Human Rights Waivers and the Right to do Wrong under the ECHR

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> "The Court takes the view, however, that a State Party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis *from the exercise of their own fundamental rights and freedoms*." (ECtHR (Grand Chamber), *S.A.S. v France*, judgment of 1 July 2014 (merits and just satisfaction), application no. 43835/11, ECHR 2014, 119, emphasis added).

Introduction

The question of the moral limitations the law may place on personal autonomy and consequently on individual choice is an old chestnut in political and legal theory. It raises the spectre of the legal enforcement of (the majority's) morality[2] and, more specifically in the case of harm to oneself, of state paternalism. Justifications for these limitations on individual autonomy vary. They depend in particular on whether one subscribes to liberal theory or not[3] and, within liberal theories, whether one sticks to the harm (to others) principle[4] or whether one endorses, as I think one should, a thicker notion of (positive and negative) autonomy that justifies further restrictions on individual choice[5].

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[2] See e.g. the Hart-Devlin debate: H.L.A. Hart, *Law, Liberty, and Morality*, Stanford: Stanford University Press 1963, especially chapters 1-2; H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, Oxford: Clarendon Paperbacks 1983, chapter 11; P. Devlin, *The Enforcement of Morals*, London and Toronto: Oxford University Press 1965, chapters 1, 5-7. See also the Wolfenden Report, *Report of the Committee on Homosexual Offences and Prostitution*, London: Her Majesty's Stationery Office 1957, 1957 Cmnd. 247, especially §§ 13 and 14, and the Williams Report, *Report of the Committee on Obscenity and Film Censorship*, London: Her Majesty's Stationery Office 1979, Cmnd. 7772, 50-60, 96-102.

[3] See on "conservative paternalism": R. George, *Making Men Moral – Civil Liberties and Public Morality*, Oxford: Clarendon Press 1993, chapters 2 and 6; J. Finnis, *On Natural Law and Natural Rights*, Oxford: Clarendon Press 1980, 216-23; J. Finnis, 'Legal Enforcement of "Duties to Oneself": Kant vs. Neo-Kantians', (1987) 87:3 *Columbia Law Review* 433-56, at 434-38, 452-56; J. Finnis, 'Law, Morality, and "Sexual Orientation"', (1994) 69:5 *Notre Dame Law Review* 1049-76 (reproduced with additions as 'Is Natural Law Theory Compatible with Limited Government?', in R. George (ed.), *Natural Law, Liberalism and Morality – Contemporary Essays*, Oxford: Oxford University Press 1996, 1-26).

[4] See on "liberal anti-paternalism": J. S. Mill, *On Liberty*, The Harvard Classics, volume XXV, part 2, New York: Collier & Son 1909-14, chapters 1, 4, and 5; R. Dworkin, *Taking Rights Seriously*, Cambridge, Mass.: Harvard University Press 1978, chapter 10 (and chapter 11); R. Dworkin, 'Is There a Right to Pornography?', (1981) 1:2 *Oxford Journal of Legal Studies* 177-212; R. Dworkin, 'Liberal Community', (1989) 77:3 *California Law Review* 479-504; R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, Cambridge, Mass.: Harvard University Press 1997, chapters 8, 9, and 10.

[5] See on "liberal paternalism": J. Raz, *The Morality of Freedom*, Oxford: Clarendon Press 1986; N. MacCormick, *Legal Right and Social Democracy – Essays in Legal and Political Philosophy*, Oxford: Clarendon Press 1982, chapter 2.

The implications of this debate in the human rights context are less clear. After all, human rights do not give rise to individual duties,[6] but to state duties. Moreover, at least some[7] individual rights are taken to protect personal autonomy in the pursuit of the individual's objective interests,[8] and are not meant to guide those individual choices. To that extent, human rights actually provide protection against paternalism. Hence the idea that holding a positive right to do X implies the negative right not to do X and even having a right to do wrong[9]. Of course, human rights may be restricted, but this does not necessarily amount to imposing moral duties on the right-holders. Moreover, even when restrictions on human rights do impose duties on the right-holders (e.g. through criminal law), those restrictions have to be justified. One may therefore argue that in those cases, human rights amount to the epitome of liberal or justified paternalism: they clearly entrench the protection of personal autonomy against the legal enforcement of morality as the default position and shift the burden of justification onto the restrictions that are themselves limited (e.g. by reference to others' human rights, public security, morals). One finds a clear confirmation of this in international human rights law:[10] the protection of morals is mentioned, for instance, as a potential ground for restricting the right to personal autonomy under Article 8 § 2 ECHR[11].

Things are not that simple, however. Human rights practice reveals further limitations to human rights that have a recurring paternalistic flavour for they constrain the autonomy of right-holders outside of the justifiable restrictions to human rights referred to before. One may mention the limitations to waiving human rights, but also the limitations to the right not to use one's rights or to the right to use them in a wrong way, all such limitations being justified by reference to the right-holder's rights themselves. In some cases, these further limitations may turn human rights into actual duties to conform with society's morality and into yet another form of moral guidance. For instance, besides being a human right, equality between men and women invoked in this way becomes prescriptive and a source of individual duties[12]. One

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6 See J. Waldron, 'A Right to Do Wrong', in *Liberal Rights: Collected Papers 1981-1991*, Cambridge: Cambridge University Press 1993, 63-87, 72.

7 This is clear for freedoms such as freedom of speech, freedom of association or freedom of religion, but it may also be argued for more positive claim-rights such as the right to education or medical care where state duties to provide education or medical care are not necessarily independent from the existence of a right and its invocation.

8 This applies even under the interest-theory of rights, of course, and not only under the will-theory. See also J. Raz, *The Morality of Freedom*, Oxford: Clarendon Press 1986, chapters 14-15, especially 407-24; J. Raz, 'Autonomy, Toleration, and the Harm Principle', in R. Gavison (ed.), *Issues in Contemporary Legal Philosophy – The Influence of H.L.A. Hart*, Oxford: Clarendon Press 1987, 313-33; Waldron (n. 6), 79.

