-holder, increase prospects of success for a third person and at the same time be economically more manageable, the treatment in question may move from being 'in contravention with important public interests' to a claim; while at a

87 See also ESCR art 12 where steps to be taken by the states to achieve the full realisation of the right to the highest attainable standard of health, are listed.

given time it may be considered in contravention with important public interests to allow a mother to donate an eye to save her daughter's sight, it may at a later point, *inter alia* due to improvements in medicine, be regarded in contravention with the right to self-determination to deny it.

Clearly, all these examples presuppose that waiver remains in force. In other words an eventual waiver is subject to revocation.

(c) A commitment *to transfuse blood* is obviously not in contravention, rather in loyal conformity, with important public interests (public health). But since it concerns interferences with the personal integrity, it must be subject to revocation. In other words, to enforce a blood 'donation' (or rather, transfer) upon an individual who no longer consents, will run counter to important public interests. The example can be extended to less severe interferences: even an undertaking to deliver hair to a wig-maker, in itself fully valid, must be revocable. To enforce a hair-cut on a regretting right-holder runs counter to important public interests.

3.5 Especially about Commercialisation

3.5.1 General Considerations

We have considered several situations where the right-holder's personal integrity is heavily involved. In some instances the interference is of such a gravity (or character) that it trumps self-determination under all circumstances and motivations (7.3.3 above). As for the rest, the evaluation of whether the state is entitled or even obliged to interfere depends largely on the motivation, including the right-holder's motivation.

The obvious point of departure is that a right-holder is free to determine her own matters, including ways of making money, even if her integrity is infringed. However, if integrity or highly personal matters are involved, economic incentives may render the disposition immoral or (otherwise) in contravention with important public interests.[88]

A certain consensus concerning questions connected to commercialisation of highly personal matters is probably present among the Convention states: decisions concerning certain personal interests should be taken without economic motivation. Even though the principle is of general application, it is presumably (originally and currently) motivated by a combination of moral considerations

88 See as an illustration the regulation in German law (BGB § 138) where 'Kommerzialisierung höchstpersönlicher Handlungen und Leistungen' is treated as a type case of 'Sittenwidrigkeit'.

(the right/interest involved) and the need for protection of right-holders in a vulnerable position, persons that may feel coerced by the circumstances to trade off such highly personal rights or interests. Hence, validity-considerations form a background. Even if society should accept, and even encourage, certain dispositions, for example donation of non-vital organs, it ought to discourage *commercialisation* of the same dispositions.[89] We shall now consider circumstances under which the fact that the right-holder gets money in return ought to render the matter immoral. Although there are no watertight distinctions between them, the division of analysis into three groups of situations seems useful.

A first group concerns the right-holder's person, more specifically his *maturity*; child labour will, with certain modifications, be considered to be in contravention with important public interests because the right-holder lacks both the (mental) *competence* to commit himself and sufficient *ability* to carry out the commitment. The Convention regulates this in article 4 (hence, see part 4 below). In the following subsections we shall consider the two remaining categories.

3.5.2 Interferences with the Right-Holder's Body

A second group is characterised by physical interferences with the right-holder's *body.* No important public interests stand in the way of allowing a right-holder to make money by selling hair to a wig-maker (however, as mentioned above society cannot assist in the enforcement of such a commitment vis-à-vis a regretting party). The situation is different when it comes to organ trading. Donation of non-vital organs is valued, but only as far as one can be sure that the motivation is medical. The prospect of profit in this area entails a risk of exploitation of individuals in a vulnerable situation that society cannot support. Probably this applies even for relatively modest interferences (donations) such as a *blood transfusion*.[90]

Abortion raises ethical challenges. Clearly, it is part of the mother's private life (self-determination) to complete the pregnancy and give birth to her child. In a majority of the Convention States it is regarded a part of her self-determination to have an abortion, too. However, a balance has to be struck between the mother's self-determination and the rights of the foetus, so that (with certain variants) the first mentioned prevails only up to twelve weeks of pregnancy.

A question of particular relevance for our discussion is whether the legal order

89 Reference may be made to The Norwegian legislation on transplantation of human organs (9 February 1973), s 10 a whereby commercialisation of human organs, parts of organs and cells and tissues are expressly forbidden.

90 Compensation for travel expenses and the like is undoubtedly no motivating factor and is hence equally unproblematic.

can support a commitment to carry out an abortion in return for money. The example is not abstract, but drawn from Swedish case law:[91] a pregnant woman had received a written acknowledgment of payment from the father of the expected child specified at 25 million Swedish kroner (approximately 3 million euros) in compensation for an undertaking to carry out an abortion. She completed her part of the trade, but the father was unwilling to pay. The court rejected her law suit for compensation, emphasising that it was manifestly in contravention of basic moral values in Swedish law to allow economic compensation to influence the ethical and medical considerations that should form the sole basis for the decision whether or not to have an abortion.

The decision is debatable.[92] It can be argued that leaving the mother without compensation is to add derision to misfortune. True enough, the instance would have been more obvious the other way around: a father who has paid can under no circumstances expect assistance from the society to have a promised abortion enforced.

However, in my opinion the Swedish courts were right. By taking a clear stance, it was underlined that the core question – commercialisation of abortion – runs counter to important public interest. This consideration trumps individual considerations in the opposite direction, so that it is logical to refuse a claim for compensation from a mother having carried out the abortion, and similarly to refuse a claim for reimbursement or compensation from a father who has paid in advance to a mother who does not keep her promise.

3.5.3 Waiver of the Right-Holder's Dignity

(a) A third group may be characterised as waiver of the right-holder's *dignity* in return for money. Keywords are prostitution and entertainment from the right-holder's handicap. The qualms attached to such issues and the arguments in favour of overturning the right-holder's will are connected to 'group identification'. A single right-holder who, personally, is willing to trade off some of her dignity, may do it to the detriment for the whole group to which she can be associated. A dwarf performing in a circus, a woman posing in a pornographic magazine or movie, or offering her services on the sex-market, may potentially damage her own dignity and self-respect, and also that of group members. To

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91 See RH 2004, 41.

92 See for a critical comment Jan Ramberg and Johnny Herre, *Allmän köprätt: det köprättsliga regelsystemet och marknadspraksis* (Stockholm 2005), while Hilde Hauge, *Ugyldighet ved formuerettslige disposisjoner* (Oslo 2009) is in favour (438-441).

the same extent the 'trade' may be said to run counter to important public interests.

The examples represent a variety concerning the potentially damaging effects on dignity, and the prevailing views in the respective communities may vary with time and place.

(b) *Pornography* is supported by the freedom of expression and current in the Convention states. A certain consensus exists on the balance that has to be struck between self-determination and freedom of expression on the one hand, and dignity and moral considerations on the other, although there are significant variations geographically concerning the equilibrium.

An obvious example of exploitation, where the right-holder under no circumstances has competence to deliver a valid waiver, is *child pornography*. In order to combat this evil international efforts have been made, which amongst other measures has resulted in Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse. Article 4 of the Convention obliges the Parties to 'take the necessary legislative or other measures to prevent all forms of sexual exploitation and sexual abuse of children and to protect children'.[93] Efforts to combat human trafficking and other forms of *sexual exploitation*, especially (but not only) of women,[94] is likely to lead in the direction of more restrictions.

Hence, any attempt to justify child pornography and trafficking with reference to waiver of the protection against indignity will have to be turned down. In the first case due to the right-holder's incompetence and in the latter due to constraint. Additionally such waivers will 'run counter to important public interests'. Hence, the national and international remedial efforts, and the developments they probably will enhance, are welcome and necessary.

Nevertheless the *commercialisation of sex* covers a broad spectrum, reaching from the gravest abuse where the element of constraint or absence of informed consent is evident (children as sex-slaves) to the reliable exercise of self-determination (the resourceful student who has deliberated the pros and cons and concluded that she 'needs' to supplement a modest loan or scholarship by selling sex to cover her expenses).

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93 The Convention is not yet in force, but several states have already taken legislative measures, see *inter alia* the Norwegian criminal code s 204.

94 See Council of Europe Convention on Action against Trafficking in Human Beings (adopted 16 May 2005, entered into force 1 February 2008) which aims at preventing and combating trafficking in human beings and guaranteeing gender equality.

While legislation criminalising pimping is quite common, rational and probably useful in order to protect the weaker party (the prostitute), a general criminalisation of commercialisation of sex may show the right to self-determination (of the prostitute) too little respect. More adequate, still in order to avoid adding insult to injury for the weaker party is to criminalise the client, while leaving the prostitute free from penalties.[95] However, even this targeted measure may, according to its intention, have an impact on the demand conceived as detrimental to the *individual right-holder* belonging to the *community* whose dignity the law seeks to protect. In other words it can be argued that even criminalisation of the client part is according the right to self-determination of the prostitute too little respect.

At any rate the fact that society abstains from criminalisation cannot be taken as an indication that prostitution is accepted: consequences for the right-holder's civil rights may be set off. While the law-enforcing machinery of the state cannot under any circumstances be activated to help the prostitute's client to his benefit in kind, to compensation or even reimbursement, it will probably be (best) in conformity with public interests to enforce the prostitute's compensation-claim for delivered services.[96]

Likewise, increased international focus on rights of the disabled is likely to restrict the options to utilise *handicaps for entertainment* purposes.[97] This is in line with the natural assumption that the vast majority of the members of communities with handicaps in question (e.g. the dwarf-community) probably are opposed to being the object for entertainment.[98]

However, as in the previous example (c), the case may be that mature individuals, with full insight as to their own situation and capability to calculate their own best interests, carry a heavy burden to the (uncertain) benefit for the self-respect of a large and heterogeneous entity to which they belong (women, disabled).

As far as the disabled are concerned, two decisions in French Conceil d'Etat

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95 See amongst other the British Sexual Offences Act 2003 s 53A and, in Norway the General Civil Penal Code s 202 a.

96 It is worth noting that German law has an express provision granting the claim from a prostitute who already has delivered (Gesetz zur Regelung der Rechtsverhältnisse der Prostituierten Vom 2001), see comments from Karl Larenz and Manfred Wolf, *Allgemeiner Teil des deutschen Bürgerlichen Rechts* (Leinen 2004) 746-747 and Hauge (n 92) 442-447.

97 See the Convention on the Rights of Persons with Disabilities art 15 (Freedom from torture or cruel, inhuman or degrading treatment or punishment) and art 16 (Freedom from exploitation, violence and abuse).

98 Compare Oliver de Schutter, 'Waiver of Rights and State Paternalism under the European Convention on Human Rights', (2000) Northern Ireland Legal Quarterly 503.

(1995) are illustrative.[99] French administrative courts had considered 'dwarf-throwing' in contravention to human dignity. In response, one of the main persons affected by the prohibition, Mr Wackenheim, argued that these events gave him an opportunity to escape unemployment. But Conceil d'Etat did not uphold his claim.

Conceil d'Etat's reasoning is somewhat blurred. It starts out with reference to certain overriding principles (human dignity) over which the individual directly concerned has no exclusive competence to dispose. The continuation is, however, more troublesome:[100] the fact that Mr Wachenheim received money for trading of (his) dignity was considered disfavouring to his case. Although the reasoning is not express, the rationale seems to be that the prospects of payment constituted a sort of 'background constraint' on Mr Wackenheim, especially since he had difficulties with getting an alternative job.[101] This line of reasoning may lead to the unfortunate results: the more the right-holder is in need of utilising his personal situation to make a living, the less the implicit waiver of dignity this may entail can be taken as decisive. This line of reasoning may have the undesired consequence that the less the state does for securing the economic and social rights of disabled and other vulnerable groups, the freer it is to overturn the individual's attempt gain control over his own life by utilising the opportunities it offers.

This observation naturally calls upon the state to reduce the 'background constraints', so that the right-holder is not (or to a lesser degree is) forced to humiliate himself.[102] In other words, the state's argument that moral considerations necessitate detachment of waiver from dignity is weak if it has made no serious efforts to establish alternative routes out of the misery for individuals belonging to the community of vulnerable in question. Relevant steps may be to provide decent work or at least sufficient social benefits (in other words there is a link to economic social and cultural rights).

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99 Conseil d'Etat 27 October 1995.

100 See in the same direction DeSchutter (n 98) 503 et seq.

101 Compare eg the Commission's rationale in *Deweer v Belgium* (App 6903/75) (1980) Series A no 35 described in above, and also the justification in some Convention states for a ban on *niqab*.

102 Compare Margaret J Radin¸ 'Justice and Market Domain', in JW Chapman and JR Pennock (eds), *Marked and Justice – Namos XXXI* (New York University Press 1989) 165 et seq.: when commenting on the situation for a poor and oppressed person accepting a humiliating job, states: 'to the desperate person the desperate exchange must have appeared better than her previous straits … It seems to add insult to injury to ban desperate exchanges by deeming them coerced by terrible circumstances, without changing the circumstances' (182).

3.5.4 Representation

Where personal integrity is at stake, it is assumed that a thorough examination of waiver on behalf of others will be conducted. While interferences devoid of any rational or defendable purpose, such as circumcision of girls, hardly can be justified by parents' consent, a call for medical treatment aimed at improving the child's quality of life can.

4 Forced Labour (Article 4)

4.1 General Considerations

It is in the very nature of the rights enshrined in article 4 that the disputed actions are enforced upon the right-holder against his will. So, it is obvious that an unconstrained and capable person can commit himself to work. A valid consent to work deprives the work or service of its 'forced or compulsory' character.[103]

Naturally, the right-holder cannot be forced physically to continued work, but he may be met with a compensation claim and similar sanctions if he withdraws from the commitment. This must be the point of departure even if the commitment to stay in the job for a certain period is an undesired element of an after all desired 'package' which typically will include advantageous elements, such as education, training and qualification as well.

However, the Court's reasoning in *Van der Mussele*,[104] where a lawyer complained about compulsory service, clearly shows that the right-holder's acceptance of a duty to deliver work as part of a 'package' is not in itself decisive for the consideration of whether the labour in question is *forced* labour; a broader evaluation is necessary:

> [T]he Court will have regard to all the circumstances of the case in the light of the underlying objectives of Article 4 (art. 4) of the European Convention in order to determine whether the service required of Mr. Van der Mussele falls within the prohibition of compulsory labour. This could be so in the case of a service required in order to gain access to a given profession, if the service imposed a burden which was so excessive or disproportionate to the advantages attached to the future exercise of that profession, that the service could not be treated as having been voluntarily accepted beforehand;

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103 Compare Van Dijk, van Hoof, van Rijn and Zwaak (n 76) 446.
104 *Van der Mussele v Belgium* (1983) Series A no 70.

> this could apply, for example, in the case of a service unconnected with the profession in question.[105]

After having satisfied itself that the labour in question was foreseeable, of limited duration and highly relevant for the profession, the Court concluded, in my opinion correctly, that there was no violation. In other words, given these circumstances the right-holder's acceptance of an acceptable 'package' made the labour, that otherwise would have had to be regarded as compulsory, in conformity with the Convention.

Nevertheless, a strict scrutiny is required in relation to labour that may be regarded as compulsory, especially where children are involved:[106] there may be no consent from the right-holder at all, or the labour may go beyond what was consented to. Even if there is consent, it is assumed that a whole range of invalidity causes connected to incapacity and coercion play an important role in this field, especially in cases concerning children and long term obligations (see immediately below).

4.2 Unacceptable Child Labour (Compulsion)

Obviously, the necessity of a careful scrutiny of the validity of the consent to work is particularly important where children are involved.

