Waiver of Human Rights
Setting the Scene (Part I/III)*

Jørgen Aall

Dr Juris (University of Bergen) Professor of law University of Bergen, Professor II University of Oslo 1998–2005, Head of Research Group in Constitutional, International and Human Rights Law, University of Bergen. E-mail: aall@jur.uib.no.

Abstract: Whether, and under what conditions, does a waiver of rights according to the European Convention on Human rights exempt a state from its corresponding obligations? And – by extension – is it, under certain circumstances, obliged to respect a waiver and thereby grant the right-holder the opposite of an express right? This article will focus on these general questions: a waiver of a right guaranteed by the Convention must be validly established, in an unequivocal manner and not run counter to any important public interests. The latter requirement implies that there are limits to the right-holder’s self-determination regarding his rights; the importance of securing human rights may reach beyond the individual directly concerned. Consequently, the right-holder does not necessarily have the competence to dispose over the right so that he, by waiving it, relieves the state of its obligation to secure the right in question. Nevertheless, the right-holder’s self-determination, too, may carry weight in particular situations and in relation to particular rights. Also this article intends to clarify the relationship between waiver and two concepts in the extension: ‘negative’ and ‘preferred’ rights. It is argued that a right-holder can, to a certain extent, claim the opposite of what a particular article expressly grants him. The legal basis for such (possible) claim is discussed. The study applies ‘ordinary legal method’ (relevant terms of the treaty (especially ECHR) read in their context, in the light of its object and purpose and with due regard to case law).

Keywords: Waiver of Human Rights, Inalienable Rights, Self-Determination, Important Public Interests, Negative Rights.

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I Introduction

1.1 Points of Departure

(a) The questions to be answered in this and two follow up articles are whether, and in that case under what conditions, a waiver of human rights exempts a state from its corresponding obligations; by extension, whether, and under what certain circumstances, it is obliged to respect a waiver and thereby grant the right-holder a right to the opposite of an express right.

(b) From Roman law we derive the sentence *volenti non fit injuria* (he who consents suffers no injury). It is uncertain whether or not the sentence aims to express a general principle concerning the individual’s autonomy, excluding sanctions against the offender for any actions to which the victim has consented. In modern society, such an idea is in any case unacceptable. A range of considerations can lead to the opposite conclusion: there may be doubt about whether the right-holder understands the consequences of her waiver; the waiver may be given under constraint; the rights of others may be involved or the interference with – or, more correctly, deviation from – the right in question may be of such gravity or of such a nature that society cannot accept it on moral grounds.

The idea that human rights represent such values that dispensation from them cannot easily be granted is plausible. But is the will of the right-holder – his self-determination – really irrelevant? In legal philosophy as well as in international writing on the law, human rights are often described as universal and ‘inalienable’. This and similar phrases are common in legal texts, and typically in national constitutions as well. The American Declaration of Independence (1776) states that all human beings have ‘certain *inalienable* rights, that among these are life, liberty and the pursuit of happiness’, and the German constitution (Article 1 (2)) states somewhat similarly: ‘Das Deutsche Volk bekennt sich darum zu *unverletzlichen* und unveräußerlichen Menschenrechten als Grundlage …’.

Moreover, what has come to be described as ‘The International Bill of Rights’, the Universal Declaration and the two follow-up Covenants of 1966 on Civil and Political Rights (CCPR) and Economic, Social and Cultural Rights (ESCR), all refer in their preambles to ‘equal and *inalienable* rights of all members of the human family [as] the foundation of freedom, justice and peace in the world’. In

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its preamble, the European Convention on Human Rights (ECHR, 4 November 1950) refers to the Universal Declaration, but has no explicit phrase concerning inalienability. Instead, it refers to and adopts the Declaration's aim of securing the rights therein.

The rights of ECHR and the extent of the states' general obligation according to Article 1 to 'secure' them despite any waiver from the right-holder will be at the centre of our attention (see 1.2 below).