9 See Waldron (n. 5), 63 ff.; J. Raz, *The Authority of Law – Essays on Law and Morality*, Oxford: Clarendon Press 1979, 274; Dworkin, 'Right to Pornography', (n. 4), 188.

10 I am assuming here that international human rights are at both legal *and* moral rights. For a full argument to that extent, see S. Besson, 'The Law in Human Rights Theory', (2013) 7 *Zeitschrift für Menschenrechte – Journal for Human Rights* 120-50.

11 For an excellent discussion of the paternalistic implications of restrictions to human rights in the context of the *K.A.* case, see e.g. M. Fabre-Magnan, M. Lévinet, J.-P. Marguénaud and F. Tulkens, 'Controverse sur l'autonomie personnelle et la liberté du consentement', (2009) 48 *Droits – Edition thématique: La liberté du consentement – le sujet, les droits de l'homme et la fin des 'bonnes mœurs'* (1) 3-57. Interestingly, in ECtHR (first section), *K.A. and A.D. v Belgium* (merits), judgment of 17 February 2005, applications no. 42758/98 and 45558/99, 60-62 and ECtHR (fifth section), *Mennesson v France*, judgment of 26 June 2014 (merits and just satisfaction), application no. 65192/11, ECHR 2014, 66, 81, the Court focuses on other grounds of restriction of personal autonomy than public morals – in contrast with its decision in ECtHR (chamber), *Laskey and Others v the United Kingdom*, judgment of 19 February 1997 (merits and just satisfaction), applications no. 21627/93, 21826/93 and 21974/93, ECHR 1997-I, 51, where the Court is less cautious about the justificatory function of morals.

12 See e.g. ECtHR (Grand Chamber), *Konstantin Markin v Russia*, judgment of 22 March 2012 (merits and just satisfaction), application no. 30078/06, ECHR 2012, 107, 150.

may coin this form of paternalism, which is intrinsic to human rights, "human rights-paternalism"[13]. The problem is that these limitations remain unchecked through the justification constraints placed on human rights' restrictions. As a matter of fact, respect for one's own rights is not usually mentioned by any of the restriction clauses in international human rights treaties. While it is clear that human rights should not be sealed off from the rest of morality and the moral evaluation of the choices of the right-holders,[14] looking for those justifications outside of human rights would be self-defeating for the distinctive importance of those rights in morality, i.e. as rights to do wrong. What I would like to argue in this essay is that those justifications may actually be found within the structure of human rights *qua* general rights themselves, but are more limited than is usually accepted.

Curiously, human rights-paternalism has not given rise to much discussion among human rights theorists. Of course, there has been mention of the so-called inalienability of human rights, but discussions of this are mostly very brief and usually refer to the external deprivation of human rights rather than their self-alienation. Even with respect to the latter, however, the common view is that human rights are "hard to lose, but few are inalienable" such as e.g. minimal rights to security and liberty[15]. What seems to be at stake even there, however, is the definitive loss of human rights rather than their waiver or misuse in a concrete case.

A cursory survey of the case-law of the European Court of Human Rights (hereafter the ECtHR or the Court) since 2002 confirms the emergence of paternalistic streaks in human rights reasoning together with and parallel to the consolidation of the right to personal autonomy. This may be observed in the way in which right-holder's waivers of their rights have been increasingly rejected[16] or in which their right to personal autonomy has been interpreted as self-limited.[17] This comes out most clearly with respect to sexual practises,[18] euthanasia and suicide[19], reproduction techniques[20] and religious practises[21]. While the

[13] See also, albeit slightly differently, Tulkens (n. 11), 47; O. de Schutter and J. Ringelheim, 'La renonciation aux droits fondamentaux – La libre disposition du soi et le règne de l'échange', in H. Dumont, F. Ost and S. Van Drooghenbroeck (eds.), *La Responsabilité, face cachée des droits de l'Homme*, Brussels: Bruylant 2005, 441-81, 451.

[14] See also Waldron (n. 6), 84-85.

[15] See J. W. Nickel, *Making Sense of Human Rights*, 2nd edn, Malden, Mass., Oxford and Victoria: Blackwell 2007, 44-45.

[16] See ECtHR (third section), *Keenan v the United Kingdom*, judgment of 3 April 2001 (merits and just satisfaction), application no. 27229/95, ECHR 2001-III; ECtHR (second section), *Horoz v Turkey* (dec.), no. 1639/03, 31 March 2009 ECtHR (Grand Chamber), *D.H. and Others v the Czech Republic*, judgment of 13 November 2007 (merits and just satisfaction), application no. 57325/00, ECHR 2007-IV; ECtHR, *Konstantin Markin* (n. 12).

[17] See ECtHR (fourth section), *Pretty v the United Kingdom*, judgment of 29 April 2002 (merits), application no. 2346/02, ECHR 2002-III; ECtHR (first section), *Jehovah's Witnesses of Moscow and Others v Russia*, judgment of 10 June 2010 (merits and just satisfaction), application no. 302/02.

[18] See ECtHR, *Laskey* (n. 11); ECtHR, *K.A. and A.D.* (n. 11).

[19] See ECtHR, *Pretty* (n. 17); ECtHR, *Keenan* (n. 16); ECtHR, *Horoz* (n. 16); ECtHR (first section), *Haas v Switzerland*, judgment of 20 January 2011 (merits and just satisfaction), application no. 31322/07, ECHR 2011.

[20] See ECtHR (Grand Chamber), *Evans v the United Kingdom*, judgment of 10 April 2007 (merits), application no. 6339/05, ECHR 2007-I; ECtHR (Grand Chamber), *S.H. and Others v Austria*, judgment of 3 November 2011 (merits and just satisfaction), application no. 57813/00, ECHR 2011.