The *Siliadin*-case shows a modern manifestation of a phenomenon that in its original form is condemned by the Convention States: slavery and forced labour (ECHR art 4).[107] Even if one accepts that a minor can commit to light work, a series of factors distinguished the conditions the applicant had experienced from the acceptable: she was a 15 year old girl from Togo who came to France to work as a domestic hand. She received neither pay, nor training (cf the *Van der Mussele*-case above).[108] The work was supposed to make up for the plane ticket, and until further notice the family who 'employed' her, confiscated her passport. She continued to work for several years under hard conditions without pay seven days a week from eight o'clock in the morning until ten in the evening. On neighbours' initiative the case was reported to the Committee against Modern Slavery. The ECtHR arrived at the conclusion that French law did not provide sufficient protection

105 Ibid [37].
106 See for example the more detailed provisions in the UN Convention on the Rights of the Child (adopted 20 November 1989, in force 2 September 1990) (CRC) arts 31 and 32.
107 See *Siliadin v France* (App no 73316/01) ECHR 26 July 2005.
108 *Van der Mussele* (n 104).

against the compulsory labour in question. Specific provisions against slavery and compulsory labour were absent, and French courts had acquitted the 'employers' for the charges according to the more general provisions regulating compulsion and exploitation. The fact that the applicant was granted compensation for non-pecuniary damage did not constitute sufficient positive protection against compulsory labour.

4.3 Long Term Child Labour (Change of Circumstances)

A particularly careful scrutiny will have to be conducted where long term commitments are in question, and even more so if the commitments are entered into on behalf of others. It is common ground between the Convention states, though, that parents – to a certain degree – can commit their under-age child, even to work.[109] However, parents or other representatives have a general obligation to act in the best interest of the child.[110] This means that the minors must have mental capacity to understand the commitment and that they want to be committed. In this perspective the parents are representatives, legal guarantees, assuring that the desired work in question is in the interest of their child. An implication of this obligation may be to say 'no', even if the child says 'please'.

A commitment that is in conformity with the wish of a child at the age of 15 and is considered to be in his best interest is normally acceptable. However, the perspective may have changed substantially when he reaches maturity. Hence, it can well be argued that the Commission, in its decisions declaring four applications manifestly ill-founded, too easily accepted a parental consent as the basis for non-terminable engagements (up to nine years) in the navy for their 15 and 16 years old boys.[111] It is at the outset astounding that national law allowed such long term commitments on behalf of others. Arguably, it may easily amount to forced labour ('run counter to an important public interest') to maintain a 'self-imposed' obligation to work under such circumstances. Long term labour contracts involving children ought to be coupled with an option, for a right-holder that has attained his majority, or before that, to terminate the obligation through his representative.[112]

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109 See the CRC art 32 para 2(a) which requires that the states provide for a minimum age for the admission to employment.

110 See the principle in art 3 of the CRC.

111 See the Commission's report in *W, X, Y and Z v United Kingdom* (App no 3479/68) (1968) YB 11 562.

112 Compare Van Dijk, van Hoof, van Rijn and Zwaak (n 76) 446.

The 'Boy Soldiers-cases' give rise to concern about long term commitments especially in an under-age-context: due to the right-holder's under age, the extent of the commitment cannot reasonably be described as foreseeable for him.

5 Personal Freedom (Article 5)

5.1 Introduction

After having proclaimed 'the right to liberty and security of person' article 5(1) continues by listing six exhaustive categories where deprivation of liberty is permitted. Waiver is not mentioned. Hence, *De Wilde, Ooms og Versyp* (the Vagrancy-case),[113] seems logical when it infers that the right-holder's consent is not a sufficient basis for the deprivation of liberty:

> Finally and above all, the right to liberty is too important in a 'democratic society' within the meaning of the Convention for a person to lose the benefit of the protection of the Convention for the single reason that he gives himself up to be taken into detention. Detention might violate Article 5 (art. 5) even although the person concerned might have agreed to it. When the matter is one which concerns *ordre public* within the Council of Europe, a scrupulous supervision by the organs of the Convention of all measures capable of violating the rights and freedoms which it guarantees is necessary in every case. Furthermore, Section 12 of the 1891 Act acknowledges the need for such supervision at national level: it obliges the magistrates to 'ascertain the identity, age, physical and mental state and manner of life of persons brought before the police court for vagrancy'. Nor does the fact that the applicants 'reported voluntarily' in any way relieve the Court of its duty to see whether there has been a violation of the Convention.[114]

These statements will, however, have to be nuanced. It is at the core of the very concept of deprivation of liberty, that it is enforced against the informed will of the person concerned (cf above on forced labour). A call for or consent to medical

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113 *De Wilde, Ooms and Versyp v Belgium* (App no 2832/66, 2835/66, 2899/66) (1971) Series A no 12 [65].
114 Ibid.

treatment in a clinic deprives (at least as a maxim) the matter of its character of deprivation of liberty.

Because consent is capable of removing the matter completely from the ambit of the right (freedom from *deprivation* of liberty), a careful scrutiny of and a swift and efficient judicial review with the validity of the continued presence of the patient's *valid consent* to stay is the most essential issue to be examined in such cases. *Gulub Atanasov*[115] is illustrative:

> In so far as the Government argued that the applicant had been placed for examination at his own request, the Court notes that he had only asked to be examined by psychiatrists (see paragraph 29 above). In any event, the Court does not consider that such a request alone, taken in isolation, is sufficient to conclude that throughout the period spent in the psychiatric hospital the applicant was a voluntary patient and not a person deprived of his liberty.[116]

(a) The causes capable of rendering consent invalid are multiple: there may be duress, the right-holder may lack the mental capacity to consent, or he may have revoked an originally valid consent. Often serious doubts as to the validity arise on more than one ground in the same case: the mentally ill and *incapable* patient is asked if he agrees to treatment, but at the same time the doctor puts him under *constraint* by communicating (more or less openly) that there is an alternative: compulsory confinement.

5.2 Risk of Incapability is Inherent in the Objective: Medical Treatment and Care-Institutions

(a) If a person with full insight into her own situation calls for treatment in a clinic, it is anomalous to label the matter as deprivation of liberty. This is obvious as far as somatic treatment is concerned. The case may be that the treatment in question necessitates that the patient stays for a certain period of time, to which she is capable of consenting to in advance. However, if she regrets consenting, a revocation of consent deprives a continued stay of its legitimacy, unless it complies with the conditions in article 5(1) or strict necessity applies, such as where the right-holder withdraws consent in the midst of an operation.

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115 *Gulub Atanasov v* Bulgaria App no 73281/01 (ECtHR, 06 November 2008).
116 See ibid [65].

(b) If the call for treatment or request for being taken into care stems from a psychiatric patient or persons in a similar *vulnerable situation*, doubts are cast on the capability and consequently validity of the consent.

It may be that the calls for hospitalisation or similar situations are already tainted from the beginning, *inter alia* by the right-holder's reduced mental condition. Even supposing that there originally is valid consent, continued stay calls for awareness. In the *Storck* case[117] the right-holder's conduct (escape) gave reasons to reject the government's argument that she (still) consented to stay. Plain passivity should normally not be considered a sufficient basis for presuming consent either. There ought to be a regular control at reasonable intervals with whether it is objectively justifiable to retain the right-holder.[118]

Assuming that there initially is a valid consent, the right-holder must be able to *revoke* it. A revocation of consent to treatment implies that a continued stay in principle is deprivation of liberty, so that the authorities will have to release the patient or, alternatively, to justify the detention with reference to the conditions required for deprivation of liberty, most obvious those related to 'persons of unsound mind' (art 5(1)(e)), or more rarely 'vagrants'.[119]

This element of possibly changed circumstances underlines the importance of judicial control with the legality of the (continued) stay at reasonable intervals. While the intervals may be months in cases where the law requirements, such as risk of damage to health, are satisfied at the outset,[120] immediate release or judicial control is called for in cases where the stay originally was based on a consent that later is revoked.[121]

If it is revealed that there is no consent to continued stay, either because there

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117 *Storck v Germany* (App no 61603/00) ECHR 16 June 2005.

118 See generally part 3 of my first Article.

119 Often national law provides for forced hospitalisation on the basis of consent in advance for a certain time-barred period. By way of example, in Norwegian law there is a three week period in s 2-2 of the Mental Health Care Act [psykisk helsevernloven] 62/1999. Deprivation of liberty without any possibility of obtain release for three weeks, seems excessive (cf the reasoning in relation to detention on remand, 5.3 below). Cf BH Østenstad, *Heimelsspørsmål i behandling og omsorg overfor psykisk utviklingshemma og aldersdemente* [Questions of lawfulness concerning the use of force towards mentally retarded and elderly demented] (Bergen 2011) who argues with force that the right-holder's reaction or attitude at the time of the interference should be considered decisive (233).

120 The principle was established in *Winterwerp v Netherlands* (App no 6301/73) (1980) Series A no 33.

121 In the *Vagrancy*-case (n 113) the applicants had, as seen in part 7.5.1 above, originally called for being taken into care. Nevertheless, lack of access to judicial control over longer periods of time (from 7 to 21 months) constituted a breach of art 5(4). It is assumed, however, that the periods in these case in no way indicates that even considerable shorter periods may be acceptable.

is no reasonable factual basis for it or because the right-holder has no capacity to consent, there is no valid waiver of the right to liberty. *Storck*[122] is illustrative. A young German woman had initially called on a clinic for treatment. The question was whether a continued stay could be based on consent; ECtHR found convincing evidence supporting the fact that the consent was in fact revoked:

> Having regard to the continuation of the applicant's stay in the clinic, the Court considers the key factor in the present case to be that – as is uncontested – the applicant tried on several occasions to flee from the clinic. She had to be shackled in order to prevent her from absconding and had to be brought back to the clinic by the police when she managed to escape on one occasion. Under these circumstances, the Court is unable to discern any factual basis for the assumption that the applicant – presuming that she had the capacity to consent – agreed to her continued stay in the clinic.[123]

As an alternative reason for considering the continued stay a deprivation of liberty, the Court pointed at the fact that the right-holder's mental conditions indicated incompetence to consent:

> In the alternative, assuming that the applicant was no longer capable of consenting following her treatment with strong medication, she cannot, in any event, be considered to have validly agreed to her stay in the clinic.[124]

The patient's mental conditions, although not necessarily rendering his consent invalid, may be insufficient as a basis for (continued) stay. This is especially so if his consent is merely assumed on the basis of the fact that he does not claim to leave. In *HL*[125] the Court was not willing to infer a sufficiently solid basis for consent to stay from the fact that the patient, a sever autistic, never had expressed a wish to leave. To the contrary it was satisfied that if he had so attempted, he would have been held or brought back:

> [T]he applicant was under continuous supervision and control and was not free to leave. Any suggestion to the contrary was, in the Court's view, fairly

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122 *Storck* (n 117)
123 See ibid [76].
124 Ibid.
125 See *HL v UK* (App no 45508/99) ECHR 5 October 2004.

> described by Lord Steyn as 'stretching credulity to "breaking point" and as a "fairy tale"'. After a three month period as an "informal patient" – formally under no legal obligation to stay – he was compulsory detained in accordance with national law. The learning is that national authorities, administrative or judicial, under such circumstances should have assured that the conditions for deprivation were present from the outset.[126]

The *HM* case[127] is distinguishable from *HL* in that the conditions in the nursing home where the right-holder resided were freer. However, she had not accepted the placement of her own free will; and, given her reduced mental capacity, more care with inference from her passivity in that respect should have been exercised. The fact that the police were employed to implement the measure, which was of unlimited duration and served the purpose of ensuring that the applicant did not leave the nursing home, hints at the unreliability of the alleged consent. Furthermore the relevant national law, the Swiss Civil Code, expressly referred to the measure at issue as one of 'deprivation of liberty'. The same term was employed by all the authorities involved in the present proceedings. Despite a relative freedom (to have personal contacts and to phone the outside world), it remains that she was not permitted to leave the institution and go home, and that, if she did, she would have been brought back to the nursing home. Hence, the authorities should already have assured from the start that the conditions for deprivation of liberty in Article 5(1)(e) was present.[128]

(a) Again, special considerations apply when it comes to consent on behalf of others. In *Jon Nielsen*[129] the majority of the Court accepted with reference to parental responsibility (art 8) that a twelve year old boy could be held back in a psychiatric hospital at the request of his mother. This view is debatable. If one focuses on the link to free (and valid) consent, it is tempting to suggest that the Court in *Jon Nielsen*, instead of accepting the mother's request as the sole basis for the deprivation of her child's liberty in a psychiatric clinic, should have assured itself that the general conditions for the deprivation of liberty of 'persons of unsound mind' was met (art 5(1)(e)).[130]

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126 Ibid [91].
127 *HM v Switzerland* (App no 39187/98) ECHR 26 February 2002.
128 See ibid.
129 See *Jon Nielsen v Denmark* (App no 33488/96) (1988) Series A no 144.
130 See Francis G Jacobs and others, *The European Convention on Human Rights* (OUP 2006) 126, and (slightly more pragmatic) Harris, O'Boyle and Warbrick (n 3) 127-128.

> The Commission's approach in the Jon Nielsen case is to be preferred. It took into account the applicants own view on his situation, even though he was under age: 'the rights of the holder of the parental rights vis-á-vis his or her children are not unlimited and do not involve any unrestricted power of decision over the child and its personal conditions' (para. 117 of its report). It underlined that the importance of the child's view will depend on 'a concrete assessment of the maturity of the applicant and his ability to understand his situation and to come to a decision as to the intervention in his personal liberty, which the admission to a hospital and detention in a psychiatric ward involve' (para. 125). The Commission concluded that the twelve year old Jon was mentally capable of grasping his own situation and of expressing his view. Thus, the mother's consent was not sufficient to avoid a breach of Article 5.

5.3 Constraint is Inherent in the Objective: Detention on Remand

While the right-holder's wish for medical treatment or similar purposes will deprive the matter of its character of deprivation of liberty (see above), the situation is different when it comes to detention as a means in criminal procedure. Unlike medical treatment, the element of personal benefit is harder to spot when it comes to detention on remand. Hence any consent to 'detention' on remand is tainted with a presumption of constraint. If the prosecution 'suggests' detention, the accused will be under considerable constraint easily rendering his eventual consent (and thereby waiver of the protection afforded by art 5) invalid.

An additional consideration can be drawn in the same direction: while normally no interests suffer in case a voluntary patient is leaving hospital, it is not easy to imagine that society will let an accused go for the sole reason that he has withdrawn his consent to stay in detention.

That is why the conditions in Article 5(1)(c) (necessary deprivation of liberty on reasonable suspicion of having committed an offence of certain seriousness) and the procedural guarantees in article 5(3) (the accused '*shall* be brought … before a court') will have to be satisfied already from the outset, irrespective of any waiver of the personal freedom from the accused.[131]

In other words, even if the right-holder consents to go to prison, a court hearing assessing the mandatory conditions for detention on remand is required.

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131 If, however, the basic conditions are fulfilled, consent is among the alternative factors that may legitimise continued detention.

6 Principle of Legality (Article 7)

Waiver can substitute law as the basis for, or justification of, different kinds of 'interferences' with rights.[132] When it comes to interferences in the form of criminal sanctions, the situation is different.