The text in ECHR and similar conventions leaves room for interpretation and characterisation. Some authors suggest, basically with reference to the importance of human rights, that there is (and should be) no room to waive such rights. Others take a more flexible approach, underlining that self-determination is also a human right. However, logically, the right to self-determination does not necessarily imply a right to trade off (other) human rights. But if, in addition to the value of self-determination itself, this trade improves the right-holder's conditions – be it his personal freedom and reputation, or his economic rights – this must be considered a substantial, although not necessarily decisive, argument in favour of a flexible approach: where the accused waives his right to a full trial by accepting a fine, he may escape publicity and imprisonment, or at least benefit from a more lenient sanction. Arguably, this illustrates that his determination to waive rights vis-à-vis a public authority (see 1.2.3.2 below) may be defensible. Waiver may be equally relevant at a horizontal level, between private parties (see 1.2.3.3 below): Without giving up (some of) his freedom to express him or herself on job-related matters, the right-holder will not get the job.

In a liberal democracy, at least in principle, it seems strange if the individual were to be barred from utilising such advantages stemming from his human rights. Correspondingly, however, it is clear that any negotiator can be subjected to duress, especially where the bargaining power of the parties is unequal (which is most often the case), not only where the right-holder's adversary is a public authority, but also, for example, a private corporation with a monopoly. Hence, even if one admits waiver as a market mechanism, general principles governing contract

4 See art 1 of Protocol 1 to ECHR and, for that matter, the UN Covenant on Economic, Social and Cultural Rights, art 11.
5 Concerning this distinction, see 3.2.5.4 below.
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The law relating to the existence and interpretation of a declaration of intention, its validity and its compliance with superior values of society are correspondingly important and will have to be carefully considered.

The hypothesis that advocates of maximum individual freedom and advocates of society’s responsibility for protecting fundamental rights are bound to meet somewhere in the middle, is palpable. When taking the position that there should be no room for waiver, one has to define a relatively narrow waiver concept in order to open a necessary corridor for individual self-determination, also in the human rights context. On the other hand, a (seemingly) more flexible position most likely will have to set some limits on the acceptability of a waiver. Thus, my hypothesis is that differences in view to a large extent are ostensible. The golden mean seems to be that on the one hand the relevance of a waiver cannot be disregarded under all circumstances and in relation to all rights, on the other that a state governed by the rule of law cannot accept waiver as the sole basis for a deviation from the state’s human rights obligations without subjecting it to thorough control.

Under what conditions a waiver is acceptable – the absence of duress and the like is one factor that immediately springs to mind – will be discussed.

(c) When linked to rights, the terms ‘universal’ and ‘inalienable’ are both ambitious and ambiguous. As far as we know, there are no human beings (right-holders) elsewhere in the Universe. Hence, the phrases ‘worldwide’ or ‘global’ rights would appear to be more pertinent. Although that also indicates an ambitiously broad domain, it is inherent in the concept itself that human rights must be secu-

6 Compare the Vienna Convention on the Law of Treaties, especially arts 11 and 31 – 33, which to a large extent reflect general principles of contract law.
8 Compare the Vienna Convention on the Law of Treaties, especially arts 51 and 53.
9 Loucaides (n 2) 48-49, states that ‘human rights … are not private personal rights that can be … waived by the individual.’ But in the next sentence he declares that ‘[t]he individual may choose not to exercise any of the human rights guaranteed by the convention.’ However, it remains unresolved whether the right-holder’s choice under all circumstances is decisive.
red irrespective of where an individual resides: *everyone* in the world has them.¹⁰

(d) ‘Global’ is a wide domain, and, the wider the domain in which the rights apply, the more urgent the need for an adjustment of the rights to ‘local’ values and traditions.

Not surprisingly, therefore, most of the convention rights allow for *exceptions and limitations* subject to certain conditions, typically that the *interference* is in accordance with *law* and is *necessary in a democratic society in order to protect certain interests*. ‘[T]he rights and freedom of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society’ (cf. the Universal Declaration Article 29 (2) and comparable phrases in a range of Articles in the follow-up Conventions) may be considered necessary and thus justify interference (see 1.2.3 below).