[21] See ECtHR (Grand Chamber), *Fernández Martínez v Spain*, judgment of 12 June 2014 (merits and just satisfaction), application no. 56030/07, ECHR 2014; ECtHR (Grand Chamber), *S.A.S. v France*, judgment of 1 July 2014 (merits and just satisfaction), application no. 43835/11, ECHR 2014; ECtHR (fourth section), *Eweida and Others v the United Kingdom*, judgment of 15 January 2013 (merits and just satisfaction), applications no. 48420/10, 36516/10 and 51671/10, ECHR 2013; ECtHR, *Jehovah's Witnesses* (n. 17).

decisions in some of those cases may be justified, there is no clear reasoning one could draw from. Worse, there is a growing confusion around the Court's references to individual consent and personal autonomy in this context[22]. This is particularly problematic as none of those limitations are mentioned by the European Convention on Human Rights (ECHR) itself. Of course, Article 17 ECHR prohibits the abuse of rights,[23] but this is a prohibition of the "destruction" of ECHR rights or of their restriction "to a greater extent than is provided in the Convention". Human rights waivers and rights-based restrictions to human rights do not usually or necessarily fit either of these two categories.

This makes it all the more important to review the Court's reasoning on human rights waivers and the right to do wrong and to propose a principled interpretation of it. My argument will be four-pronged. After some delineations and distinctions (1), I will identify and discuss three versions of human rights waivers and the right to do wrong one encounters in the ECtHR's case-law: human rights waivers (2), human rights "not to" (3) and the human right to personal autonomy (4). In each case, I will try to propose the interpretations of the case-law that are the most coherent and justified.

Methodologically, this essay approaches the question of consent in ECHR law from the perspective of human rights theory, and, more precisely, from the perspective of a legal theory of human rights. It aims to provide the best interpretation and justification of the existing practice of European human rights law, i.e. one that puts the practice in its best light[24]. To that extent, this essay does not merely aim to propose a moral theory of personal autonomy in the human rights context that could then be used to reform the existing practice. Nor, however, is it about reconstructing the practice as a theory and hence merely about justifying it. The practice of European human rights law entails its own immanent justifications and critiques that need to be identified and interpreted in the proposed theory of personal autonomy in human rights law so as to best fit the practice while justifying and criticizing it at the same time.

Dean Spielmann has always been a keen supporter of human rights theory and its role in judicial reasoning. Given his longstanding interest in Article 8 ECHR and his dissent from some recent decisions of the Court pertaining to consent in that context,[25] I humbly submit these reflections as a tribute to his many years of work at the Court.

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[22] For a discussion and various attempts at mapping the issue, see e.g. O. de Schutter, 'Waiver of Rights and State Paternalism under the European Convention on Human Rights', (2000) 51:3 *Northern Ireland Legal Quarterly* 481-508, 481; P. Frumer, *La renonciation aux droits et libertés: la Convention européenne des droits de l'homme à l'épreuve de la volonté individuelle*, Brussels: Bruylant and Editions de l'Université de Bruxelles 2001; de Schutter/Ringelheim (n. 13); Tulkens (n. 11), 46 ff.; P. Frumer, 'La renonciation aux droits constitutionnels', in M. Verdussen and N. Bonbled (eds.), *Les droits constitutionnels en Belgique – Les enseignements jurisprudentiels de la Cour constitutionnelle, du Conseil d'État et de la Cour de cassation*, volume 1, Brussels: Bruylant 2011, 367-94; C. Ruet, 'L'autonomie personnelle dans la jurisprudence de la Cour européenne confrontée à la philosophie des droits de l'homme', in M. Doat and P. Charlot (eds.), *Liber amicorum Gilles Darcy – Détours juridiques: le praticien, le théoricien et le rêveur*, Brussels: Bruylant 2012, 699-732; S. Van Drooghenbroeck, 'Conflict and Consent – Does the Theory of Waiver of Fundamental Rights Offer Solutions to Settle Their Conflicts?' (forthcoming, manuscript on file with author).

[23] See e.g. Marguénaud (n. 11), 27; Tulkens (n. 11), 32-33.

[24] See e.g. Besson (n. 10); S. Besson, *Human Rights as Law* (forthcoming, manuscript on file with author).

[25] See e.g. his dissenting opinion in ECtHR, *Fernández Martínez* (n. 21) or *Hermi v Italy* (Grand Chamber), judgment of 18 October 2006 (merits), application no. 18114/02, ECHR 2006-XII, 73 (see note 36).

1. Some Delineations and Distinctions

1.1. Delineations

Discussions of human rights waivers under the ECHR and, more generally, of the protection of the personal autonomy of the right-holder usually start with delineations[26]. Too often, indeed, the omnipresence of the reference to 'consent' in the Court's case-law and the family-resemblance between those different uses of 'consent' are the source of much confusion.

There are at least two features of personal choice in the Court's reasoning that should be kept outside the scope of this discussion.

The first one pertains to the optional nature of the individual remedies under the ECHR. Right-holders may choose to invoke a violation of their Convention rights or not, and hence to waive their right of application under Article 34 ECHR. Where they do introduce an application, they may at any time agree to conclude a friendly settlement with the respondent State (Article 39 ECHR). The waiver of remedies should not be conflated with the waiver of rights, however.[27] Remedies enable the victim of a human rights violation to obtain recognition or the declaration of the state's responsibility for the violation (Article 41 ECHR). These responsibilities arise from the violation of ECHR duties itself. Thus, enabling remedies to be waived cannot affect the causing of a wrong and the related responsibilities either way, unless the corresponding ECHR rights and duties are waived in the first place.