One thing is that it is hard to spot any imaginable advantages, and hence any rational motivation, for the right-holder to opt for punishment without law. Even more important is the objective supporting the *nulla poena sine lege*-principle. Its objective is not limited to preventing arbitrary or excessive use of power (as is the case for interferences in general). Rather the essential purpose is to regulate the individual's conduct by general deterrence. This objective cannot be obtained without a general norm (law) existing prior to the point in time where the addressee (the individual) is calculating ways of conduct ('do not act in contravention with this norm'). Hence, the legal requirement is a '*conditio sine qua non*' for the imposition of criminal sanctions. We can conclude that punishment solely on the basis of consent (waiver of the law-requirement) will '*run counter to important public interest*'. There is neither an obligation nor a privilege for the state to respect a waiver of the *nulla poena sine lege*-protection.

Later (in the third article) I shall investigate whether similar considerations apply to the closely related *nulla poena sine judicare*- principle. But the focus firstly is on derogable substantive rights.

7 Private Life

7.1 Introduction

Private life is a broad concept.[133] In the field of physical or mental integrity there is a borderland between article 8 and article 3, where the most serious interferences will be subsumed under the latter as torture, inhuman or degrading treatment.[134]

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132 See part 4 of my first Article.

133 See generally Harris, O'Boyle and Warbrick, (n 3) 365-371; Van Dijk, van Hoof, van Rijn and Zwaak (n 76) 666-690 and Francis G Jacobs and others (n 130) 335-337 and 358-361.

134 Note that the fact that there is borderland where it is not always clear whether the matter most pertinently should be subsumed under art 8 or a 3 encourages caution in placing too decisive importance to the division between derogable (parts 2-4) and non-derogable rights (parts 7-11). Cf Frumer (n 34) who concludes that the distinction is of little guidance [896].

For the sake of coherence these instances are presented jointly in part 3. Here I shall focus on some remaining aspects of private life, likely to be of importance for the question we are discussing: waiver of aspects of private life in an employment context and implied waiver of the right to honour and reputation by seeking the public light.

7.2 Waiver of Private Life in an Employment- or Business-Context:

7.2.1 General Questions

(a) Where the demands for jobs exceed the supply, applicants will, in order to get the job, be inclined (or 'forced') to accept conditions that they in fact consider (and that should be considered) unacceptable. The employee may also face a situation where the employer at a later stage holds that certain limitations of the rights of the employee are implicit in his employment contract. A third variant is that an already employed right-holder is faced with new conditions which he in the first place accepts in order to keep the job, but later condemns. In all instances the question is to what extent a hollowing of the right-holder's remaining rights can be considered conventional with reference to his (initial) waiver.

The question of waiver and its consequences may, generally, arise either in the form of certain prior conditions accepted by the right-holder in order to gain employment, a promotion or the like, or in the form of a sanction for not having obeyed a commitment.

(b) Contract is the cornerstone of employment law. And the employment contract regularly regulates waivers. Nevertheless, protection of the employees against exploitation of different kinds has been a major goal both at the international level, especially through ILO,[135] and (partly as a consequence of those commitments) at the national level in the form of extensive protective legislation.[136]

Again, the respect for the right to self-determination (art 8) dictates that the right-holder at least to a certain extent should have the competence to shape the rest-content of his private (or family) life in the particular employment context in

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135 A selection of relevant ILO Conventions are: C173 Protection of Worker's Claims (Employer's Insolvency) Convention 1992; ILO Convention 158 Termination of Employment Convention 1982; ILO Convention No 29 Forced Labour Convention 1930; ILO Convention No 98: Right to Organise and Collective Bargaining Convention 1949; and Worst Forms of Child Labour Convention 1999.

136 See Norwegian 2005 act, for example chapters 10 (work hours), 11 (minor's labour) and 13 (protection against discrimination).

order to get the job he desires. For example, it is obvious that he can trade off the right to private and family life (and freedom of movement for that matter) so that he commits himself not to leave the job during work hours (without any further justification such as family member's illness).

At the same time as some aspects of private life are incompatible with obligations arising from the employment contract, and consequently must be considered tacitly (if not expressly) waived (eg the option to stay home), it is correspondingly obvious that an employment contract does not imply an *en bloc* waiver of private life. The point of departue must be that the right-holder retains his basic right to private life as long as it is consistent – or rather, not inconsistent – with his obligations under the contract. To presume a general waiver of private life by signing a job contract will conflict with both the clarity-requirement that is a precondition for the validity of waiver in a narrow sence and the conformity-with-public-interest-requirement.[137]

However doubtful cases easily arise: can an employer claim that the employee carries out a hair-cut or change of clothing, or access to his correspondence conducted at work? This can only be answered in the affirmative if and to the extent that it is necessitated (reasonable) by the demands of the job in question.

7.2.2 Telephone Interception and the Like

(a) In *Halford*[138] ECtHR confirmed that the applicant, who was Assistant Chief Constable, had experienced an interference with her private life in that the telephones in her office had been intercepted. The background was, so she convinced the Court that after she had brought a sex discrimination complaint against the police force for failure to promote her, her telephone had been tapped by her opponent to assist in its defence against her complaint.

Halford[139] concerned the relationship between a public employer and its employee. The fact that the relationship to the employees primarily was (is) regulated by contract suggests that the considerations connected to the extent of the admissibility of waiver of private life are relevant in a private party context.

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137 See generally chapter IV of the first Article for a comparison with the relationship to the general conditions for an interference ('prescribed by law and … *necessary in a democratic society*').
138 *Halford v UK* (App no 20605/92) ECHR 1997-III.
139 Ibid.

(b) In concluding that the telephone tapping was disproportionate ECtHR emphasised several factors, amongst them that the employer had given no prior warning that such interceptions could take place and *even* that a telephone had been designated to her with the *assurance* that she could use the office telephones for the purpose of her complaint. The emphasis of these special features leaves it uncertain whether an employer generally is entitled to intercept business telephones. However, the most pertinent interpretation of *Halford*[140] probably is that if the employee (the right-holder) continues his relationship with the employer after a warning of the possibility of surveillance of his communications, this can, as a point of departure, be taken as an acceptance of the removal of her expectation of privacy in this particular context. But this acceptance obviously is neither unconditioned nor unlimited.[141]

Warning, or information, in advance and in general terms that the employer is entitled to intercept is a minimum condition for a waiver-based interception. It will, analogously to the legal-requirement for interferences[142] have to be described with some precision *when* interception may be carried out and be accessible to the employer.[143] Correspondingly, subsequent information to the right-holder that a monitoring or interception has been carried out, and of the results thereby obtained, may be required.[144]

The question then, still in line with the conditions for interferences, is: what constitutes necessary and sufficient (reasonable) *causes* for interception? It must be expected that the employer is able to provide a reasonable cause for interception, for example, reasonable grounds to suspect that the employer is acting detrimentally.

And even if private life is waived by way of an acceptance of control of communications, the employer will have to perform it reasonably (proportionately). A more lenient interference than interception may be sufficient (and therefore

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140 Ibid.

141 See Gillian S Morris & Timothy J Archer, *Collective Labour Law* (Hart Publishing 2000) 62-63.

142 See *Sunday Times v UK (App no 6538/74)* (1979) Series A no 30 [49]: 'a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.'

143 Obviously it cannot be required that the employer informs of an actual interception as that would destroy the whole purpose. All the more important is it that the information on instances constituting grounds for interception in general is available.

144 Cf the ECtHR's judgment in the Klaas Case v Germany (App no 5029/71) (1979) Series A no 28.

required): in order to reveal unauthorised private use of the employer's telecommunications, monitoring may be sufficient so that interception is disproportionate.[145]

7.2.3 Continuation: E-mail (and Internet)

Copland[146] concerned e-mail monitoring. The case is comparable to, but distinguisable from *Halford*[147] in two respects. The fact that the interference referred to the applicant's *e-mail*, not her telephone, is of lesser importance. Both are media for private communication. More significant is the fact that Copland, unlike Halford, had not been *assured* that the relevant medium would not be monitored. Hence, her expectations of confidentiality did not have the same firm basis. Nevertheless, ECtHR went one step further by finding that monitoring of e-mail *without prior warning* of such possibility violated article 8.

The question of waiver is not adressed directly. But it seems plausible that if there had been a warning, the employee's waiver of this particular aspect of private life could have been presumed. Still, the interference might, under certain circumstances, have been considered disproportionate.

Monitoring of *internet* use has a different character: it does not, at least not so clearly, represent an interference with the right-holder's correspondance. And in the continuation: the character of the medium does not, at least not to the same degree, lay the ground for expectations of confidentiality.

True enough, an employee who uses the employer's data facilities for private or other clearly not-job-realted purposes, may approach the point where he is in breach of confidence and duty to deliver work instead of lapsing into amuesment. Nevetheless, the question arises whether monitoring, storing and eventually use of collected information infringes his private life. This is especially so where the employee has reasonable expectations of confidentiality. Again, such expectations have the firmest basis where the employee is assured in advance. Their basis will gradually decrease where the issue is not adressed (in the contract, instructions or the like) and be non-existent where the employee is instructed not to use certain of the employer's facilities.

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145 In Norwegian law, control measures may only be implemented if they are 'objectively justified' and do not involve strains that are not 'proportionate', see the Norwegian Working Environment Act s 9-1. In addition, the employee must be informed of the measures in advance, see s 9-2. New technology provokes new legal responses. Hence, additional legislation on internet and e-mail is to be expected.

146 See *Copland v UK* (App no 62617/00) ECHR 3 April 2007.

147 *Halford* (n 138).

In line with *Halford*[148] and *Copland*[149] it must be presumed that clear instructions from the employer that certain use of internet (or other madia) is considered a security risk or otherwise undesired has to be respected if it is not manifestly unreasonable. Hence an employee who continues to work after such instructions, can be presumed implicitly to have consented, and to the same extent, to have waived this aspect of his private life. Exceptions must be made if the employer's claimed interest is unsubstantiated or his instructions are ambiguous.

> A decision from the Norwegian Supreme Court is illustrative. The case concerned the dismissal of employees who had misused the employer's data facilities to download pornographic material from internet. The court seems – in my view correctly – to take as a point of departure that the employer's expressions that he considers a certain matter a security risk (so that the employer must avoid it) is more important than the factual existence of such a risk. In other words as long as such instructions are made clear to the employer, the latter must be considered to accept the limitations they represent to his private life. However, the case was solved on the fact that the employer for a long time had known about such downloads without reacting.[150] Under such circumstances the dismissals were unfair. Perhaps one could say that the subsequent practise (where the employer had turned a blind eye to the undesired conduct) had *botched the clarity* of the instructions.

7.2.4 Negative Consequences due to Sexual Tendency

Debarment or dismissal from employment because of homosexual tendency is most likely to occur in the context of a religious community or the armed forces. Applied in an article 8-context this means that the same legal consequences should be drawn where the right-holder declines to waive his private life, by way of refusing to answer questions on sexual tendency for example, as where he is dismissed because of his homosexual tendency. The character of the right indicates that it should be considered irrelevant whether the right-holder has accepted to 'refrain' from his tendency.

7.2.5 Concluding Remarks

A wide range of possible conflicts are imaginable, especially under article 8. While

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148 *Halford* (n 138).
149 *Copland* (n 146).
150 See Rt 2005, 518.

the requirement of clear evidence for waiver will be met, the test most often will be on its reasonableness: its conformity with 'important public interests'. If a given restriction is not common within the sector to which the employment in question belongs, the the latter requirement may already be in danger. The same holds true if it is implemented through a less assuring procedure.[151]

As far as the proportionality consideration (as part of the public interest-consideration) is concerned, a central test will be whether the purpose with the restriction can be achieved by and less intrusive measures. An employer demanding that employees cut their hair for food hygiene purposes could be directed to limiting themselves to demand the use of kerchiefs, tying of hair or the like.

As far as ordinary interference considerations are concerned, the state is accorded a certain margin of appreciation. Again a parallel can be drawn with the waiver situation in that the employer is in need of certain flexibility in his administration of the labour force.[152] But there are certainly limiting factors: the more intrusive, the more there is a European consensus on the matter and the less job-specific the measure is (eg sexual orientation compared to clothing), the lesser flexibility to the benefit of the employer. In *Kara*[153] the Commission found no violation in a case concerning cloth-requirements, holding that the employer is entitled to require from their employers a commitment to conform to dress requirements that are reasonably related to work. This view-point is relevant not only as far as health- and security requires certain clothing. Branding too may constitute a justifiable reason for such requirements. Often security and branding/company identity-building coincide: a commitment for the crew to carry the company's uniform on board an airplane is certainly a point in marketing, but may be of importance to security.

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151 See especially the ECtHR's judgment in the *Vogt v Germany* (App no 17851/91) (1996) Series A 323 where a teacher was suspended from her position as a consequence of membership in the communist party (DKP). ECtHR found that this was an interference that failed to meet the requirement 'necessary in a democratic society' in art 10 of the Convention. I place weight on the fact that DKP was a legitimate party; that the duty of loyalty vis-a-vis the employer was stretched too far compared to similar situations in other member states; that she took care to do her job well; and that the interference was harmful in that it created great difficulties in getting another relevant job.

152 Cf Morris (n 141) 67.

153 *Kara v United Kingdom* (**App no 36528/97**) ECHR 22 October 1998.

7.3 Implicit Waiver of Private Life (Honour)

7.3.1 Introduction

'Private life' is a broad concept. A genuine definition is hard to establish, and case-law has refrained from trying. It can, however, be vaguely described as a sphere where the individual, as a starting point, can reject interference by others, be it private persons or public authorities. The fact that the right-holder is at a public place, cannot generally be interpreted such that the collection or use of information about his person can be justified by reference to his consent.[154] In *Peck*[155] the applicant was caught on closed circuit television camera when trying to commit suicide. The information enabled the police to prevent Peck from fulfilling his intention. The applicant later expressed his gratitude for that. However, he was not equally satisfied with the subsequent use of the footage: in order to demonstrate the efficiency of the surveillance system, the footage, which clearly identified the applicant, was later used in a television broadcast *without the right-holder's consent*. The Court, in my opinion correctly, considered this a violation of the applicant's private life.

7.3.2 Implicit Waiver of Private Life by Seeking the Public Spotlight

(a) In cases concerning the balancing of freedom of expression and protection of private life (including protection of honour) ECtHR has held that the individual claiming to have been the victim of violations of her private life by too excessive expressions, typically from the media, *has sought the public light* and so implicitly waived (or at least reduced her expectations of) protection of private life (see generally 2.3.3 above). However, recent case-law seems more inclined to underline the limits to such implicit waiver. Two dimensions have come to the fore: whether the expression can be fairly said to contribute to an important public debate and, what is of greatest interest to our topic, whether the right-holder's attitude can *fairly* be seen as a waiver of private life.

(b) *Von Hannover*[156] offers an illustration of both aspects. Photos taken by paparazzi and published, without the right-holder's consent, in several German magazines re-

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154 Naturally an interference, eg in the form of recording, storing and even publication of information, including pictures of the right-holder, may be considered necessary and proportionate without the right-holder's consent, eg for the prevention of disorder and crime, according to the second limb of art 8.

155 See *Peck v The United Kingdom* (App no 44647/98) ECHR 21 August 2003.

156 See *Von Hannover v Germany* (App no 59320/00) ECHR 24 June 2004.

vealing the princess of Monaco's private life, did not contribute to any (important) public debate, and had therefore no legitimate public interest. This was especially so since she, unlike a politician, had not actively sought the public light.