The opportunity to adjust the ‘universal’ (global) rights to competing demands of a given ‘domestic’ society is strengthened by a principle developed in case law: the admittance of a *margin of appreciation* for the convention states in the implementation of the rights (obligations). This margin is especially, but not exclusively, linked to the proportionality-assessment in the second paragraph of Articles 8-11 respectively. Its extension varies, inter alia with the right in question and the (political versus legal) character of the purpose allegedly justifying the interference: generally it is wider in relation to interferences with property rights compared to interferences with the freedom of expression, and wider if the interference (with the latter right) serves ‘moral’ grounds compared to ‘the authority and impartiality

¹⁰ Just as a broad domain concept gives rise to a need for delimitation and clarification, the right-holder concept – ‘everyone’ – does so as well. A newborn is undoubtedly a human being and qualifies automatically as ‘everyone’, a phrase frequently used in the human rights instruments (see ECHR art 1). In one instance, namely art 12, the circle of right-holders is expressly limited: only ‘men and women of marriageable age’ have the right to marry and to start a family. Generally, the rights use the same concept as in art 1: ‘everyone’ has the right to ... (or the negation ‘no one’ shall be subjected to ...). Despite these similarities, material differences can dictate differences in the content of the concept as it is applied in different contexts. The age and stage of development of the protected party will influence the extent, even the existence, of the protection. While art 3 may be important already from before birth, as a limit on any treatment of the foetus, it makes no sense to argue that it is protected against arbitrary deprivation of liberty (art 5). In relation to most rights, except those laid down in arts 2 and 3, the protection will be without significance for the newborn, and first have substance once the child reaches the age of majority. Again, art 5 offers an example: a juvenile’s right to liberty of person has to be balanced against parenting rights (art 8). The content of the rights to expression and organisation (arts 10 and 11), will also in all probability have to be determined with due regard to the stage of development.
of the judiciary’. Especially in relation to questions towards the outer limit of a right, where no uniform standard or practice can be found among the Convention States, this margin may be substantial and of decisive importance for whether there is a liberty or even an obligation for the state to respect a waiver. Even though human rights are ‘universal’ in principle, most of them are subject to limitations and adaptations.

These observations also suggest that rights may be limited by the right-holder’s own dispositions (waiver), so that the term ‘inalienable’ is the name of the possible result of a complex consideration that as well may conclude otherwise. Only if the individual cannot waive the right in any conceivable situation, the right is inalienable.

1.2 Legal Basis for the Evaluation of Waiver

1.2.1 Introduction

To the extent that legal consequences can be attached to waiver, which will be investigated below, it serves as a defence for the respondent state whereby responsibility for a human rights violation is avoided. The defence is relevant both before national and international judicial authorities.

Before national authorities, the question is whether there is an entitlement – or even an obligation – to disrespect a waiver. The question may arise either in the form of an entitlement (or obligation) to criminalise and prosecute a particular conduct, even if consented to, or in the form of an entitlement (or obligation) for the legal system (the courts) not to assist in the enforcement of a contractual obligation entailing the waiver of particular rights.

Before the international authorities, the question is whether the actions of the national authorities in this respect are in accordance with the Convention: e.g. that they were right in punishing certain conduct even if it was consented to.

Both articles 38 and 1 of ECHR, governing the competence of The European Court of Human Rights (ECtHR) to assure that an eventual friendly settlement

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12 Such as is the case for euthanasia, even if it concerns one of (or the) most fundamental of the Convention Rights, the right to life (art 2).
13 In the latter case we can for the present speak of a ‘negative right’ for the right-holder, see further part 5 below.
between the applicant and the responsible state respects Convention rights, and governing the competence and responsibility of the contracting state to secure the same rights respectively, have a bearing on the assessment of the legal consequences of waiver rights. The two rules point in the same direction: waiver is relevant, but not necessarily decisive (1.2.2 and 1.2.3 below).

1.2.2 ECtHR’s Competence to Ascertain that a Friendly Settlement is in Conformity with Human Rights: the ‘Constitutional Nature’ of the Convention

The principal obligation of the ECtHR to place itself at the disposal of the parties with a view to securing a friendly settlement between the applicant and the respondent state (ECHR art 38) indicates that the will of the individual is at least relevant at this stage: He can waive his right to a binding decision by the ECtHR. The fact that the right-holder in this way can ‘forgive’ a wrongful act does not, however, necessarily mean that his initial acceptance of the same act places it in accordance with the Convention. And, even if one accepts that the rule in art 38 has some relevance, it is apparent that the will of the individual concerned is not decisive. ECtHR’s responsibility is to supervise the conformity of the settlement with ‘respect for human rights’. Arguably this demonstrates the constitutional nature of the Convention. 

The underlying rationale is that respect for a human right may reach beyond the individual directly concerned. Consequently, the right-holder does not necessarily have the competence to dispose the right so that he, by waiving it, relieves the state of its obligation to secure the right in question.