The other reference to consent in ECHR law is its invocation by a state as justification for the restriction to a given human right[28]. This is the case, for instance, when a right-holder is deemed to have renounced his freedom of religion by concluding an employment contract as a teacher in a religious school[29]. This is sometimes wrongly equated with a human rights waiver, but should be carefully distinguished from it. In such cases, the right-holder has not decided to renounce anything, and if she has, it is not her rights themselves. This distinction is actually echoed in the difference in reasoning between those cases and cases of human rights waivers *stricto sensu* in the Court's case-law. In the former, the right is not waived and the duties arise. Consent is merely advanced as one justification for the restriction of those duties. Actually, it is rarely admitted as a sole justification and the restriction has to go through the whole justification test[30].

1.2. Distinctions

With these delineations in place, mapping the various ways in which personal choices may be protected by human rights requires the drawing of some more distinctions.

First of all, a human right holder may decide to renounce her own rights in a given case. For instance, she may decide she wants to die or to refuse education. This is a human rights

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[26] See de Schutter/Ringelheim (n. 13), 445-50 on waivers; Ruet (n. 22), 704-8 on personal autonomy.

[27] Contra de Schutter (n. 22), 484-85.

[28] This justificatory invocation of consent by the state usually replicates a previous private invocation of consent in the horizontal relationship between the right-holder and one or many other individuals. This is the case when consent is expressed by contract or in intimate relationships.

[29] See e.g. ECtHR, *Fernández Martínez* (n. 21), 109-10. See also ECtHR, *Eweida* (n. 21).

[30] See e.g. ECtHR, *Fernández Martínez* (n. 21), 135, 141; ECtHR, *Eweida* (n. 21), 83; ECtHR (fifth section), *Schüth v Germany*, judgment of 23 September 2010 (merits), application no. 1620/03, ECHR 2010, 71.

waiver *stricto sensu*. When a right is (validly) waived in a case, no concrete duties arise. No conflicts of rights (and duties) may occur either, as a result.

Secondly, a human right holder may invoke a given right "not to" use her own rights (or to use them wrongly). For instance, she may invoke her right to life in order to die or her right to education to refuse education. If the right is (validly) invoked in this way in a case, the concrete corresponding duties will arise. Potential conflicts of rights (and duties) may arise between the right-holder's rights (and duties) or between her rights (and duties) and those of others. As a matter of fact, the corresponding duties to a right "not to" are best captured as the absence of a right "to", thus turning the right "not to" into a (Hohfeldian) privilege or liberty-right[31].

Thirdly, a human right holder may invoke the right to personal autonomy to protect her choices on how to use her other rights. For instance, she may invoke her right to personal autonomy to decide on whether and how to live or to die. If the right is (validly) invoked in this way in a case, the concrete corresponding duties will arise. Additional potential conflicts of rights (and duties) may arise between the right-holder's rights (and duties) or between her rights (and duties) and those of others. Invoking the right to personal autonomy to protect one's choices provides those choices with greater protection than merely waiving one's rights to the protection of interests that are in contradiction with those choices. While in the latter, because the right is waived, no state duties arise to counter her choices,[32] in the former the state incurs duties to actually protect the right-holder's choices.

In what follows, I will discuss each of those three ways in which the ECtHR may be said to protect human rights holders' choices in the realization of their human rights. The aim is to propose a justified and coherent reading of the existing case-law that can be replicated consistently in the future.

Of course, in practice, the three approaches may not look that different in their outcomes. Indeed, personal autonomy is the underpinning value or principle in all three instances, and we know how difficult and indeterminate this concept is in moral and political theory. However, mapping what rights and duties arise from concrete circumstances and what normative conflicts we face proves essential to provide a justification for the state's interference and to assess whether or not it is paternalistic[33]. One may even argue that some cases may have been decided differently by the Court had the claims been framed differently[34]. Of course, the Court is constrained by the margin of appreciation of states parties and does not always have much leeway in the way in which the claims are constructed[35].

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[31] On this distinction, see W. N. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', (1913) 23:1 *Yale Law Journal* 16-59.

[32] This does not turn waivers into (Hohfeldian) "privileges", however, for there is no individual "right" to waive one's human rights and no corresponding absence of state duties in respect of what is waived. Contra de Schutter (n. 22), 482, who distinguishes between waiver as a "privilege" and waiver as a "right".

[33] It may avoid, for instance, jumping to conclusions and drawing the existence of a "right" to impose sadomasochistic practises over others from the recognition by the ECtHR of the justificatory "consent" to such a practice. On this question, see e.g. Marguénaud (n. 11), 12-13; Fabre-Magnan (n. 11), 14-15.

[34] This is the case of ECtHR, *Keenan* (n. 16), 92, for instance. See e.g. M. Lévinet, 'La notion d'autonomie personnelle dans la jurisprudence de la Cour européenne des droits de l'homme', (2009) 48 *Droits – Edition thématique: La liberté du consentement – le sujet, les droits de l'homme et la fin des 'bonnes mœurs'* (2) 3-18, 9-10.

[35] For reasons of scope, I am not discussing this question here although it is clearly particularly sensitive in all matters pertaining to the legal enforcement of morality (see e.g. ECtHR, *Pretty* (n. 17), 74-75; ECtHR, *S.H.*

2. Human Rights Waivers

A human right-holder may invoke a given right "not to" use her own rights (or to use them wrongly). For instance, she may invoke her right to life in order to die or her right to education to refuse education. If the right is (validly) invoked in this way in a case, the concrete corresponding duties will arise. No conflicts of rights (and duties) may occur either, as a result.

In what follows, I will discuss the ECtHR's case-law on waivers by taking three questions in turn: the admissibility of human rights waivers; their conditions of validity; and their consequences.