The latter point was even more directly underlined in *Egeland and Hanseid,*[157] where the applicants' (Norwegian journalists') right to publish pictures of an accused with reference to her previous cooperation with the newspaper, was rejected. The Court was:

> [U]nable to agree with the applicants' argument that the *absence of consent* by B was irrelevant in view of her previous cooperation with the press. Her situation could not be assimilated to that of a person who voluntarily exposes himself or herself by virtue of his or her role as a politician …[158] or as a public figure …[159] or as a participant in a public debate on a matter of public interest …[160]. Accordingly, the fact that B had cooperated with the press on previous occasions could not serve as an argument for depriving her of protection against the publication by the press of the photographs in question'. (Emphasis added)[161]

A decision from the Norwegian supreme court offers an even better example: a couple had participated in the reality program 'Big Brother'. Throughout the same period and sometime after, they had generously given interviews and 'home-at-reports'. Two years after their participation in the TV-programme, they wanted to withdraw from the 'public life' and made it clear that they refused to give any more interviews. This stand was not respected by the magazine 'Se og Hør' ('Look and Listen'). The notice concerned purely private matters (break up of relationship, adultery and the like). The Supreme Court emphasised that the information conveyed by the reportages clearly lay outside what the freedom of expression aimed at protecting (namely information capable of contributing to a debate of common interest). Hence, their revocation of the former waiver of private life ought to have been respected.

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157 *Egeland and Hanseid v Norway* (App no 34438/04) ECHR 16 April 2009.
158 See *Lingens v Austria* (App no 9815/82) (1986) Series A no 103 [42].
159 See *Fressoz and Roire v France* (App no 29183/95) ECHR 21 January 1999 [50] and *Tønsbergs Blad AS and Haukom v Norway* (App no 510/04) ECHR 01 March 2007 [87].
160 See for instance ECtHR's judgments in *Nilsen and Johnsen v Norway* (App no 23118/93) ECHR 25 November 1999 [52] and *Oberschlick v Austria* (App no 11662/85) (1991) Series A no 204 [31-35].
161 See *Hanseid* (n 157) [62].

(c) It seems pertinent to conclude that private life, as a point of departure, constitutes a limit beyond which the press cannot pass without an allowance from the right-holder. However, this limit is flexible. A public interest in the information, such as in the case of a politician's life and practices in contravention with what she preaches, may justify publication regardless of any waiver of the protection of private life. In other words: the more *public* interest in the matter, the less expectation of respect for *private* life of the involved.

7.4 Waiving Aspects of Private life by Exercising the Freedom of Religion

7.4.1 General

(a) To some extent the saying 'one cannot have one's cake and eat it too' hints at a dilemma relevant for this part of our topic: by opting for a particular religion the right-holder, in a given context, may (implicitly) afford her private life less priority, just as she, in a given context may determine to prioritise employment before religion (see chapter 7.6.2 below on the latter). However, there are limits to the societal acceptability of this logic.

(b) An important part of the freedom of religion is 'exercised' internally in the mind of the right-holder, as his thoughts, beliefs and convictions. What his religion causes him to sacrifice his private life (sex, career, amusements) will often not come to the knowledge of the outside world.

(c) However, an important aspect of the right is the right to manifest one's religion in community with others (cf the text of ECHR art 9(1)). If the right-holder is joining a religious society, questions connected to his (implicit waiver) of private life, may be pushed to extremes. There may be manifestations and consequences that, even if they are based on the right-holder's firm and informed convictions, cannot be accepted.

7.4.2 Especially about Discrimination on Grounds of Sex and Sexual Orientation in Religious Communities

(a) An important aspect of the freedom of religion is the right to worship and manifest in community with others, in public or within the circle of like-minded individuals. Where this 'circle' adopts the form of an organisation or community, conflicts between the individual right-holder and the religious community

to which he professes to be a part may arise, typically as a conflict between the two as employee and employer respectively: the right-holder claims to have been passed over, unfairly dismissed or the like because of her sex or sexual orientation. In relation to the latter, even questioning on the issue may be considered assaulting and detrimental.

Clearly, in conformity with the general principles described above (part 3 of the first article), the right-holder must be able to revoke his waiver by leaving a community whose norms and convictions he no longer shares.[162] However, the right-holder may choose to stay with the community, but disagree with a particular aspect. Further, even if there is harmony in the relationship between the organisation and the individual right-holder – in the sense that she accepts its practice (on sex- or sexual tendency-discrimination) – the question is in principle, the same: whether the state is entitled or even obliged to evaluate the practice within the society and intervene because it '*runs counter to any important public interest*'.

(b) The freedom of religion (art 9) is essentially a freedom to choose a conviction with all it entails. As a starting point a right-holder who voluntarily joins a religious community cannot complain about its 'downsides'. By joining he has waived the right to have specific aspect of his private life incompatible with the religion respected. A Catholic priest must respect his church's view on abortion, and suffers no injury if he is dismissed after having advocated in contravention of this dogma.[163] The application made by a Norwegian priest, where he complained about a dismissal from his state-church-position after having ceased 'the governmental part of his position' in protest against the Abortion Act, was held inadmissible for that reason.[164]

(c) But can the state interfere in a case of *discriminating practice* within a religious society, typically on the ground of sex or sexual orientation? As a starting-point: probably not. It is quite common that religious a community's practice is more conservative on such matters compared to contemporary political society. And it

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162 It is well documented that the freedom to convert in many countries is limited, or non-existent. Most often, then, there is no question of revocation, as the religion is forced upon the inhabitants from birth.

163 Compare the Commission's decision in Rommelfanger v Federal Republic of Germany (1989) 62 DR 151 et seq, where a medical doctor practising in a Catholic hospital was expected to be loyal to the convictions of his employer.

164 (1985) 42 DR 247.

is not unreasonable to assume that these features are among those a right-holder ought to take into consideration when considering whether or not to join or remain with a particular religious society.

On the other hand, equality between the sexes and non-discrimination of persons with a homosexual tendency has been the result of a major effort (and achievement) in western political societies over the recent decades. Developments have taken place, especially with regards to equalisation between the sexes. But differential treatment of homosexuals is still common. The tendency towards equal status is not equally clear within the religious communities. Accordingly, the time is probably not ripe for the imposition of the commonly accepted political standards on religious communities. But, exactly for this reason an increased tension is created. Several factors, indicated by the rules governing the issue, are of importance for the evaluation: it may be disproportionate – or expressed in waiver-terms; or it may run counter to important public interests to accept a differentiation-practice under certain circumstances (it then will amount to discrimination). A preliminary observation to have in mind is that *prevailing views in political society* on what constitutes discrimination is under continuous development.

(d) The legal point of departure, ECHR article 14 (in combination with art 8), states that the Convention rights shall be secured without discrimination inter alia on the ground of sex … or other status. The last mentioned concept covers sexual orientation.[165] Current ECtHR practice shows an emphasis upon the equality between the sexes as a major goal in the member States of the Council of Europe, and that 'this means that very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention.' The discrimination on grounds of sexual orientation, too, holds a prominent place, although it is probably correct to assume that the development has not come so far in this field. The question then is whether the rights of the religious community are sufficiently weighty.

The Convention protects the freedom of religion of the religious society as well (art 9). And it seems obvious that the two rights will have to be balanced. It is, as a point of departure, assumed that the right-holder's affiliation to the community constitutes a valid waiver of the protection against discrimination. At least as long as it is supported by weighty religious convictions of the community in question,

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165 See among other authorities the *Fretté v France* (App no 36515/97) ECHR 26 February 2002 where no violation was found by the fact that a homosexual man was denied to adopt a child.

the deviation from the equality-aspiration will easily be considered justified (proportionate) by the waiver.

(e) Case law from ECtHR on these particular issues is rather scarce, but inferences can be drawn from other relevant legal instruments, especially the Convention on Elimination of Discrimination against Women (CEDAW). As we shall see the proportionality-test is central to these instruments. According to CEDAW articles 2 to 16 the parties are under an obligation to take steps in *all fields* to ensure equal treatment of men and women. Somewhat surprisingly CEDAW has no express exception for religious communities. It is, however, natural to assume that this protection will have to be balanced against the right to freedom of religion of the particular religious community.[166]

ILO Convention No 111 (1958) is aimed at discrimination in the labour market. However it states that any distinction, exclusion or preference in respect of a particular job based on the inherent requirement thereof shall not be deemed to be discrimination. EU-directives, too, may contribute to the interpretation, as they may be seen as the expression of the legal opinion of member states to EU *and* ECHR. According to the EU Treaty article 13 EU-organs are entitled to implement different measures in order to combat discrimination, *inter alia* on the ground of sex and sexual orientation. Several Directives deals with the issues. Directive 2006/54/EU consolidates and codifies the development on sexual discrimination. After having stated the main principle, prohibition of sex-discrimination, the Directive (in art 14 No 2) accepts exception where the character of the job so requires, provided that the aim is legitimate and the deviation proportionate. Directive 2000/78/EC on prohibition *inter alia* on discrimination on ground of sexual orientation is construed in very much the same way.

(f) Not surprisingly the tendency in member state's legal systems shows the same picture:

> In the *United Kingdom* these issues are regulated in the Sex Discrimination Act 1975 (SDA) and Employment Equality (Sexual Orientation) regulations 26 June 2003 (SO). According to SDA section 19, an exception from the prohibition against discrimination is made for employment can be limited

166 See *inter alia* ECtHR in *Otto-Preminger-Institut v Austria* (App no 13470/87) (1995) Series A no 295-A. Admittedly it counts in the opposite direction that in its report of 1995 (A/50/38 [460]) the Committee has criticised Norway for its exception in the Sex Discrimination Act (see below).

to one sex so as to comply with the doctrines of the religion or to avoid offending the religious susceptibilities of a significant number of its followers. According to SO employment (generally) can be limited and a person can be dismissed on ground of sexual orientation if being of a particular sexual orientation is a genuine and determining occupational requirement, and it is *proportionate* to apply it (section 7(2)). More specific rules for religious societies, 'for the purposes of a religion' (section 7(3)) seemingly go further in accepting different treatment by not specifying a proportionality-requirement. However, the difference is modest because the Supreme Court has interpreted the concept 'for the purposes of a religion' so as to be only applicable to appointment of religious leaders and teachers such as priests and imams.

The Equality Act 2010 was passed 8 April 2010. It was expected that most parts of the Act would enter into force by the end of November. The Act imposes – to a wider extent than previous Acts – obligations directed at both public and private organs, aimed at prohibiting discrimination. Some of the provisions are sturdily debated (and even condemned by the Pope himself, who has argued that they go too far in disrespect of the right to self-determination of the Catholic Church (see http://news.bbc.co.uk/2/hi/uk_news/8492597.stm). As a main rule, Part 5, Chapter 1, section 39 prohibits even religious societies from discrimination in employment on the ground of sexual orientation.

In *Norway* 'the internal affairs' of a religious community can justify an exception from the general prohibition on sex discrimination (see Likestillingsloven (Sex Discrinmination Act), section 2). By 'internal affairs' is meant the part of activity that is closely connected to the exercise of the religion (priests as opposed to employees in kindergartens or nursing homes). Nevertheless, within the Church of Norway the option not to appoint female priests was removed in 1956. Presently approximately 20 per cent of the priests are women and actually the percentage is somewhat higher for bishops (three out of eleven). As far as discrimination against homosexuals is concerned there is an express exception in Arbeidsmiljøloven (the general employment act) section fors 13-3 allowing different treatment on ground of homosexual *living arrangements* with respect to employment in positions in religious communities. Tendency in itself is irrelevant). This exception, too, is aimed at religious communities' 'internal affairs'.

f. These legal points of departure give cause to sum up the relevant factors for the assessment of whether a disadvantageous treatment of women and homosexuals within a religious society is in conformity with 'important public interests'. In balancing the right a religious society has to define the maxims of its religious beliefs against the protection from discrimination of its individual members, several factors are relevant. One necessarily gravitates into considerations similar to those necessary for assessing *interferences* in general; a balancing-test is required which involves the weighing of interests: the importance for the religious society of upholding the differential treatment on the one hand and the importance for the right-holder and the society at large (cf 'important public interests') of combating the disputed treatment (see part 4.3 of the first article).

Factors related to the religious community and to the individual right-holder may be elaborated. For the community a central point is the link between core elements of its religious dogma, a concept that has to be interpreted in connection with article 9 (thought, conscience and religion). If the doctrine dictates different treatment of men and women (or heterosexuals and homosexuals) in certain religious contexts (preaching, teaching), debarment of women (or homosexuals) from such *preaching functions* is logical, and will as a point of departure have to be accepted. More concretely, it may be more necessary (and logical) to accept debarment of a female or homosexual priest as compared to an accountant.

A variety of activities run by the religious community are due to be considered from this perspective: while the religious element may be evident for a kindergarten or school run by a religious community, professional education qualifying for non-religious professions (eg as a teacher) ought to be conducted by and open for all on equal footing.

Even in the core area acceptance of differentiation may be problematic where the community holds a dominant position in the society: then the individual right-holder is not, to the same extent, free to leave. Where the community holds state power this reasoning applies *a fortiori*. In the latter case additional reasons for scepticism apply: the identification between the community and the society – the state – gives rise to an expectation that the same standards are applied.[167] Albeit a state-church-construction is in conformity with the Convention; the arrangement entails expectations and consequently obligations on the part of the state: a

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167 ECtHR's scepticism towards religious rules in political society is manifest in the *Refah Partisi (The Welfare party) and others v Turkey* (App no 41340/98; 41342/98; 41348/98) ECHR 13 February 2003 where dissolution of a political party allegedly intending to establish *Sharia* in Turkey was considered 'necessary in a democratic society' and hence acceptable according to art 11.

political majority responsible and creditable for equality between the sexes and individuals with different sexual orientation in the society at large, will be inclined not to accept that the same state, as a state-church-employer is discriminating on such grounds, in employment-practice for examples.

8 Family Life

8.1 Introduction

The concept of family life is complex.[168] I shall not dwell on the concept, but rather focus on whether there is a negative equivalent to the closely related right to marry after a shorter presentation of implicit waiver of family life in different employment contexts.

8.2 Waiving Family Life by Prioritising Religion

Naturally a right-holder, by exercising his self-determination, may choose to abstain from marriage and family life in a broader sense. Beyond his self-determination this may follow from his prioritising the freedom of religion: an ambition to become a Catholic priest excludes marriage, choosing to become monk implies even more noticeable limitations on family life. To the extent that such choices are the result of the right-holder's free and informed will, there is little the state can or should do to interfere.

8.3 Employment

By accepting a job the employee must be considered explicitly or implicitly to have waived several aspects of family life. Many are evident, such as the right to stay home with spouse and children during work hours. Others present more of a challenge: has the right-holder, despite her contractual obligation to be at the employer's disposal during work hours, retained a right to take care of family members in cases of illness, to attend the funeral of a family member and so on? As in relation to (implicit) waivers of private life in employment contexts (see above), the consideration will focus on the relative weight of the respective

168 See generally Harris, O'Boyle and Warbrick (n 3) 371-376 and Jacobs and others (n 133) 334-335.

interests: how well-founded is the employee's claim for leave and how detrimental is it to the employer?

8.4 Negative Right to Marry?

8.4.1 Introduction: Marriage is a Freedom

(a) The right to marry (art 12) is a freedom. Hence right-holders choose whether or not to make use of it. By implication, everyone has the right to stay unmarried and not found a family. This latter option may become illusory due to different invalidating factors tainting the will of the right-holder.

(b) A first factor that may render an activation of the right invalid may be derived from the text of article 12: right-holders must have reached the age of maturity; they must be of marriageable age. Most Convention States allow for marriage before maturity with the consent of parents and, normally the recommendation of a public official.[169] This is necessary to secure that marriage is in the *best interest* of the young intending spouses.[170] Under all circumstances, to the extent that national law allows under-age individuals to marry, there should be accompanying procedures aimed at guaranteeing that the intention of the involved persons is informed and independent (valid).