15 In response to the Government’s submission – that substantive or territorial restrictions were permissible under the provisions of former art 25 (individual applications) and 46 para 2 (conditioned recognition of the Competence of the Court) – the Court in Loizidou v Turkey (App no 15318/89) ECHR 1996-VI, underlined that ‘such a system … would not only seriously weaken the role of the Commission and Court in the discharge of their functions but would also diminish the effectiveness of the Convention as a constitutional instrument of European public order (ordre public) (para75). In para 93 the Court repeats and elaborates the same point: ‘the Court must bear in mind the special character of the Convention as an instrument of European public order (ordre public) for the protection of individual human beings and its mission, as set out in art 19 (art 19), “to ensure the observance of the engagements undertaken by the High Contracting Parties”’. 
1.2.3 The State’s General Obligation to Respect and Secure Convention Rights

1.2.3.1 Introduction

(a) Arguably, the state’s obligation to ‘secure … the rights and freedoms defined in … this Convention’ (ECHR art 1; cf CCPR Article 2 (1)) indicates a responsibility for maintaining the rights independently of the wishes of the individual concerned.

(b) Primarily the obligation to ‘secure’ is a negative obligation on the state to abstain from an activity that interferes with human rights (eg inhuman treatment). The obligation further means that the state should not only refrain from interferences, but also that the rights should be actively secured. This positive obligation for example means that criminal law provisions should be provided to protect the rights (eg the right to life) and that an independent investigation should be conducted where they are or may have been violated (eg in case of a suspicious death).

Pursuant to firm case law, this positive obligation also entails the protection of rights in the sphere of relations between individuals. In order to regulate their conduct, such measures as criminal law provisions and enforcement aimed at deterring certain unwanted acts may be required, even if consented to by those involved. In this (horizontal) sphere of relations between individuals, civil law measures may, however, be most appropriate: a contract obligation in conflict with important public interests could be set aside (considered null and void) by the courts.

(c) In the sphere of relations between individuals it is most natural to analyse the effect of a waiver of rights in terms of the responsible state’s positive duty to secure the right (typically proclaimed in the first paragraph of an article, while in the vertical field of relations between the individual and the state it may be more

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16 See for example Assenov v Bulgaria (App no 24760/94) 1998-VIII 3264.
17 See for example X and Y v Netherlands (1985) Series A no 91 concerning sexual abuse (art 8) and Siliadin v France (App no 73316/01) ECHR 26 July 2005 concerning forced labour (art 4).
18 See Rommelfanger v Federal Republic of Germany (1989) 62 DR 151, where it is stated that enforcement with the assistance of the competent state authority (typically the courts) of contractual obligations between private parties does not as such constitute interference by a public authority, but can activate positive obligations with a view to securing the rights in question. In Young, James and Webster v UK (Application no 7601/76; 7806/ 77) 1981) Series A no 44 (see immediately below), the State’s responsibility was activated by the enactment of legislation which made the disputed treatment lawful, thereby failing to secure the applicants’ rights under art 11.
natural to regard a waiver-based deviation from rights as – or equal to – an interference that has to meet the conditions for interferences, typically pursuant to the second paragraph of the article in question.\(^\text{19}\) (see further 1.2.4 below). In both cases, the efforts to achieve a fair balance between the conflicting interests – the value of respecting the (original) will of the individual and the societal importance of upholding the right – is what matters.

1.2.3.2 The Obligation to Secure where there is a Waiver Vis-à-Vis Public Authorities
(a) A deviation from a right based on a direct waiver vis-à-vis public authorities comes close to an interference and will therefore, presumably, be subject to stricter scrutiny compared to cases concerning waiver between private parties. A typical situation is where an accused accepts a fine, and thereby waives his right to a fair hearing, in order to escape publicity and have the case brought to a swift conclusion.