First of all, the admissibility of waivers. The ECtHR routinely accepts human rights waivers in practice. So far, this has mostly been with respect to procedural rights (Articles 5 and 6 ECHR)[36] and to freedoms (Articles 8, 9, 10 and 11 ECHR)[37]. Early on, there were indications in the case-law that this should not necessarily extend to all ECHR rights,[38] but the Court never listed the human rights covered by this blanket exclusion from waivers. The closest the Court has come to expressing a limitation on human rights waivers is when it excluded waivers from the right not to be discriminated against (on grounds of gender or race)[39]. Curiously, however, in another case, the Court emphasized the non-opposability by the state to a right-holder of her own right not to be discriminated against on grounds of gender in the case of a conflict between that right and another right of the right-holder, thus indicating indirectly that waiving that right may be admissible[40].

Most of the Court's reasoning on the admissibility of waivers may be said to be justified. Because human rights protect personal autonomy and individual choice, they should be interpreted to protect the waiving of that choice. If that is correct, it is difficult to understand why some human rights cannot be waived. First of all, there is one main exception to the waivability of human rights, however, and it is inherent to human rights as general or the

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(n. 20), 97, 110; ECtHR, *Evans* (n. 20), 82, 89; ECtHR (fourth section), *Hristozov and Others v Bulgaria*, judgment of 13 November 2012 (merits and just satisfaction), applications no. 47039/11 and 358/12, ECHR 2012, 124-26). For a discussion in this context, see Tulkens (n. 11), 48-49.

[36] See e.g. ECtHR (Grand Chamber), *Hermi v Italy*, judgment of 18 October 2006 (merits), application no. 18114/02, ECHR 2006-XII, 73; ECtHR (chamber), *Pauger v Austria*, judgment of 28 May 1997 (merits and just satisfaction), application no. 16717/90, ECHR 1997-III, 58-63; ECtHR (chamber), *Pfeifer and Plankl v Austria*, judgment of 25 February 1992 (merits and just satisfaction), application no. 10802/84, ECHR Series A no. 227, 74.

[37] See e.g. ECtHR, *Eweida* (n. 21), 106; ECtHR (Grand Chamber), *Sørensen and Rasmussen v Denmark*, judgment of 11 January 2006 (merits and just satisfaction), applications no. 52562/99 and 52620/99, ECHR 2006-I, 54; ECtHR (Grand Chamber), *Sindicatul "Păstorul cel Bun" v Romania*, judgment of 9 July 2013 (merits and just satisfaction), application no. 2330/09, ECHR 2013, 146.

[38] See e.g. ECtHR (plenary), *Albert and Le Compte v Belgium*, judgment of 10 February 1983 (merits), applications no. 7299/75 and 7496/76, ECHR Series A no. 58, 35.

[39] See e.g. ECtHR, *D.H. and Others* (n. 16), 204 (racial discrimination); ECtHR, *Konstantin Markin* (n. 12), 107, 150 (sexual discrimination).

[40] See ECtHR, *S.A.S.* (n. 21), 119; and dissenting opinion of Judge Tulkens, ECtHR (Grand Chamber), *Leyla Sahin v Turkey*, judgment of 10 November 2005 (merits and just satisfaction), application no. 44774/98, ECHR 2005-XI, 11-12. Maybe the Court should have made an argument about the scope of the right instead, excluding gender-sensitive religious signs from the scope of the right not to be discriminated against. For a general discussion, see C. Ruet, 'L'interdiction du voile intégral dans l'espace public devant la Cour européenne: la voie étroite d'un équilibre', (2014) 5 *Revue des droits de l'homme*, available at http://revdh.revues.org/862 (accessed on 17 February 2015).

equal rights of all: the basic equality they are constitutive of[41]. That equality, and hence the quality of being a human right-holder cannot be waived just as morality itself cannot be waived morally. Of course, what is regarded as making us equal and hence as a ground of prohibited discrimination has varied over time. It now includes most importantly gender and race, which it did not yesterday and might not tomorrow. The unwaivability of equality also explains, secondly, why the Court seems to object to the waivability of the "very heart" of each Convention right[42]. Waiving that inner core would imply waiving one's equal autonomy and equal rights. This is also how one should understand the Court's reference to the significance of the "right to liberty" in a "democratic society", i.e. in a society of equal right-holders, and to its unwaivability[43].

We should resist a further move, however, which is to follow the reference by the Court to the "important public interest"[44] constituted by gender and racial equality in its case-law to include other human rights among the unwaivable rights. Not only is the notion of important public interest an indeterminate notion, but it is difficult to understand, as I explained in the introduction, how a mere public interest could undermine what rights stand for in morality, i.e. the protection of personal autonomy and individual choice. The same should be said about the invocation of absolute rights (and duties) as a potential limitation on human rights waivers[45]. some human rights' higher degree of stringency, when applicable, does not tell us anything about their waivability, and hence about their applicability in the first place. Of course, and this should alleviate some of the fears this statement may raise, the key in each case will be to assess whether the personal autonomy of the right-holder that justifies a given waiver can actually be regarded as enhanced in this case,[46] and hence whether the waiver is valid, as I will explain now.

Secondly, the validity of waivers. Most of the discussions in the Court's case-law on waivers pertain to the conditions under which a waiver may be considered valid. According to the Court, the waiver "must be established in an unequivocal manner" (explicitly or tacitly), be informed and without constraint[47]. It may take the form of consent, but not necessarily so[48].

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[41] See S. Besson, 'The Egalitarian Dimension of Human Rights', (2013) 136 *Archiv für Sozial- und Rechtsphilosophie Beiheft* 19-52; P. Gérard, *L'esprit des droits – Philosophie des droits de l'homme*, Brussels: Publication des Facultés universitaires Saint-Louis 2007, 206. As I have argued elsewhere, basic equality is how we should understand the reference to "dignity" in some of the ECtHR's case-law, and in particular the combined reference to freedom and dignity [equality, that is] (e.g. ECtHR, *Jehovah's Witnesses* (n. 17), 135; ECtHR, *Pretty* (n. 17), 65).