(c) Other invalidating causes may be of importance as well: unlike CCPR article 23, third paragraph, article 12 of ECHR does not expressly state that 'no marriage shall be *entered* into without the free and full consent of the intending spouses.' It may be debatable whether a similar prohibition against forced marriage can be read into article 12. But strong arguments are in favour of such interpretation of this *freedom.* At any rate the freedom from forced marriage can, depending on the

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169 See for example the Norwegian Law on marriage (Ekteskapsloven) s 1 and the British Marriage Act 1949 part 1 [3].

170 In several Convention states the attempt to combat forced marriages amongst people from a foreign culture has caused amendments to the legislation on marriage. In Norway the 1991-law was amended in 2007 with s 18 prescribing that a marriage concluded abroad will not be recognised in Norway if *inter alia* one of the parties was below 18 years of age. The main purpose – to avoid involuntary marriages – is loyal to arts 12 and 8. But it would have been more pertinent to address the principal question, coercion, more directly. According to the present general phrasing, completely voluntary marriages may be barred as well. In order to comply with the Convention it is necessary to apply the exception clause in the last para of the same section, according to which the Ministry of Children, Equality and Social Inclusion may, upon the request of the parties, recognise the marriage if strong reasons support it.

circumstances, no doubt be based on the obligation to secure the private life of the parties (art 8), eventually to prevent inhuman treatment (art 3). In other words: even if there is no negative right to marry, to force the positive right upon a right-holder may activate those *preferred* and prevailing rights.

(d) Later I shall focus on whether there is a *negative equivalent* to the expressed positive right to marry.

8.4.2 Right to Freedom from Continued Marriage? Articles 12 and 8

(a) By the extension of a prohibition of compulsion to enter into marriage, the question may be raised if there can be, under national law, an obligation to *stay* in a marriage, or whether states are obliged to offer a negative right: to *divorce*. In other words: can the exercise of the positive right to marriage be irrevocable in the sense that it determines the right-holders' status for the future, irrespective of any change in circumstances (including lapse of the parties wish to stay married)?.

Johnston[171] appears to answer the question just raised. The ECtHR rejected the applicant's assertion that a right to divorce could be based either on article 12 or article 8. As far as the negative interpretation and application of article 12 is concerned, the reasoning is logical:

> It is true that the Convention and its Protocols must be interpreted in the light of the present-day conditions. However the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset.[172]

The rejection of the argument that the right alternatively could be based on article 8 is grounded on the context that as long as the founding fathers of the Convention deliberately left a right to divorce out of article 12, it would have been disloyal to read it into article 8 (or any other article).

De lege ferenda, however, this legal state is less than satisfactory. And, relying heavily on national law, the Court has taken some steps to water it down. In *F v Switzerland*[173] it held that a temporary prohibition in certain cases on remarriage within three years after divorce was disproportionate and hence a violation of article 12 (the decision is interesting also because art 12, unlike art 8, has no

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171 *Johnston and others v Ireland* (App no 9697/82) (1986) Series A no 112.
172 See ibid [53].
173 See *F v Switzerland* (App no 11329/85) (1988) Series A no 128.

reference to a proportionality-test). And in *Aresti Charalambous*[174] the Court – *obiter dictum* – seems to take this stance a step further by more generally assuming that if the right to divorce is granted under national law, the right to remarry must not be unduly hampered:

> The Court notes that if national legislation allows divorce, which is not a requirement of the Convention, Article 12 secures for divorced persons the right to remarry without unreasonable restrictions (see *F. v. Switzerland*, judgment of 18 December 1987, Series A no. 128, p. 18, § 38). The Court would not exclude that a failure to conduct divorce proceedings within a reasonable time could in certain circumstances raise an issue under Article 12 of the Convention. However, in the present case, bearing in mind all the circumstances and the overall length of the proceedings, the Court finds that the applicant's situation was not such that the very essence of that right was impaired.[175]

Evidently, the opinion of the Court is still that 'divorce … is not a requirement of the Convention'. Nevertheless, the two last mentioned judgments may indicate a development in the direction of such a requirement under certain circumstances. The positive right to (re)marry constitutes a weighty argument in favour of allowing a negative interpretation of the right to marry (in other words a right to divorce), because the existing marriage constitutes an obstacle for the exercise of the positive right to (re)marry.[176]

8.4.3 Right to Freedom from Continued Marriage on the Basis of Article 3?

Let us now consider the situation where the right-holder has no intention to re-marry. He simply wants to get out of a marriage. *Johnston* and subsequent case law (so far) reject a right to divorce even in a situation where the right-holder's most urgent problem is the obstacle to re-marriage that this denial constitutes. It then seems natural to infer that the Convention supports even less a right to divorce when there is no new marriage involved.

Undoubtedly, if there is information that one of the spouses (typically the wife) is being exposed to maltreatment (rape for example),[177] the state will be

174 *Aresti Charalambous v Cyprus* (App no 43151/04) ECHR 19 July 2007.
175 See ibid [56].
176 It is worth noting that a ban on bigamy is common ground among the Convention states.
177 As we have seen there is no acceptance in Europe for the view that marriage implicitly entails an irrevocable duty to provide sex, see 3.5 above.

committed by article 1 to make efforts to bring the situation to an end – to 'secure' the protection of the right-holder (typically by the enforcement of criminal law). Similarly it will be obliged to react against any attempts by a husband to – *de facto* – force a wife to stay at home (art 1 in combination with art 5) or otherwise limit her freedom of movement (art 1 in combination art 2 of Fourth Protocol).

The assumption that the victim's desire to continue in a marriage is inversely proportional to the risk for such and similar violations is plausible. But even if the disharmony between the spouses does not amount to criminal offences, the one who is coerced, by the national legal order, to an undesired continued marriage may be left to considerable mental suffering. It may be argued that the absence of a right to divorce may leave the right-holder in an inhuman or degrading situation so that the applicability of article 3 as a preferred right may arise, at least *de lege ferenda*. Under certain circumstances, for example where the right-holder's conscience prohibits living together with her new partner without being married (see 9.3 below), article 3 may form the basis for a right *de lege lata* to dissolve the existing marriage.

9 Freedom of Religion (Article 9)

9.1 Introduction

The right to freedom of thought, conscience and religion has several aspects relevant for our topic, many of which are evident already from the text of article 9, namely that a right to change religion is included. Other relevant aspects have been made clear in case law, such as the states' positive obligation 'to ensure the peaceful enjoyment of the right … to the [right-holders]'.[178]

It is evident however, and even confirmed by the same case law, that these freedoms, even in their passive form (thought, conscience) will have to accept attacks, for example by holders of different convictions.[179] The recognition of pluralism inherent in the Convention dictates that the balance is struck fairly, so that there is no discrimination against certain religious groups. Historically (and currently) religion and discrimination (of persons belonging to other religions) are closely linked. It may take the form of positive discrimination of (members of) a religious society, typically the one holding state-power (direct

178 See *Otto-Preminger Institut* (n 166) [47].
179 Ibid.

state responsibility). First, however, we shall look at situations where religion has to be balanced due to the right-holder's own contractual commitments, in other words, situations where he explicitly or implicitly has waived his rights according to article 9.

9.2 Waiving Certain Aspects of Religion by Choosing Employment – and Related Questions

9.2.1 Introduction

A variety of situations may arise where a person's religion or belief conflicts either with general social obligations according to law or with obligations he has taken on by contract, typically an employment-contract. The point of departure will be that where an obligation claimed to have a negative effect on the freedom of religion stems from an employment-contract, the right-holder has exercised his self-determination to prioritise job before certain aspects of his religion or beliefs. In *Kalac*[180] ECtHR emphasised that the applicant, as an officer, had accepted limitations on the freedom of expression when he took employment. When he later several times had expressed fundamentalist views, early retirement was not unreasonable or disproportionate. However, as we shall see, this point of departure will have to be adjusted, *inter alia*, if the right-holder has made his choice under constraint.

9.2.2 Conflict between Work Hours and Worship

(a) In *X*[181] the Commission concluded that there was no interference with the applicant's (a Muslim schoolteacher) right to religion by the fact that his employer, the school-authorities, had not allowed him 45 minutes off every Friday to attend a mosque. Especially since he was offered a revised employment-contract, proportionally reducing working-hours and pay, the decision presumably is correct: the teacher had voluntarily accepted working-conditions, which he knew from the start would prevent him from Friday prayer at the mosque. He had at no time, neither when initially interviewed nor at any later point in time during the first six years of his employment, uttered any wish for time off during school hours.

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180 *Kalac v Turkey* ECHR 1997-IV 1199.
181 See *X v UK* (1981) 22 DR 27.

Konttinen[182] is similar. The applicant, who had joined the Seventh-Day Adventists, had now, according to his *new religious belief*, to refrain from work on the Sabbath, which starts Friday evening. Therefore, on six occasions he had left work before time. Since the applicant ultimately could have relinquished his job to the benefit of his religion, the Commission found that the dismissal, after several warnings from his superiors, constituted no interference with the applicant's freedom of religion.[183]

It seems to follow from this case law that it is irrelevant whether the conflict between employment-obligations and religion arises as a consequence of the right-holder's adoption of a (new) religion during the employment-period or existed from the start. In both instances it is, or it can at least be asserted to be, up to the right-holder to consider which of the rights (goods) he wishes to prioritise.

This line of reasoning holds a strong position, at least as a starting point. However, its reasonableness depends on the circumstances. If the employer is in a monopoly-situation or near to it or more generally if the labour market offers the right-holder few alternatives, the consideration is more complex. The right-holder's legitimate expectations with regards to flexibility and reasonableness from his opponent, the employer, will be higher.

(b) More challenging, is the situation where the *employer introduces new obligations* with an adverse effect for the right-holder's religion. It is highly debateable whether the Court in *Stedman* applied a reasonable test when considering that the applicant had himself to thank when he was dismissed after having refused to *change* his contractual obligations vis-à-vis the employer.[184] *In concreto* the right-holder refused, on religious grounds, to undertake a new obligation to work Sundays. Arguably, the employer should have a heavy burden to prove the reasonableness of such *new* obligations.

(c) The Court will conduct a thorough examination of the employer's allegation that the employee's (exercise of) religion is incompatible with his contract obligations. In *Ivanova*[185] the Court found that the substantive motive for the

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182 See *Konttinen v Finland* (App no 24949/94) ECHR 3 December 1996, 68.

183 See also the Court's judgment in *Kosteski v 'The former Yugoslav Republic of Macedonia'* (App no 55170/00) ECHR 13 April 2006 where the case law is confirmed.

184 See *Stedman v the United Kingdom* (App no 29107/95) ECHR 9 April 1997. For a critical comment, see Morris (n 141) 60.

185 *Ivanova v Bulgaria* App no 52435/99 (ECtHR, 12 April 2007)

dismissal of the applicant was her affiliation to the organisation Word of Life, and that the new conditions that were introduced, which she had failed to meet, were not sufficiently justified:

> The fact that the applicant's employment was terminated in accordance with the applicable labour legislation – by introducing new requirements for her post which she did not meet – fails to eliminate the substantive motive for her dismissal. Most telling in this respect is the meeting of 2 November 1995 at which the applicant was pressured by two Government officials to renounce her religious beliefs in order to keep her job….[186]

This was considered to be 'a flagrant violation' of the right to freedom of religion guaranteed under article 9.

9.2.3 Conflict between Certain Professional Duties and Personal Conviction

The question of provoked abortion is loaded with political tension. Nevertheless, even though to have an abortion is no human right in itself,[187] in most European countries it is a statutory right for women up to a certain period (normally the first 12 weeks) of pregnancy. In order to carry it out safely, a hospital equipped with necessary facilities and medical personnel is necessary.

The political tensions connected to abortion reflect the convictions surrounding it: 'pro self-determination' or 'pro-life'. Of relevance for our discussion is then: can a physician, a nurse or other necessary personnel employed in a hospital refuse to carry out an abortion with reference to religion or conscience, or has she waived this aspect of religion (conviction) by taking on the job?

Clearly, this is a highly moral question. The answer to the legal question depends on a balancing test: are there enough willing personnel to carry out the law-based expectations/obligations? One will probably have to add, without overburdening the alternative personnel. The answer to these questions will, in turn, of course depend *inter alia* on whether the activity in question is central (and time-consuming) compared to other activities, whether the unwilling personnel can easily be relocated and replaced with willing personnel. Normally such a replacement will depend on convincing other members of the labour-market to take over the right-holder's tasks. This can be obtained by economic incentives,

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186 See ibid [84].

187 The Commission in *Brüggemann and Scheuten v Germany* (App no App. No. 6959/75) (1977) DR 10, 100 confirms that such right cannot be based on art 8.

effectively paid by the right-holder, who has to bear an equivalent reduction of his salary.

In the extension of this 'money-solution-point', it could be asked whether it is permissible to tempt the unwilling right-holder with more money to overcome his unwillingness. Arguably, this is affording the will of the right-holder too little respect. The strength of the right-holder's conviction is of relevance, and a change of mind, whether motivated by money or not, may indicate that his (original) will was not too deeply rooted. At any rate his right to self-determination counts heavily in favour of considering his changed mind decisive, so that there is no infringement of his conviction.

If a solution cannot be reached by means of an agreement whereby the job will be undertaken, the employer will be entitled to confront the employee with an ultimatum: abide by the terms of the contract, or find another means of employment. As in previous discussions, the considerations are complicated where there are no other employment alternatives (see 9.3.3.2 above).

Further, it can be argued that it is relevant whether or not the obligation in question is introduced after employment or had existed from the start. In the latter case its negative consequences are consented to, and there is no disregard of the right-holder's will. It is assumed, however, that even *new obligations* may have to be respected by the employee, so that he either accepts to perform or quits. *Inter alia* the societal necessity of the extension of the activity and its reasonable relationship with the basic features of the work that originally was taken will be of importance for the consideration where the employer (eg a hospital) extends its activities to include abortion after the right-holder was employed.

9.2.4 Continuation: Conflict between Education and Certain Aspects of Religion

Different from implicit waiver in a job context, but with some similarities, are cases concerning participation in higher education. *Leyla Sahin*[188] was denied access to teaching at the Faculty of Medicine at the University of Istanbul because she was not willing to abandon her hijab. In accepting the prohibition the Court relied heavily on the sensitive character of Turkish secularism and its importance for Turkish democracy.

Construed in waiver-terms: was the state obliged to respect her religion manifested by the hijab, or had Sahin waived the right to wear the hijab when she accepted the conditions for higher education? In line with the Commission's

188 *Leyla Sahin v Turkey* (App no 44774/98) ECHR 10 November 2005.

reasoning in the *Ahmad*[189] and *Stedman*-cases[190] (9.3.2.3 above), it could be argued that the right-holder can opt out from an education that hinders her in manifesting her religious beliefs. Again, this line of reasoning is tainted with certain weakness: certainly, if the education is compulsory, the right-holder is not free to opt out. Qualms are apparent in relation to optional higher education because this must be considered an essential good that the right-holder should not be easily coerced to compromise.

Somewhat surprisingly, the Court in *Dogru,*[191] concerning expulsion from French primary school of a nine year old girl who wore hijab, applied a quite similar reasoning as in the *Leyla Sahin* case. Even this interference was accepted as proportionate. Arguably, this is a bit more troublesome since primary education to an even greater extent must be considered an essential good (which is reflected by ESC Article 13(2)(a): 'primary education shall be compulsory …').[192]

9.2.5 Continuation: Special Considerations in Relation to Public Positions Vested with State Power: Police Officers' and Judges' Right to Carry Religious Symbols when on Duty

(a) In the public debate police officers' or judges' right to carry hijab (or similar religious markers) at work is often construed as a question of whether the work in question is a human right, indicating that members of such professions have no right to carry hijab because becoming a police officer or a judge is not a human right.