(b) However the individual’s relationship with the public authorities in a given case may be horizontal, in the sense that it originates from a contract and not from exercise of public power. In \textit{Young, James and Webster},\(^\text{20}\) the Court stated that the state can be held responsible regardless of whether an alleged violation originates from its exercise of power or from its competence laid down in contract. In \textit{Halford},\(^\text{21}\) the question of interception of an Assistant Chief Constable’s office-telephone came up. Given the fact that the right-holder’s counterparty is still a public authority, this situation will also be tantamount to interference. This seems to be the reasoning in \textit{Copland}\(^\text{22}\) that concerned monitoring of a teacher’s telephone, e-mail and internet use. The Court referred to:

The Government’s acceptance that the College is a public body for whose acts it is responsible for the purpose of the Convention. Thus, it considers that in the present case the question to be analysed under Article 8 relates to the negative obligation on the state not to interfere with the private life and correspondence of the applicant …\(^\text{23}\)

\(^{19}\) See the \textit{Glasenapp v Germany} (App no 9228/80)(1986) Series A no 104 and \textit{Kosiek v Germany} (App no 9704/82) (1986) Series A no 105 cases, where a dismissal on the grounds of the expression of certain opinions was pronounced by a public authority and therefore constituted interference.

\(^{20}\) \textit{Young, James and Webster v UK} (n 18).

\(^{21}\) \textit{Halford v UK} (App no 20605/92) ECHR 1997-III.

\(^{22}\) \textit{Copland v UK} (App no 62617/00) ECHR 3 April 2007 [39].

\(^{23}\) Ibid [39].
1.2.3.3 The Obligation to Secure where there is a Waiver Vis-à-Vis another Private Party

(a) Let us move to the constellation in which the right-holder’s counterparty is another private party. It was only confirmed some decades after its entering into force that there is a third party application of the Convention. This means that the state’s responsibility to secure Convention rights can be activated because of its neglect. The implications are many.

At a general level, the legal order must be arranged in such a way as to prevent private violations. There can be no doubt that a lack of effective criminal provisions protecting life will place the state in violation of art 2 of the Convention in a murder case. This express provision cannot form the basis for an antithetic interpretation of less express articles. It follows from the general obligation to secure the rights (art 1) that, inter alia, criminal provisions directed against private violations are needed for effective protection of the right in question. Hence, functional criminal provisions protecting the physical integrity (articles 3, 5 and 8) are needed.

Moreover, the obligation to secure the rights entails a responsibility to implement the general legal provisions in practice. This means that breaches have to be investigated effectively and, depending on the circumstances, that preventive measures are implemented in order to avoid a violation.

The decisive factors in this respect are: censurable passivity in a situation where the authorities have knowledge (or negligent lack of knowledge) of a risk of a violation of the Convention. In Osman, a case concerning a killing by a stalker, the Court established the test to be applied:

24 In X and Y v Netherlands (n 17) a violation of art 8 was found to have taken place because the national criminal provisions were ineffective. A lacuna in Dutch law, made it impossible to instigate criminal proceedings against the perpetrator. See in general A Clapham, Human Rights in the Private Sphere (Clarendon Press, Oxford 1993).
25 See art 2 ECHR, which (as the only material provision) expressly states that the right to life shall be protected by law.
26 See, among other authorities, X and Y v Netherlands (n 17).
the 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.\textsuperscript{28}

Even though the case concerned the obligation to protect life, the test is – mutatis mutandis – of more general relevance. However, the importance of the right and what is at stake for the right-holder will naturally influence the vigilance required by the state. In any event, the state’s obligation:

\begin{quote}
[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.\textsuperscript{29}
\end{quote}

This is in line with well-established case law and doctrine, establishing that the state’s margin of appreciation tends to be wider when positive obligations are activated. (see 1.1 above).

(b) If the state neither has nor should have had knowledge of an activity between consenting individuals, it cannot reasonably be blamed for not taking remedial action. Hence, the state cannot automatically be blamed (and be responsible) for not preventing dangerous sexual acts between consenting individuals or for not protecting an employee against improper surveillance.

Nevertheless, the issue may be made manifest through accessible contract provisions, the practice being brought to public knowledge by the media or by complaints or similar procedures by the individual concerned (or any other). If the authorities for such (or any other) reasons have or should have had the relevant information that a right-holder has been subjected to (possible) private violations, activation of the state responsibility to act may be proper.

\textsuperscript{28} See Ibid [116]. Similar statements are found inter alia in Branko Tomasic and others v Croatia (App no 46598/06) ECHR 15 January 2009 [50-51], and in Opuz v Turkey (App no 33401/02) ECHR 9 June 2009 [129].