[42] See e.g. ECtHR, *Schüth* (n. 30), 71. By extension, see ECtHR (plenary), *De Wilde, Ooms and Versyp ("vagrancy") v Belgium*, judgment of 18 June 1971 (merits), applications no. 2832/66, 2835/66 and 2899/66, ECHR Series A no. 12, 65.

[43] ECtHR, *De Wilde, Ooms and Versyp* (n. 42), 65. See also on the linkage between equality of rights and democracy under the ECHR, ECtHR (Grand Chamber), *Ždanoka v Latvia,* judgment of 16 March 2006 (merits and just satisfaction), application no. 58278/00, ECHR 2006-IV, 98. See also Besson (n. 41); S. Besson, 'Les droits de l'homme internationaux et la forme politique fédérale', in S. Besson and E. M. Belser (eds.), *La Convention européenne des droits de l'homme et les cantons – Die Europäische Menschenrechtskonvention und die Kantone, Journée BENEFRI de droit européen de l'Institut de droit européen – BENEFRI-Tagung im Europarecht des Instituts für Europarecht*, Zurich: Schulthess 2014, 215-47.

[44] See e.g. ECtHR, *D.H. and Others* (n. 16), 204; ECtHR, *Konstantin Markin* (n. 12), 107, 150; ECtHR, *Hermi* (n. 36), 73.

[45] See also de Schutter (n. 22), 486-88; de Schutter/Ringelheim (n. 13), 442.

[46] Contra Fabre-Magnan (n. 11), 30, I see the problem as being solely one of the objective assessment of the validity of a waiver by consent, and not also of its admissibility in the first place.

[47] See e.g. ECtHR, *Pfeifer and Plankl* (n. 36), 74-79; ECtHR, *Hermi* (n. 36), 73; ECtHR, *D.H. and Others* (n. 16), 202-4.

With respect to consent, the Court pays close attention to the circumstances under which consent takes place and in particular of the economic constraints weighing on the right-holder.[49]

Here again, the approach of the Court seems correct. Because human rights protect personal autonomy and individual choice, the waiving of that choice should be fully autonomous. An objective assessment of the right-holder's autonomy in the circumstances of each case is called for[50]. Importantly, consent is not necessarily the reflection of an autonomous choice, and should therefore be approached with caution[51]. This is particularly the case when the object of consent is coercion[52]. In short, then, waivers may occur without consent and consent does not necessarily provide for a valid waiver. But when consent can be assessed as being in line with one's objective autonomy, it is difficult to argue it should be resisted[53].

Finally, the consequences of waivers. In this last respect, the Court's case-law has taken an odd turn that does not have much to do with drawing the consequences from a human rights waiver. Instead of leaving the waived right unapplied, it seems to consider that it applies and that the corresponding duties may be restricted by reference to the waiver, but only provided other justifications for a restriction are given[54]. Among those other conditions bearing on the justification for the restriction, the Court has mentioned, as it should, the usual grounds such as respect for other human rights, public security and so on. Depending on the cases, therefore, consent to the restriction may end up contributing to the justification of the restriction or not. This is unsurprising given the level of reasoning at which the Court is operating, but it is surprising to treat human rights waivers in this way.

This curious conflation in the Court's reasoning stems, as I explained before, from its lack of distinction between the state's invocation of a "waiver" or rather of individual consent to the restriction of one's rights, on the one hand, and the actual (explicit or tacit) waiver of one's rights by the right-holder, on the other. In the former case, consent is just one of the elements to consider in the balance when justifying a restriction to a human right, whereas in the latter, in the absence of a right, there should be no balancing or justification. Of course, in practice, for a case to reach the Court, an individual application is required and it is difficult to imagine an applicant applying to claim that her waiver was not acted upon and that state duties arose and were respected. As a result, discussions of real human rights waivers arise in the course of the Court's reasoning on the violation of other human rights and, in such cases, it is difficult to distinguish between real waivers and mere invocations of consent by the state to justify a restriction of the right. In those circumstances, it is actually safer for the right-holders to assume, as the Court does, that so-called waivers are potential justifications for restrictions

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[48] See e.g. ECtHR (chamber), *Deweer v Belgium*, judgment of 27 February 1980 (merits and just satisfaction), application no. 6903/75, ECHR Series A no. 35, 49-51; ECtHR (fifth section), *Suda v the Czech Republic*, judgment of 28 October 2010 (merits and just satisfaction), application no. 1643/06, not yet reported, 48.

[49] See e.g. ECtHR, *Sørensen and Rasmussen* (n. 37), 59.

[50] See also de Schutter/Ringelheim (n. 13), 442, 452-56.

[51] On the ambivalence of consent and how it is accepted as expression of a human rights waiver in sadomasochistic sexuality cases such as ECtHR, *K.A. and A.D.* (n. 11) and not in Muslim veil cases such as ECtHR (second section), *Dahlab v Switzerland*, admissibility decision of 15 February 2001, application no. 42393/98, ECHR 2001-V or ECtHR, *Leyla Sahin* (n. 40) (see, however, ECtHR, *S.A.S.* (n. 21), 119), see Fabre-Magnan (n. 11), 28-30. See also Tulkens (n. 11), 46-47; de Schutter/Ringelheim (n. 13), 469 ff.

[52] See also de Schutter/Ringelheim (n. 13), 454. See more generally M. Fabre-Magnan, 'Le domaine de l'autonomie personnelle – Indisponibilité du corps humain et justice sociale', (2008) 1 *Le Dalloz* 31-39, 32.

[53] See also Fabre-Magnan (n. 11), 42-45.