The perspective is somewhat misconceived. The freedom of religion must be the starting point, and the question to be answered is whether or not the right-holder by applying for the job reasonably must be considered to have waived that particular aspect of her religion. Most often, there is no doubt as to evidence for and the validity of waiver in these instances. The question is whether the condition is *reasonable* (in conformity with 'important public interests').

(b) Taking race or colour adversely into consideration on employment will easily be considered discriminatory (above). The use of religious markers are self-chosen,[193]

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189 *Ahmad* (n 181).

190 *Stedman* (n 184)

191 See *Dogru v France* (App no 27058/05) ECHR 4 December 2008.

192 Naturally, the firm stance on secularism in France is an important explanation of the Court's acceptance.

193 Religion too may (to a varying degree) be self-chosen. The point in the present connection is that it may be troublesome to signal this preference.

and therefore different: they signal a personal *preference* that *may* (be perceived as) run(ning) counter to neutrality.

Judges and police officers (as opposed to for eg Salvation Army Officers) are vested with state power and are dependent on confidence in order to be able to fulfil their role as guarantors for the rule of law. Hence, *neutrality* in performing their duty is of utmost importance. This may be achieved by barring the accessibility to carry markers that signal a personal *preference*.

It is worth underlining that appearances ought to be considered decisive. The officer may very well have the personal integrity to conduct impartially. But her carrying a particular marker may be perceived in a way that may reasonably cast doubt. Of relevance for this discussion, as far as judges concerns, is ECHR article 6: allowing a judge to signal his religion, political or other personal preference will easily run counter to impartiality-requirement of that article. Case law has underlined that appearances are decisive: 'justice must not only be done, it must also be seen to be done'. Hence, if a participating judge's impartiality can be *reasonably* doubted, he must withdraw.[194] It can easily be understood if a person accused of blasphemy or racial discrimination felt some unease sitting before a judge on the bench wearing a religious symbol identified with the religion he is accused of having harassed.

Exactly because we, including members of the police force, are different with regards to non-chosen statuses (such as colour, race), a uniform that signals consensus and unity with regard to the rule of law as a common value and to a non-biased administration of state power, is important. And the important task to conduct state authority in an impartial manner should prevail over considerations of plurality, religious as well as political (see above), in this particular context. It may be a mistake to allow special value markers in uniforms.

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194 See among other authorities *Hauschildt v Denmark* (1989) Series A no 154 [48]: 'Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see the De Cubber judgment [26.10.1984] … para 26). This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive (see the Piersack judgment of 1 October 1982 … para 31). What is decisive is whether this fear can be held objectively justified.'

(c) Hence it should be considered within the state's margin of appreciation to require the right-holder to choose between the job and that particular aspect of the religion. Naturally, the state can choose to give precedence to plurality.[195] However, it may thereby, as far as judges are concerned, enter into problems in relation to article 6. It may also create inconvenience for a right-holder who, despite her religious affiliation, prioritises neutrality at work: a female police Muslim, for example, may be constrained by family members to carry hijab if that is an option according to national law.

9.3 'Compulsion' to Join a Particular Religion in order to Obtain Advantages

The question can be raised whether different kinds of privileges for a particular religious group amount to compulsion to abandon another conviction. One type of situation is where state-power and religion are confused. Article 12, second paragraph, of the Norwegian Constitution may be illustrative. According to this provision half of the members of the cabinet shall profess to 'the State's public religion', (which, according to art 2 of the Constitution, is the Evangelical-Lutheran religion). It is not difficult to see that anyone with the ambition of becoming a minister will consider the odds better if he converts to the 'right' religion.

9.4 Continuation: Negative Right to Religion

Inherent in the right to *freedom* of religion is not to be religious or to adhere to any particular religion. That this exists as a negative right is even more obvious when read in conjunction with the freedom of thought mentioned in the same sentence (in the same art). Hence it is obvious that any prohibition on becoming an atheist or converting to another religion (other than the one shared by those wielding state power),[196] will be in contravention with a negative right to religion.

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195 In UK, United States and Sweden, for instance, carrying hijab is allowed even for police officers and judges. A lifting of the ban has been debated, but so far not materialised in Norway.

196 According to the Christianity of the Middle Ages, an apostate was subject to severe sanctions. According to one of the leading experts on Islamic Law, Abdullahi Ahmed An-Na'im, Toward an Islamic Reformation, Syracuse University Press 1996, the prevailing view of *Shari'a* is the death penalty for an apostate like Salman Rushdie, while less grave cases of apostasy may be met with other kinds of discretionary punishment. The author himself, however, is 'unable "as a Muslim to accept the law of apostasy as part of the law of Islam today"' (see 183). And there may, as the title of the book indicates, be a movement toward an Islamic legal reformation also on this point.

10 Freedom of Expression (Article 10)

10.1 Introduction

The core of 'the freedom of expression' as laid down in ECHR Article 10 is, precisely, the freedom to *express* oneself, that is to communicate a message, political or for any other purposes, in any form; orally, in writing, by broadcast or web, painting or print. However the freedom contains several aspects beyond what normally is perceived as the core: a right to *receive* information that others are willing to communicate and to *hold* opinions are rights according to the text of the provision. Case law has implied more: a *right to remain silent* (in other words the negative right),[197] *a claim for information* that the holder of information is unwilling to communicate[198] and a claim to *express oneself through information channels of others*.[199]

In addition to questions related to the negative aspect of the freedom of expression – the *right to remain silent* – that will be dealt with in part 3, focus will be on waiver of freedom of expression in different employment contexts (10.2 below).

10.2 Private Employee's Waiver of Freedom of Expression Vis-à-Vis his Employer

10.2.1 Points of Departure

The point of departure is that an employee can waive his freedom of expression related to job sensitive matters. Typically such waivers are explicitly regulated by the labour contract. By its nature these will be waivers meant to deal with future situations. Such situations call for certain mindfulness because the premises may change by the lapse of time.

In the field of employment a variety of situations may accentuate the question of waiver, such as where an employee is *dismissed* because of an alleged breach of a contractual obligation not to express anything that may be harmful to the employer, typically because the expression runs counter to the employer's convictions or

197 See among other authorities *Goodwin v the United Kingdom* (App no 17488/90) ECHR 1996-II.

198 See among other authorities *Leander v Sweden* (App no 9248/81) (1987) Series A no 116.

199 See among other authorities *Appleby and others v the United Kingdom* (App no 44306/98) ECHR 6 May 2003.

profile. The situation may also be that an applicant is *barred* from employment because he refuses to accept such commitments. As we shall see ECtHR has distinguished, in my opinion too drastically, between dismissal and debarment, holding that only the first situation is capable of constituting an interference.

10.2.2 Compatibility with Important Public Interests

Rommelfanger is a good example of the first mentioned category. The Commission found that German courts had struck a fair balance between the demands of the employer and those of the employee.[200] The employer was an organisation based on certain convictions (the Catholic Church). Hence it was necessary to have regard not only to the applicant's freedom of expression, but also to the church's freedom of belief, a freedom that could not be exercised effectively without imposing certain duties of loyalty on its employees. The Commission emphasised that national courts had weighed the interests and assured themselves that there was a reasonable relationship between the measures affecting the freedom of expression and the nature of the employment as well as the importance of the issue for the employer, and thereby assured that any compulsion did not *strike at the very substance of the freedom of expression*. In such cases the positive obligations do not extend beyond this standard protection.

But when does the compulsion 'strike at the very substance of the right'? The, admittedly vague test ought to be whether there are public interests to support freedom of expression. That may be the case even if the information in question at the outset is protected by the employer's convention rights, typically a religious society's. It is assumed that this test is a dynamic one. What once passed on the basis of waiver can today be considered unacceptable despite any waiver. Probably a waiver as in *Rommelfanger*'s[201] situation, where the contested expressions had a religious dimension and ran diametrically counter to the opinion and beliefs of the employer, the Catholic Church, would likewise not have been accepted today.

It is, however easy to imagine situations where a waiver even in the context of religious societies should be without consequences. In *Rommelfanger*[202] the issue was abortion. As politically loaded as it is, it must be considered common ground that different stances to this question are in conformity with the plurality that characterises democracy. The considerations are different where an employer's practice conflicts with his official profile. Examples may be, where an organisation

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200 See *Rommelfanger* (n 163) 151 et seq.
201 *Rommelfanger* (n 163).
202 Ibid.

for equality between the sexes having a strikingly low percentage of female employees, or the facts of the *Rommelfanger* case[203] with the following variation: despite an officially proclaimed rejection of abortion, the employer encourages a key employee to have an abortion in order still to benefit from her skilful work. A 'whistle-blower' will be entitled to inform about such double standards, despite any prior waiver of the freedom of expression.

The examples border between respect for employer's policy (as in *Rommelfanger*[204]) and the importance of revealing criticisable conditions. The last decades have witnessed an increased focus on whistle-blowing.[205] Today there is an inclination to consider an expression, which contains legitimate criticism of certain general interest, as not only acceptable but even praiseworthy. On the other end of the scale is sensitive company information (production techniques and the like). Such information is obviously covered by an employee's loyalty declaration (waiver of freedom of expression), unless the information is simultaneously of public importance, typically because the production is immoral for one or another reason.[206] A certain parallel to company secrets in the private sector is the need for confidentiality of information that may be detrimental to national security or similar public interests in the public sector.

10.3 Continuation: Special Considerations in Public Employment

10.3.1 General

In the sphere of public employment, contract-based restrictions on freedom of expression have traditionally held the strongest position. However even in this field, whistle-blowing and similar grounds for expressions has gained acceptance. The main focus here will be on whether it is *reasonable* to sanction an utterance from an employee who has waived freedom of expression (10.3.3 below). But first I will offer a brief overview of case law concerning what is considered a *sanction*. It will be argued that it suffers from lack of consistency (10.3.2 below).

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203 Ibid.

204 Ibid.

205 Amendments to the Norwegian Employment Act strengthen employees' right to whistle-blowing, see ss 2-4, 2-5 and 3-6 (in force 1 January 2007). See generally its *Traveaux Preparatoire* (Innst S nr 270 (2003-2004) s 39 and Innst S nr 75 (2005-2006)).

206 Obvious examples are information that sheds light on an enterprise's responsibility for child labour, inhuman working conditions or pollution.

10.3.2 The Sanction

In *Mr B v United Kingdom* the Commission considered (correctly) that a modest disciplinary sanction directed against an employee for breach of a commitment to remain silent about job related matters, undertaken by contract was an interference (see below on the necessity).[207] Quite a few cases have dealt with 'Berufswerbot'. In *Vogt*[208] a teacher was dismissed as a consequence of his expressions outside the working place, more precisely his association with and arguing in favour of the Communist party. In this case the sanction was *dismissal* of a permanent employee.

By contrast, in *Glasenapp* and *Kosiek* the applicants were *barred* from employment because of (otherwise) similar circumstances. In these cases ECtHR considered that there was no interference with the applicant's rights because public employment under no circumstances is a right under the Convention (compare CCPR art 20).[209]

Truely enough, there is no right to employment under the Convention. However, there is no right to stay in a particular job either (as in *Vogt*). Arguably the common features of debarment and dismissal should be at the centre of attention. Both are negative consequences of *expressions*, with a likely chilling effect on the exercise of that freedom. What matters therefore, is not (the absence of) a right to employment, but the infringement such sanctions represent with the right-holder's freedom of expression. Arguably, a dismissal most often will be felt as more intrusive compared to debarment. However, such difference will have to be taken into consideration together with other factors in the consideration of the *reasonableness* of the sanction.

10.3.3 Reasonableness – Point of departure

Public service employees are entitled to freedom of expression. But their freedom is in some respects more limited. Especially two considerations justify a more limited freedom of expression in the public sector. The importance of *one voice*, for example in foreign policy, necessitates restrictions on the freedom of expression

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207 See the Commission's decision on admissibility in (1986) 45 DR 41. Compare the *Wille*-case (*Wille v Liechtenstein* (App no 28396/95) ECHR 28 October 1999) where it was considered an interference that the Prince of Lichtenstein had sent a letter to the President of the Constitutional Court informing him that he would not be re-appointed because of his expressions on interpretation of the Constitution.

208 See *Vogt* (n 151).

209 A fact which the Court relied heavily on, see *Glasenapp v Germany* (App no 9228/80)(1986) Series A no 104 [53] and *Kosiek v Germany* (App no 9704/82) (1986) Series A no 105 [39].

of each particular service employee representing the state. In *Ahmed and others*[210] restrictions on superiors civil servants' opportunity to conduct political activity was considered necessary in order to preserve neutrality in their functions as advisors for political organs and as press officers. The Commission's decision in *Haseldine*[211] is in line with *Ahmed and others*: the dismissal of a British diplomat, who in a newspaper article had criticised his own Government, was considered in conformity with article 10. Here the statements encroached upon the very essence of the loyalty the employer reasonably could expect from the employer.

Furthermore, insofar as a service man in his official capacity has access to *sensitive information*, concerning the health of private persons or military secrets for example, it is only to be expected and prevalent in the Convention states that their freedom of expression on the matter is restricted.

In *Kudeshkina*[212] the Court reiterates that:

> [E]mployees owe to their employer a duty of loyalty, reserve and discretion. This is particularly so in the case of civil servants since the very nature of civil service requires that a civil servant is bound by a duty of loyalty and discretion … . Disclosure by civil servants of information obtained in the course of work, even on matters of public interest, should therefore be examined in the light of their duty of loyalty and discretion (see *Guja*, cited above, §§ 72-78).[213]

Nevertheless, the dismissal of the applicant, a professional judge, because of his expressions in the course of a hearing was considered a violation under the circumstances.

It seems pertinent to indicate two factors that are capable of supporting a service person's freedom of expression: (1) the information has a rather general political character (not closely connected to the job) and, (2) even if job sensitive, 'whistle-blowing' is the only effective way to crackdown on criticisable conditions.

10.3.4 Information not Closely Connected to the Job

If the matter expressed on has no or only a peripheral connection to the employee's field of responsibility or sensitive matters connected to his work place, the element

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210 See *Ahmed and others v the United Kingdom* (App no 22954/93) ECHR 1998-VI.
211 *Haseldine v the United Kingdom* (App no 18957/91) (1992) DR 73, 231.
212 See *Kudeshkina v Russia* (App no 29492/05) ECHR 26 February 2009.
213 See ibid [85].

of utilising one's position to reveal sensitive and for the employer (the state) damaging information, recedes. Hence, a sanction is more likely to be considered an unreasonable or disproportionate interference with the employee's freedom of expression.

It may be challenging to draw the limits when it comes to expressions that (allegedly) are of a more general political character, rather than related to the service person's work. However considerations beyond 'secrecy-considerations' may apply: the more the service person reasonably may be identified with the state, the less she is free to express her own views on issues. There is an obvious need for the state to speak with one voice.