\textsuperscript{29} See among other authorities, the Keenan v UK (App no 27229/95) ECHR 3 April 2001[90] concerning suicide.
Depending on the circumstances, which include the gravity of the matter and nature of the right involved, different steps might be considered appropriate. One important context where rights between private parties are waived is in the employment field. In such situations, the considerations will most probably concern the right to private or family life or the freedom of religion, expression or association (arts 8-11).

If the state has failed to provide legal protection against wrongful dismissal for whistle blowing or against discrimination in employment, this may prompt an examination into whether general law provisions protecting the whistle-blower or disfavoured exist, typically in employment law, and whether court proceedings are accessible for anyone who claims to be subjected to an unjustified dismissal.

In graver instances, criminal law provisions and their enforcement may be proper, for example when it comes to the protection of private or family life, personal liberty or protection against inhuman or degrading treatment in public or private institutions. Where physical integrity is at stake, criminal law provisions are normally required.

1.2.3.4 The State’s Right or Obligation to Trump the Right-Holder’s Self-Determination where no other Parties are Directly Involved

There are situations in which the right-holder through his action (or passivity) acts on her own, making it unnatural to define a counterparty vis-à-vis whom she can be said to have directly waived her rights. She can nevertheless practice the right to self-determination: she decides to end her life or to expose herself to great risk by her own actions (e.g., mountain climbing). The state may still be under an obligation to make efforts to prevent the acts in question in contravention of the right-holder’s will.

1.2.3.5 Concluding Remarks

Consequently, the question of the consequences of a waiver can arise in a context where the right-holder waives his right directly in relation to a public authority, in a context involving two private parties as well as in a situation where the right-holder is on his own. Because positive obligations are involved, there is an assumption that the state’s responsibility to set aside a waiver is more subdued in the latter two situations.

Although the general obligation to secure is an important point of departure

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30 Examples are Rommelfanger (n 18) and Lustig-Prean and Beckett v UK (App no 31417/96; 32377/96) ECHR 27 September 1999.
for our study (constituting a basis for the ‘paternalistic’ view), it may still be argued that the question remains whether waiver relieves the state of its obligation (the ‘individual freedom’ view). Hence, in order to progress in the investigation, one is required to see what this general secure-obligation is together with the particular rights it refers to. The rights are laid down in different categories of special provisions.

1.2.4 The State’s Obligation According to Different Kinds of Rights

1.2.4.1 Derogable and Non-Derogable Rights

(a) The state is under an obligation to secure the Convention rights. The other side of the coin is its admission to interfere with (or derogate from) them for certain purposes (see typically ECHR the second paragraph of arts 8 – 11). But these provisions do not mention ‘waiver’ among the circumstances that can justify an interference. And it can be argued that, since the exception clauses normally are regarded as exhaustive and ought to be narrowly construed, waiver cannot form the legal basis for an exception. This perception would indicate that a deviation from rights will be regarded an interference notwithstanding any waiver, and consequently that the general conditions for interferences apply.

However, a waiver-situation may, and arguably should, be viewed from a different angle: when a right-holder waives a right, there is no interference with that right. And if there is no interference (first paragraph of the article in question), there is no need for a justification (according to the conditions in the second paragraph of the same article). In other words, a waiver may be regarded as a sufficient basis for relieving a state of its normal obligation to comply with the Convention. For example, if an employee promises to pay loyalty to his employer by keeping job related information secret, there is no interference with his freedom of expression if he is dismissed for breach of the commitment. It is no more than a natural sanction for breach of a self-imposed obligation. Similarly, it is natural to consider limitations on the opportunity to pray and worship during working hours as being waiver-based. Hence, there is no interference with the freedom of religion if a

31 In Winterwerp v Netherlands (App no 6301/73) (1980) Series A no 33, the ECtHR confirmed that a provision that opens for an exception from a convention right (in casu the personal liberty in ECHR art 5(1)) is exhaustive and must be narrowly construed, see para 96. The point is confirmed in firm case law, see inter alia A and others v UK (App no 3455/05) ECHR 19 February 2009 [162] and Gebura v. Poland (App no 63131/00) ECHR 6 March 2007 [26].

believing teacher is denied time off for such purposes, or is dismissed for acting in contravention of instructions in this respect.  