[54] See e.g. ECtHR, *Eweida* (n. 21), 83; ECtHR, *Fernández Martínez* (n. 21), 135, 141; ECtHR, *Schüth* (n. 30), 71.

and not actual waivers, even though one should hope for the sake of personal autonomy that valid human rights waivers can also be respected as such and the waived rights left unapplied. In hindsight, the Court is better advised to refer less automatically to "waivers" as "consent", and vice-versa; this would help its reasoning gain in clarity about the distinction between real and false waivers.

3. Human Rights "Not To"

A human right-holder may invoke a given right "not to" use her own rights (or to use them wrongly). For instance, she may invoke her right to life in order to die or her right to education to refuse education. If the right is (validly) invoked in this way in a concrete case, the concrete corresponding duties will arise. And potential conflicts of rights (and duties) may arise between the right-holder's rights (and duties) or between her rights (and duties) and those of others.

In what follows, I will discuss the ECtHR's case-law on the rights "not to" by taking two questions in turn: the existence of that right; and its consequences.

First of all, the existence of the right "not to". The case-law of the Court has confirmed that at least the freedoms protected under Article 11 ECHR, and by extension under Article 9 and 10 ECHR, give rise to positive as much as to negative rights: in short a freedom to do as much as the freedom not to do[55]. This has not however been extended to other ECHR rights, although it has not been excluded by the Court either. This is understandable as not all human rights are rights to accept and some are rights to be given. The latter are more difficult to conceive of negatively and so as to accommodate individual choice.

Second, the consequences of the right "not to". When the Court recognizes the existence of a freedom not to, it is as a privilege of the right-holder (a liberty-right): the state incurs no right legally to require the object of that freedom. It is easy to understand how strong a requirement that would be if all human rights entailed a "right not to": the protection of some dimensions of personal autonomy would end up undermining much of the legal enforcement of morality by not only setting duties on the state not to guide our conduct in some cases, but it would also deprive it of the right to guide *tout court*.

4. The Human Right to Personal Autonomy

A human right-holder may invoke the right to personal autonomy to protect her choices on how to use her other rights. For instance, she may invoke her right to personal autonomy to decide on whether and how to live or to die. If the right is (validly) invoked in this way in a case, the concrete corresponding duties will arise. And additional potential conflicts of rights (and duties) may arise between the right-holder's rights (and duties) or between her rights (and duties) and those of others.

In what follows, I will discuss the ECtHR's case-law on the right to personal autonomy by taking three questions in turn: the scope of that right; its conditions; and its limitations.

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[55] See e.g. ECtHR (chamber), *Sigurður A. Sigurjónsson v Iceland*, judgment of 30 June 1993 (merits and just satisfaction), application no. 16130/90, ECHR Series A no. 264, 37; ECtHR (Grand Chamber), *Chassagnou and Others v France*, judgment of 29 April 1999 (merits and just satisfaction), applications no. 25088/94, 28331/95 and 28443/95, ECHR 1999-III, 103.

First of all, the scope of the right to personal autonomy. According to the Court, the right to personal autonomy is protected under Article 8 ECHR,[56] but also under Article 9 ECHR in the specific context of religious autonomy[57]. And one may argue, by extension, under other freedoms such as Articles 10 and 11 ECHR, as well. It comes close to protecting a right to self-determination[58] and a right to individual choice. According to the Court, this "ability to conduct one's own life in a manner of one's own choosing includes the opportunity to pursue activities perceived to be of a physically harmful or dangerous nature for the individual concerned"[59]. And this extends to activities that may have a fatal outcome[60].

Second, the conditions of the right to personal autonomy. The Court's case-law is not very specific about those conditions, but it seems at times to branch out again into the discussions of free and uncoerced consent[61] one encounters in its reasoning on waivers. It has also mentioned the vulnerability of the right-holder, and how this may negatively affect her autonomy[62]. This seems right. For the right to personal autonomy to be validly exercized, therefore, one needs to have some way of assessing that autonomy objectively. Assessing autonomy is a difficult thing to do, of course. As mentioned before, consent is often invoked in this context as evidence of one's autonomy, but it needs itself to be assessed objectively as an expression of autonomy.

Finally, the limitations to the right to personal autonomy. According to the Court, the right to personal autonomy, like most other rights under the Convention, may be limited if justifications are provided for that restriction. Among those, the case-law mentions, of course, public morals and the human rights of others[63]. The latter raise the usual questions of conflicts of rights and their resolution[64]. Their invocation as justifications on the right to personal autonomy should be approached with some additional caution, however. This is particularly the case when the Court applies generalization arguments from the individual case to others. For instance, it claims that protecting one's right to choose how to die may endanger others'

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[56] See e.g. ECtHR, *Pretty* (n. 17), 66; ECtHR, *K.A. and A.D.* (n. 11), 83. On the development of personal autonomy under Article 8 ECHR, see Lévinet (n. 34); Ruet (n. 22).

[57] See e.g. ECtHR, *Jehovah's Witnesses* (n. 17), 135.

[58] See on this term and its interchangeable use with personal autonomy, ECtHR (third section), *Van Kück v Germany*, judgment of 12 June 2003 (merits and just satisfaction), application no. 35968/97, ECHR 2003-VII, 78; ECtHR (Grand Chamber), *E.B. v France*, judgment of 22 January 2008 (merits and just satisfaction), application no. 43546/02, not yet reported, 43.

[59] See e.g. ECtHR, *Jehovah's Witnesses* (n. 17), 135; ECtHR, *Pretty* (n. 17), 62, 66; ECtHR, *K.A. and A.D.* (n. 11), 83.

[60] See e.g. ECtHR, *Haas* (n. 19), 51.

[61] See e.g. ECtHR, *Jehovah's Witnesses* (n. 17), 119.