Vogt[214], *Glasenap* and *Kosieck*[215] concerned dismissal and debarment from public employment. As explained above[216] the negative impact on the freedom of expression ought to be considered an interference in all three cases. However, it can be argued that more is needed for a dismissal to be considered reasonable (proportionate) because it is an interference with an established position and hence a more intrusive measure than debarment. It is suggested, however, that the cases represents a rather bygone view on the limits of freedom of expression. They all pivot on general political opinions, not extreme ones, and not with a damaging potential for the employer or the society. It is questionable whether the opinions and expressions of the applicants were *covered* by their waivers. Certainly they did not go to the core of the right (as in the *Leander*[217] and *Rommelfanger* [218]cases). At any rate it should be considered in contravention with important public interests to limit such expressions with reference to waiver. It is assumed that a violation today would have been found on similar facts.

10.3.5 Room for Whistle-Blowing Even for Civil Servants

Recent case law may indicate a trend in this direction. In *Guja*[219] a civil servant had handed over documents revealing dubious conditions within the prosecuting authority to a newspaper. Even if this is an area where loyalty and confidence generally hold a strong position, the dismissal of the applicant was considered a breach of his freedom of expression. The Court stated:

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214 *Vogt* (n 151).
215 *Glasenap* and *Kosieck* (n 209).
216 See chapters 3.2.5.3 and 7.4.3.2 above.
217 *Leander* (n 198).
218 *Rommelfanger* (n163).
219 *Guja v Moldova* (App no 14277/04) ECHR 12 February 2008.

> In this respect the Court notes that a civil servant, in the course of his work, may become aware of in-house information, including secret information, whose divulgation or publication corresponds to a strong public interest. The Court thus considers that the signalling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection. This may be called for where the employee or civil servant concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large.[220]

Apparently, the decisive factors were that without the applicant's actions information that from a public point of view was important to reveal, would most likely have remained concealed. In other words, we have a case illustrating the relevance (and importance) of whistle-blowing even within the public sector.

10.4 Negative Right

10.4.1 Introduction

Certain aspects of the freedom of expression have the character of a negative right, a right to remain silent. To the extent that an individual (typically holding a certain profession) is under an *obligation* to remain silent, he obviously has the right to the same. The state may be required under the Convention to impose such obligations for the protection of rights of others, to prevent the spreading of sensitive information about patients or clients (art 8) for example,[221] or in order to secure the presumption of innocence by prohibiting expression of false accusations (art 6(2)).[222]

The *right* to silence is not expressly anchored in article 10, and it may be questioned whether the basis for this right is to be found in article 10 or a 'preferred right'. As already touched upon,[223] similar articles may at least support the conclusion that article 10 encompasses a right to silence in *particular fields*.

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220 Ibid [72].

221 See among other authorities *Z v Finland* (App no 9/1996/627/811) (1997) ECHR 1997-I where a violation of art 8 was found by the fact that a judgment contained sensitive health information (name and disease) of the wife of the convicted.

222 See chapter 4 of forthcoming third Article on Waiver of procedural rights.

223 Ibid.

10.4.2 No General Right to Remain Silent

Assuming that there is, in particular circumstances, a right to silence, this right can by no means be unlimited.[224] As for the positive rights contained in article 10, it may be subject to limitations 'necessary in a democratic society' (compare the waiver-test; whether it 'runs counter to any important public interests'). An obvious example of a legitimate interference with the right to remain silent is the obligation to give *factual information* to a court in order to enable it to fulfil its fundamental function in a society based on the rule of law.[225] Partly linked to this function is the common obligation to give personal data to the police on request. The ECtHT has even recognised that deprivation of liberty may be in conformity with article 5(1)(b) to secure the fulfilment of such obligations.[226]

The right-holder enjoys a stronger protection when it comes to *opinions and beliefs* (as opposed to factual information) and information (even if factual) about *personal matters.*

10.4.3 Matters Concerning Personal Opinions and Convictions

The right to hold opinions is clearly anchored in article 10. Article 9, too, will easily come into play: where the opinion assumes the character of a conviction. Arguably this encompasses a right to hold opinions *to oneself*. In most contexts interferences with this right is not practical, simply because the information will not come to the knowledge of others; 'absolute protection of holding opinions ended when they were aired or manifested'.[227]

However, questions of disrespect of the right to silence may arise where the right-holder is under pressure to express anything in contravention with his conviction. In *Buscarini and Badla* the applicants were sworn in as members of parliament, without referring to the Gospel as they were supposed to.[228] The oath was declared invalid and they were instructed to swear correctly, or lose their seats in parliament. The ECtHR found that the instruction was an interference with

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224 See statements in the Commission's decision in *K v Austria* (App no 16002/90) (1993) Series A no 255-B [51-52].

225 The importance of the courts is evident both from the Preamble of ECHR and also the express provisions in arts 6, 5(4) and 5(3) of the Convention.

226 See for example *Vasileva v Denmark* (App no 52792/99) ECHR 25 September 2003 where a woman was detained for 13 hours in order to secure her obligation to give personal data to the police. Although at the outset anchored in art 5(1)(b), ECtHR found 13 hours to be excessive and hence a violation.

227 Dominic McGoldrick, *The Human Rights Committee: its Role in the Development of the International Covenant on Civil and Political Rights* (OUP 1991) 460.

228 See *Buscarini and others v San Marino* (App no 24645/94) ECHR 18 February 1999.

the applicants' freedom of religion that failed to meet the requirement 'necessary in a democratic society'. Evidently it was of importance for the consideration that this confessional requirement was applied in a political context.

Applied in a religious context, for employment in a religious society for example, the assessment is different. In such contexts silence may to a large extent legitimately be held to the detriment of the right-holder, where she refuses to confess to or inform about personal matters essential for the religion in question for example.

Beyond this there are a whole range of situations where public authorities are entitled to make certain contributions conditioned on information from an applicant: a person who is applying for a disability pension will be required to deliver information about his health condition. In such situations he cannot complain about the said negative consequences if he chooses to remain silent. The overriding theme here is whether there is an objectively reasonable link between the required information and the contribution.

10.4.4 Sensitive Personal Information

The point of departure ought to be that everyone has the right to remain silent about information that is covered by the right to private life, freedom of religion and freedom of assembly and organisation. This means that as a main rule there is a right to remain silent in relation to information about personal matters, beyond core aspects such as sexual orientation, to *inter alia* business matters, family life and relations such as status, religious conviction, membership in a political party or more generally political preference.

An attempt (successful or not) to force the right-holder to surrender the information will be considered an interference with his right to remain silent (with the possible addition of his right to private life). However, these rights are subject to exceptions according to the second paragraph of the relevant articles (10 and 8). Hence, an interference may be considered necessary for the protection of health or prevention of crime, for example.

10.4.5 Continuation: Protection against Self-Incrimination

Where the 'personal information' is one's own criminal conduct, special principles and rules apply. The issue is no longer 'only' the aversion inseparably connected to undesired exposure of personal information, but a more urgent need not to be forced to contribute to one's own criminal conviction. Hence, while there is, upon court request, an obligation to give information of importance for the prosecution of others, the accused is entitled to keep information that may incriminate the

accused to himself. In this particular context the accused has the right, but clearly no obligation, to remain silent. In most national legal systems the accused will benefit from a confession, typically in terms of a reduction of sentence (part 8.1 above). That too advantageous reductions may constrain the will of the accused is not to be ruled out and hence gives rise to serious concerns as to whether the privilege against self-incrimination has been duly respected (to be addressed in the third article).

10.4.5 Journalists' Right to Protect Sources

(a) In *Goodwin*[229] a journalist was sanctioned with a £5000 fine for refusing to reveal the source of information in a secret note dealing with an enterprise's financial difficulties. The Court underlines the importance of a right for the press not to be forced to reveal sources. However, it is obvious that this right can be misused: as a mechanism to conceal poor journalism, or even worse, to conceal the lack of facts to substantiate the case.

Hence, the right to protect sources cannot be absolute. Before we return to the question whether an interference with the journalists' right to protect sources is 'necessary in a democratic society' for certain purposes (see (d) below), we shall have a briefer look at the circuit of protected ((b) below) and committed ((c) below).

(b) In *Goodwin*[230] the Court linked the right for *the press* to protect sources with its vital function as public watchdog. This purpose indicates that the circuit of protected persons will be wide. In principle everyone working as a journalist may be protected, regardless of whether she is employed or works on an ad hoc basis.[231] This will encompass, in addition to ordinary journalists, also persons contributing to one single program or publication.

The medium is not decisive. Thus, contributors to a newspaper, a book or an internet publication will be protected, provided that the expressions have a journalistic character.

(c) According to most national legal systems there is a general obligation to give information if requested by a *court*,[232] while the obligation vis-à-vis other public

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229 *Goodwin* (n 197).
230 Ibid.
231 Compare Kyrre Eggen, *Ytringsfrihet* (Oslo 2002) 323.
232 See eg the Norwegian Criminal Procedure Act (1981) ss 90 and 108.

authorities is more limited: the police can merely require personality information (name address and similar).[233] However, special rules authorising certain administrative authorities to require information, are not uncommon in national law.[234] As far as the information is capable of contributing to the conviction of the informant, problems in relation to the protection against self-incrimination may arise (see above). As far as the information is capable of revealing the identity of its source, the problem we are concerned with here may be activated.

(d) It is natural to start the analysis of the extent of journalist's right to protect sources with a focus on the information covered; it concerns a right to protect *sources*. Hence, it is the *identity* of the source, not the content of the information as such that is covered. On the other hand, not only personality-information (name, address, telephone number, internet address) is covered, but also information that is capable of revealing the identity, even if on the surface is neutral.

Since the right to protect sources, though only implicitly, is anchored in article 10(1), its limitations will be directly governed by the conditions established in the second paragraph of the same article: for an interference with the right to protect sources to be in conformity with the Convention, it must be 'necessary in a democratic society … for the protection of … rights of others'. This proportionality-consideration is basically a balancing test, where the weighing of the interests of the source against the interests of others, a party having been subjected to accusations in the media for example, is to be conducted.

The *Goodwin-case*[235] reveals a strict scrutiny in favour of the right-holder (the journalist). The Court states that an interference 'cannot be compatible with Article 10 … unless it is justified by an overriding requirement in the public interest' (para 40). And the margin of appreciation accorded to the state is a narrow one: 'Limitations on the confidentiality for journalistic sources call for the most careful scrutiny by the courts'.

Two conditions seem to be indispensible; the interference has to be substantiated by very important public interests and the information about the identity of the source must be of substantial importance for the solution of the case in question.

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233 The (limited) *obligation* to give information is not to be confused with information, eg about income, health condition and the like, as a *condition* for obtaining certain benefits, eg a pension.

234 Examples are competition and tax authorities, see for example Companies Act (1985) s 434 which authorises inspectors to claim information from employees in a company under investigation and the Norwegian Competition Act (2004) s 24 which authorises the supervising body (*Konkurransetilsynet*) to claim relevant information from anyone.

235 *Goodwin* (n 197).

As far as the first condition concerns it is evident that 'public interests' includes private interests: the interference in the *Goodwin*-case[236] was made to protect the interests of the private enterprise. This was not disputed, but the enterprise's interest in the case was not considered important enough to outweigh the right-holder's right to secrecy.

Arguably the majority stretched the negative right to expression to its breaking point, that is, beyond a point where harmony with the positive right to freedom of expression is sustained. I fail to see why the right to protect a source of information that was detrimental to the enterprise and that was most likely procured through criminal acts – theft and breach of confidence – could outweigh an, at the most, very modest public interest in the information.[237] Hence, I am more inclined to agree with the minority of the Court who puts emphasis on the fact that 'the importance of protecting the source was much diminished by the sources complicity, at the very least, in a gross breach of confidentiality which was not counterbalanced by any legitimate interest which publication of the information was calculated to serve'.[238] Compared to the considerations in *Rommelfanger*[239] where the importance of loyalty to the employer was considered decisive, the majority-opinion in *Goodwin* seems disproportionately favourable to the right-holder.

Measured against the same criteria, especially the importance in a democratic society of information about improper police methods, *Voskuil,*[240] however is easy to accept. The applicant, a journalist, had written an article on arms trade based on information from a police source. The information indicated that the police had applied criticisable methods capable of having led to a wrongful conviction of the involved in the arms trade case. The applicant had been detained for 17 days in order to compel him to surrender the information. The Court accepted that the interference was lawful and pursued a legitimate aim. In the assessment of whether it was proportionate, the Court stated:

> Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure

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236 Ibid.

237 The information dealt with a plan for refinancing of a middle size enterprise. All three British courts had held that the information was without public interest.

238 The phrasing is quite similar to that used by House of Lords in the same case.

239 *Rommelfanger* (n 163).

240 *Voskuil v the Netherlands* (App no 64752/01) ECHR 22 November 2007.

> cannot be compatible with Article 10 of the Convention *unless it is justified by an overriding requirement in the public interest*'. (emphasis added)[241]

Such an overriding interest was not to be found in the case. To the contrary, the Government's interest in knowing the identity of the applicant's source was not sufficient to outweigh the applicant's interest in concealing it.

Sanoma Uitgevers BV[242] illustrates, however, that the privilege has its limits. The case dealt with constraints imposed on journalists in order to make them hand over pictures of an illegal road race stored on CD to the police. The police wanted to make use of the pictures in the investigation of an allegedly similar case. In the assessment of whether the seizure represented a fair balance between the competing interests – the journalistic privilege in protecting sources and the unravel of crime – a section of the Court put emphasis on the severity of the crime that could be unravelled, the lack of alternative ways of disentangling it and the fact that the pictures never were used for other than the requested purpose:

> In particular, the domestic authorities are not prevented from balancing the preferred interests served by prosecuting the crimes concerned against those served by the protection of journalistic privilege; relevant considerations will include the nature and seriousness of the crimes in question, the precise nature and content of the information demanded, the existence of alternative possibilities to obtain the necessary information, and any restraints on the authorities' procurement and use of the materials concerned ….[243]

11 Freedom of Assembly and Organisation (Article 11)

11.1 Freedom of Assembly

The freedom of assembly is in the extension of the freedom of expression. This freedom has played a less important role compared to its relatives, expression and organisation. As far as *waiver* of this right concerns specific case law is almost

241 Ibid [65].

242 *Sanoma Uitgevers BV v the Netherlands* (App no 38224/03) ECHR 14 September 2010.

243 See the Chamber's judgment of 31 March 2009 [57]. Subsequently, the Grand Chamber reached an opposite conclusion (violation of art 10) based on a finding that the interference was not in accordance with law which is required by the second paragraph of the art (see ibid judgment of 14 September 2010.

absent. However, because a demonstration is a manifestation of the freedom of expression, situations similar to those discussed in 9.7 above are easily imaginable; though, if *Rommelfanger*[244] had expressed himself through a demonstration instead of a newspaper article, the considerations most likely would have been based on article 11 instead of article 10, and with a similar conclusion. Another example could be based on adjusted facts of the *Ezelin*-case:[245] a requirement that in order to obtain authorisation, lawyers are required to waive the right to demonstrate against judicial decisions will easily 'run counter to important public interests'.

The existence of a *negative right* to demonstrate is feasible as well: if the right-holder is exposed to, or runs the risk of negative consequences in the case of absence from a gathering, his negative right to demonstrate will easily be considered violated. In certain totalitarian regimes[246] where there are reports of serious sanctions (deprivation of liberty, ill-treatment and the like) of persons who do not actively support the regime, in the form of a demonstration for example, such conditions would undoubtedly violate the negative aspect of the right (not) to demonstrate. Within the European system equivalent questions in relation to the right to *organise* have given rise to important case law (2 below).

11.2 Freedom of Organisation

11.2.1 Waiver

In relation to a number of positions, the police, armed forces, or of the administration of the state, ECHR article 11 recognises a more general law-based exception from the right to freedom of assembly and association. Thus, from the perspective of the Convention members of these groups may renounce a right they would have otherwise enjoyed in other positions.