[62] See e.g. ECtHR, *Pretty* (n. 17), 72-74; ECtHR, *Keenan* (n. 16), 91; ECtHR, *Haas* (n. 19), 16-17. See also Ruet (n. 22), 731-32. On the ambivalence of the notion of vulnerability in the ECtHR's case-law, however, see S. Besson, 'La vulnérabilité et la structure des droits de l'homme – L'exemple de la jurisprudence de la Cour européenne des droits de l'homme', in L. Burgorgue-Larsen (ed.), *La vulnérabilité saisie par les juges en Europe*, Brussels: Bruylant 2014, 59-85.

[63] See e.g. ECtHR, *Jehovah's Witnesses* (n. 17), 119; ECtHR, *Pretty* (n. 17), 72-74; ECtHR, *K.A. and A.D.* (n. 11), 83.

[64] See e.g. ECtHR, *Keenan* (n. 16), 29. See e.g. S. Besson, *The Morality of Conflict – Reasonable Disagreement and the Law*, Oxford: Hart Publishing 2005; L. Zucca, *Constitutional Dilemmas – Conflicts of Fundamental Legal Rights in Europe and the USA*, Oxford: Oxford University Press 2007; O. de Schutter and F. Tulkens, 'Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution', in E. Brems (ed.), *Conflicts between Fundamental Rights*, Antwerp, Oxford and Portland: Intersentia 2008, 169-216; E. Brems (ed.), *Conflicts between Fundamental Rights*, Antwerp, Oxford and Portland: Intersentia 2008; P. Ducoulombier, *Les conflits de droits fondamentaux devant la Cour européenne des droits de l'homme*, Brussels: Bruylant 2011; S. Smit, *Resolving Conflicts between Human Rights*, dissertation, forthcoming. On human rights conflicts and waivers, see Van Drooghenbroeck (n. 21).

right to life because some of them may be vulnerable and not be able to exercise their right to personal autonomy[65]. This is a resurgence of human rights-paternalism in the name of the rights of others.

Interestingly, the limitations to the right to personal autonomy in the Court's case-law also include the right-holder's other rights,[66] even though those are not mentioned under any of the ECHR restriction clauses. Thus, the case-law mentions the right not to be discriminated against on grounds of gender[67]. This form of equality-based human rights-paternalism may be justified, as I explained before with respect to human rights waivers, by reference to human rights themselves and the equality they are constitutive of.[68] This is particularly important when the right to personal autonomy is invoked in the context of Article 9 ECHR and of religious autonomy: the latter form of personal autonomy has an additional collective dimension[69] whose implications for the equality of human right-holders should be resisted.[70]

To go further, however, it is difficult to see why those limitations should include other human rights of the right-holder than her equality[71]. Indeed, those other rights, such as bodily integrity,[72] for instance, may be waived, thus undermining the justification of their self-restriction, as it were. This applies, of course, only if the conditions for a waiver discussed before are fulfilled, and in particular in the case of an objective assessment of the compatibility of the waiver with the right-holder's autonomy. It is not, however, because there is an internal conflict between the rights of a right-holder that the right to personal autonomy should not be given priority and be balanced with those other rights. As a matter of fact, it would be surprising to see waivers of human rights that are not protected as rights in themselves succeed, while the invocation of the right to personal autonomy as a right would fail to take priority over (waivable) conflicting rights of the right-holder.

Conclusions

With the steady development of the right to personal autonomy in the case-law of the Court, the question of its limitations, especially in cases of harm to oneself, is bound to arise more and more often. Commodification, especially in the sexual but also reproductive context, has

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[65] See ECtHR, *Pretty* (n. 17), 74-75; ECtHR, *S.H.* (n. 20), 97, 110; ECtHR, *Evans* (n. 20), 82, 89; ECtHR, *Hristozov* (n. 35), 124-26. For a critique of this argument, see also de Schutter/Ringelheim (n. 13), 478-79.

[66] See e.g. ECtHR, *Pretty* (n. 17), 72-74.

[67] See e.g. ECtHR, *Jehovah's Witnesses* (n. 17), 119.

[68] Importantly, this point about the equality of rights-holders as a limitation to the right to personal autonomy should not be entirely identified with the argument that rights that pertain to one's relationship to oneself may be set aside by personal autonomy (e.g. in the context of hunger strike or assisted suicide), while others that pertain to one's relationship to others may not (e.g. in the context of dwarf tossing, surrogate motherhood, sadomasochism, prostitution) (Fabre-Magnan (n. 11), 43-44, 56). All human rights are relational in what they protect, indeed (see also Besson (n. 41)), and my argument here is that it is that very relation and equality they are constitutive of that may not be waived or derogated from. It is interesting to note in any case that most of the examples one may give of human rights pertaining to the relationship to oneself somehow imply the intervention of someone else in practice, whether of other private parties or of state authorities.

[69] See ECtHR, *Sindicatul* (n. 37), 159; ECtHR, *Fernández Martínez* (n. 21), 132.

[70] On collective rights and their implications for the equality of human rights, see also J. Waldron, 'Taking Group Rights Carefully', in G. Huscroft and P. Rishworth (eds.), *Litigating Rights: Perspectives from Domestic and International Law*, Oxford: Hart Publishing 2002, 203-20.

[71] One should also mention the blanket reference to "human dignity" in ECtHR, *S.H.* (n. 20), 113 and hence the indirect endorsement of the Austrian approach to assisted procreation techniques through the margin of appreciation argument. For a similar critique of what the recognition of the margin of appreciation implies in this case, see the dissenting opinion of Judges Tulkens et al.

[72] See e.g. ECtHR, *Jehovah's Witnesses* (n. 17), 119.

become an increasing concern. One should also mention concerns for the communitarian consequences of the invocation of personal autonomy in the religious context.

While it may have been fine to ignore the difficult questions raised by human rights-paternalism when the cases were sparse, the time has come for more coherence in the way in which the Court approaches our right to do wrong. With that right, it is the moral role of human rights that is at stake.