National legislation and other human rights conventions may state a more extensive right, typically by not exempting the mentioned groups generally. In contrast with ECHR article 11(2), CCPR article 22 confines itself to allowing limitations of the right to association for the police and armed forces (not for members of the public administration).[247] However, the difference between

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244 *Rommelfanger* (n 163).

245 A violation was found on the facts that a lawyer was sanctioned for having participated in a demonstration against two judicial decisions, see *Ezelin v France* (App no 11800/85) (1991) Series A no 202.

246 Such as China and Iran.

247 Notice also that CCPR art 21 does not contain any specific provision allowing for limitation of the right to assembly for members of the armed forces, police and the public administration.

ECHR and CCPR is hardly substantial at this point. Due to the importance the mentioned groups may have for the effective functioning of society, the state will be granted a wide opportunity to limit their right to organise (especially their right to strike) according to the common conditions in the second paragraph of the article. Similarly, much is needed before an informed and otherwise valid waiver of the right to organise from members of the said groups will be considered in contravention with 'important public interests'.

The assessment of waiver in other contexts may draw on *inter alia* like considerations in relation to public service employees. To the extent that a waiver-based limitation is substantiated by the right-holder's vital function and correspondingly potential damaging effect of (particular aspects of) the exercise of his right to association it will most likely be considered in conformity with 'important public interests'. In contemporary society it may be considered unreasonable to accept a waiver of the right to associate *in tote* for members of a certain profession even with a vital function (such as pilots and oil field workers), while a waiver-based limitation of the right to strike from the same grouping is more likely to be accepted.

11.2.2 Negative Right

11.2.2.1 Points of Departure

A negative right to association is not expressly laid down in ECHR (or other general conventions on civil and political rights). However, already in its early case law ECtHR read it into article 11, an article that by express terms guarantees a positive right to association. The Court obviously saw no obstacle in the connotations of the positive aspects in the wording 'including the right to *form and join* trade unions' in the second sentence of the article. In its landmark decision in *Young, James and Webster* the Court was not convinced by the state's argument that the *travaux preparatoire* argued in favour of a literal interpretation: a purely positive right 'to join'.[248] The case concerned a so called 'closed shop'situation where the employer and a particular trade union had agreed that membership in that union was a condition for employment. In its elaborations the Court stated:

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248 *Young, James and Webster v UK* (Application no 7601/76; 7806/ 77) 1981) Series A no 44. Cf the rejection of reading a right to die into art 2 which protects the right to life (part 7.2.6 above) and the rejection of reading a right to divorce into art 12 which protects the right to marry (part 9.2.4 above).

> It does not follow from the omission in the drafting of Article 11 of the Convention of the formula guaranteeing that 'no one may be compelled to belong to an association – as stated in Article 20 § 2 of the Universal Declaration of Human Rights – 'that the negative aspect of a person's freedom of association falls completely outside the ambit of Article 11.

The Court avoided a more general interpretation at that stage, preferring to solve the case on its relatively clear facts: the impact for the applicants was grave, as the condition was introduced after the employment had commenced ('post-entry closed shop'). However, a pre-entry situation, where a right-holder is continuously barred from obtaining a job as long as he fails to join a particular union, ought to be considered equal. The difference is one of intensity, not one of nature or substance.[249]

The applicability of asrticle 11 to pre-entry closed shop was confirmed in later case law (*Hoffman Karlskov*).[250] Here too, the impact was grave: the applicants' bread and butter. In other words both pre- and post-closed shops may '*strike at the very substance*' of the negative right to union. A combination of the two may even occur, such as where the right-holder accepts the condition in order to gain the job, and attacks the condition subsequently. In *Sørensen and Rasmussen*[251] the applicants initially had accepted the membership. But once employed they had, respectively, refused to pay the membership dues and challenged the compulsion to join the particular union they opposed because of political views.

> The Court does not in principle exclude that the negative and the positive aspects of the Article 11 right should be afforded the same level of protection in the area under consideration. However, it is difficult to decide this issue in the abstract since it is a matter that can only be properly addressed in the circumstances of a given case. At the same time, an individual cannot be considered to have renounced his negative right to freedom of association in situations where, in the knowledge that trade union membership is a precondition of securing a job, he accepts an offer of employment notwithstanding his opposition to the condition imposed. Accordingly, the distinction made between pre-entry closed-shop agreements and post-entry

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249 Cf the discussion of similar questions related to dismissals and debarment as sanctions for utterances in chapter 10 above.

250 See judgment of 20 March 2003.

251 *Sørensen and Rasmussen v Denmark* (App no 52562/99; 52620/99) ECHR 11 January 2006.

> closed-shop agreements in terms of the scope of the protection guaranteed by Article 11 is not tenable.[252]

In the Court's opinion the fact that the applicants knowingly took employment on the said condition, did not significantly alter the element of compulsion inherent in having to join a trade union against their will.[253] Construed in waiver-terms; under such circumstances there is no excuse for the state in a *waiver of the negative right* to organise.

When assessing the question whether a certain element constitutes an unacceptable coercion in contravention with the right (freedom) not to organise, it is useful to bear in mind that we are dealing the application of a right, and that the right in question is not an absolute one (which is evident from Article 11(2)). And when assessing the conditions for interference, especially its proportionality, the gravity of the impact is crucial. In the state's ambit lies typically the need to protect the interests of the trade union and its members. The interference is characterised by a negative consequence of choosing not to join a (particular) union.[254] It may be useful to analyse the concept of interference in this context in terms of an objective and a subjective requirement.

11.2.2.2 The Subjective Element

Subjective elements, the way in which the matter is perceived by the right-holder, including the strength in his remonstrance, are relevant when considering the gravity of the constraint. This follows not only from an (dynamic) interpretation of article 11, but is supported *inter alia* by articles 8 (autonomy), 9 ('thought, conscience') and 10 ('hold opinions') as well. In *Sørensen and Rasmussen*[255] the Court pays attention to subjective elements.

> Furthermore, regard must also be had in this context to the fact that the protection of *personal opinions* guaranteed by Articles 9 and 10 of the Convention is one of the purposes of the guarantee of freedom of association, and that such protection can only be effectively secured through the guarantee of both a positive and a negative right to freedom of association …

252 Ibid [56].
253 See ibid [59] of the judgment.
254 The applicant may not oppose unions as such, only the particular union the employer is coercing him to join. In such situations both the applicant and the union she prefers may be considered victims, cf ECHR art 34.
255 *Sørensen and Rasmussen* (n 251).

> In this connection, the notion of *personal autonomy* is an important principle underlying the interpretation of the Convention guarantees. This notion must therefore be seen as an essential corollary of the individual's freedom of choice implicit in Article 11 and confirmation of the importance of the negative aspect of that provision'. (emphasis added)[256]

In *Ólafsson,* too, the Court paid attention to the subjective element.[257] The applicant was forced to support an organisation which held political views he strongly disapproved (Icelandic membership of EU).

Sigurjonsson, delivered more than a decade earlier, is probably the clearest example of the application of subjective elements.[258] The Court underlines that the applicant had consistently and at all times objected to becoming a union member. Apparently it accepted that his objections rested on a firm belief.

Hence, it is fair to establish this subjective element as part of the Court's reasoning supporting the conclusion that the applicant had been subject to constraint in violation of the negative right to freedom of association.

11.2.2.3 The Objective Gravity of the Consequences of Non-Organisation

(a) In most cases (that have been considered) the interference is loss of livelihood. Confronted with such serious consequences for the right-holder, there is a presumption that the Court will be reluctant to accept the states justification. In *Young, James and Webster* the Court relied heavily on the gravity of the consequences.[259] A similar important interest was at stake in *Sigurjonsson.*[260] Here the applicant was not an employee, but a self-employed taxi driver who lost his license because of non-compliance with a statutory provision that conditioned the license on membership in a particular organisation. It is reasonable to interpret the judgment such that it was this serious consequence, combined with a subjective element ((c) below) that led to the violation. The government's argument, that the arraignment facilitated the administration of the taxi service in the public interest, was considered relevant, but insufficient in outweighing the negative consequences for the applicant.

(b) Consequently more lenient or remote consequences are more likely to succeed

256 Ibid [54].
257 *Vordur Olafsson v Iceland* (App no 20161/06) ECHR 27 April 2010.
258 *Sigurdur A, Sigurjonsson v Iceland* (App no 16130/90) (1993) Series A no 264.
259 See *Young, James and Webster* (n 248).
260 See *Sigurdur A Sigurjonsson* (n 258).

if they have a reasonable justification. Certain kinds of different treatment will be accepted as reasonable, for example that only unions over a certain size will have the right to negotiate. A right-holder who wishes to join another organisation will have to accept that his (smaller) union has no such right. In line with this reasoning the Court in *Gustafsson* held that it was within the state's margin of appreciation to allow an impediment to a restaurant owner, compelling him to be member of an employer's organisation or at least to commit to a collective agreement.[261]

A related question is to what extent the right-holder will have to accept handicaps likely to be the fruit (or rather the lack of fruit) of reduced negotiating power: lower salary and the like. At the outset the assumption that trade unions fight for their members only, seems plausible. However there is a gradual transition to the loss-of-livelihood-situation: substantial differences in pay ought to be considered an infringement of the negative right to organise.

A certain increase in conditions for accepting an arrangement seems to have found acceptance in *Wilson & National Union of Journalist and others.*[262] Here the state had failed to comply with its obligation to secure the right by allowing employers to use economic incentives (among other things better wage and insurance conditions) in order to influence employers to waive the right to negotiate through trade unions. A spectrum of comparable situations may raise the question whether the right to negative freedom of association is encroached upon.

Compulsory fees requested by labour unions have given rise to disputes. Such fees become particular problematic if they go beyond the actual expenses the organisation has had in order to take care of the unorganised right-holder's interests. It is one thing to accept that an employee who benefits from a collective agreement but who is not a member of the organisation who has negotiated that agreement, is compelled to pay a fee to the organisation for the compensation of its expenses necessary to supervise the agreement, in so far as it concerns the wage and working conditions of the unorganised. This has the character of compensation for received contributions. It is quite another thing if the fee also includes expenses to negotiate the agreement, its political agitations or similar; this will in reality compel the right-holder to support an organisation she otherwise not support.

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261 See *Gustafsson v Sweden* (App no 15573/89) ECHR 30 July 1998.
262 See *Wilson, National Union of Journalist and others v the United Kingdom* (App no 30668/96; 30671/96; 30678/96) ECHR 16 September 1997.

Because separation of the different parts of the organisation's expenses frequently is difficult, the ECtHR has required transparency so that it can be ascertained that the fee is limited to cover the said acceptable expenses. In *Evaldsson,*[263] where a violation of article 1 of Protocol No 1 was found, the Court stated *inter alia*:

> [I] cannot be ascertained whether a possible surplus generated by the inspection work has been used to cover part of the costs relating to the Unions branch activities, i.e., inter alia, wage negotiations, union agitation and political work ….[264]

In *Ólafsson*[265] the Court confirms that even relatively modest compulsory contributions (*in casu* in the form of an 'industry charge') imposed on non-members to the benefit of an organisation the right-holder does not want to support, may violate the negative freedom of association. In line with *Evaldsson*[266] it concluded that the lack of transparency as to the benefit of the payment for the non-members, the organisation's unlimited power to decide on the allocation of the charge and the insufficient control mechanisms connected to it, rendered the system disproportionate and hence in violation of article 11.

12 Waiver of Substantive Rights: Preliminary Conclusions

(a) This part of our study confirms that core elements of *substantive rights* normally cannot be waived since they reach beyond the individual right-holder's sphere. When it comes to non-derogable rights this core is a wide one: there is no waiver of the protection against torture.

(b) Nevertheless, such sensitive matters as are covered by these most 'sacred' *non-derogable* rights: life, integrity and personal freedom, simultaneously lie at the centre of the right-holder's self-determination, which is in itself a human right.

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263 *Evaldsson and others v Sweden* (App no 75252/01) ECHR 13 February 2007.
264 Ibid [61]. The Court did not find it necessary to conduct a *separate* examination of whether the same facts revealed a violation of art 11; that is easily acceptable. However, it can be argued that the *key question* more pertinently should have been considered in relation to art 11.
265 See *Sigurdur A Sigurjonsson* (n 258).
266 *Evaldsson* (n 263).

As a consequence, the right-holder's consent to or call for particular *treatment*, for example may remove the issue completely from the ambit of the protection against *inhuman* treatment (art 3). Similarly, the presence of a valid and current consent is crucial when estimating whether sexual conduct entails an inhuman treatment. In other cases it is even clearer that absence of consent is intrinsic in the key concept of the protected right: it is obvious that an unconstrained and capable person can commit himself to work, and consequently that there is, to the same extent, is no *forced* labour (art 4), and similarly that there is no *deprivation* of liberty if the right-holder calls for treatment in a clinic. In such cases focus will be on *validity* of the right-holder's decision in a narrower sense: his free, informed and continued determination.

Clearly, self-determination, even if exercised by an informed and unconstrained individual, has its limits within the field of non-derogable rights. Deviation from a non-derogable right on the basis of waiver (or consent), will easily 'run counter to *important public interest*'. Deviation from the protection against ill-treatment (ECHR art 3) more easily will 'run counter to important public interests' compared to waiver of the right to correspondence (art 8). By way of example, ECtHR has stated that 'even assuming the conditions referred to … above were satisfied [that the waiver was informed and so valid in the narrower sense], no waiver of the right not to be subjected to racial discrimination can be accepted, as it would be counter to an important public interest'.[267] Similarly, the protection against bodily harm cannot be waived unless the interference is *supported by an independent and important objective*, typically the saving of life or improvement of health by a medical operation. Such consent-based and purpose-rational interferences, reveals the relevance of a proportionality-consideration even in the fields of non-derogable rights.

In the field of non-derogable rights there still is a periphery where waiver plays a *self-sufficient role*. Less serious bodily interferences, for the purpose of medical training or experimentation for example, that otherwise would have run counter to the protection against ill-treatment (compare CCPR art 7), may be acceptable because it is consented to.

(c) When it comes to *derogable substantive rights* (typically those in arts 8 – 11) the consideration connected to the core-periphery-dimension finds a reflection in the parallel to the ordinary conditions for interference, most often set out in the second paragraph of the relevant article (law, purpose and necessity). While

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267 *DH and others v The Czech Republic* (App no 57325/00) ECHR 13 November 2007.

waiver of such rights plays an independent role in that it most often can substitute *law*, there are certain limits with regards to the proportionality, including the purpose-rationality, of the waiver-based 'interference': for a waiver-based right-deviation to be in compliance with the Convention, conformity with 'important public interests' still is required. However, where waiver of a *derogable* right is substantiated, the state has more leeway. It is natural that self-determination holds a relatively strong position within this field. If the matter genuinely concerns the right-holder only, *the state will normally be free to accept his original decision to waive*.

(d) Not insignificantly, a right-holder can even in a number of cases even *claim* the opposite of what a particular Article expressly grants him. Such '*negative rights*' (see chapter V of the first Article) are evident *inter alia* in relation to the substantive 'positive rights' expressed in Articles 10 and 11 (see corresponding chapters above). Even the opposite of a right to marry (Article 12) – a right to divorce – may in certain cases develop, eventually on the basis of a '*preferred right*' (see chapter 8.4 above).

(e) In the third forthcoming article I will pursue these questions of whether and to which extent a state party is free, and eventually even under an obligation to respect waiver of *procedural rights.*