Irrespective of whether a waiver-based exception from human rights is regarded an interference or not, it must be presumed that a committed state cannot regard their implementation with indifference, but rather is under an obligation to secure the rights. (see 1.2.3 above). Consequently, there should be a control of whether an exception from that point of departure is well founded. It is striking that this control may be conducted according to a pattern comparable to that applicable to traditional interferences (typically regulated by the second paragraph of the same article that proclaims the right): if the right-holder’s situation is only insignificantly affected, the right is not ‘interfered’ with and the state is not required to provide any justification. If his situation is affected beyond this lower threshold, a legal basis – either in waiver (consent) or in general law – for the ‘interference’ must be proven. Further, the requirement that the ‘interference’ must be necessary … in the interest of health, morals or a variety of similar purposes (see eg art 10(2)), apparently has a parallel in expectations that waiver is purpose-rational and ‘in conformity with public interests’ or similar formulations.

When a range of public purposes, including the ‘private life of the parties’, can justify deviation from the states’ normal duty to respect a particular individual’s right, for example from the right to a public hearing in ECHR art 6(1), the same individual’s wish with regard to the exercise of the right must at least be considered relevant when assessing the conditions for interference in a particular case.

I assume that a waiver will be a qualified argument in favour of accepting the deviation from a right that should otherwise have been respected. So, supposedly waiver may justify a parallel transfer of the necessity assessment in favour of the state. It may be sufficient for it to demonstrate that there is no other (more general) interest involved on whose behalf the holder of the individual right has no competence to dispose (see chapter 4 below).

In short, waiver is presumed to be capable of substituting the law-requirement and influencing the necessity-consideration in relation to ‘interferences’ with derogable rights.

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33 See as an illustration the Commission’s decision in Rommelfanger (n 18) 27.
34 The law-basis may be either written or unwritten, but must be accessible and sufficiently precise, see Sunday Times v UK (App no 6538/74) (1979) Series A no 30 [47].
35 Ibid [49].
36 See 1.4 on the points of departure in case law and further elaborations generally in 4.2 and 4.3.
37 This seems to be the reasoning in Mr B v UK (1981) 45 DR 41.
A presumption that non-derogable rights are inalienable seems plausible. Obviously, the protection against torture (ECHR art 3) cannot be waived. However, the following example indicates that even within this category of rights distinctions have to be made. The protection against inhuman and degrading treatment (see again ECHR art 3) is non-derogable too. Hence, there can be no (unilateral state) interference with the right. Nevertheless, the right-holder’s consent to (or waiver of protection against) certain treatment is presumably capable of removing the matter completely from the ambit of art 3, for example if she calls for a medical operation or treatment.

1.2.4.2 Substantive and Procedural Rights

As to the distinction between substantive (material) and procedural rights, a preliminary observation is that the Court occasionally has characterised provisions from both categories as ‘of particular importance’, as ‘holding prominent place within the Convention rights’ or the like. From a logical point of view, this probably means that other rights are of (relatively) lesser importance. Any statements in that direction are, however, conspicuously absent in case law. To this, it may be added that the distinction between the two often is difficult. While substantive rights may contain procedural elements, procedural rights may contain substantive ones. We have already, in relation to the discussion of derogable rights, made use of the – basically procedural – art 6 as an example: the ‘private life of the parties’, can justify deviation from the states’ normal duty to respect the right to a public hearing.

Additionally, although specific procedural rights in art 6(3) may appear more unreserved, case law shows that when read together with the overriding fairness-standard in art 6(1), a similar limitation as for interferences with substantive rights can be justified. Again, there is a parallel between such limitations of procedural

38 See for example the *Handyside v UK* (1976) Series A no 24 on the substantive freedom of expression (art 10).
39 See for example the *Golder v UK* (1975) Series A no 18 on the procedural fair trial (art 6).
40 The Court often reads this into the proportionality requirement, accepting that there is no violation of the substantive right if the national procedure in relation to the interference is satisfactory (see, among other authorities, *McMichael v UK* (App no 16424/90) (1995) Series A no 307-B.
41 See also for example *Golder* (n 39) where the question was the right to a court as such.
42 See *Doorson v Netherlands* (App no 20524/92) ECHR 1996-II where the interest to protect a witness justified anonymity to the detriment of the defendant who according to the text of art 6(3)(d) has an unreserved right to cross-examine.
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rights and requirements that waiver is purpose-rational and ‘in conformity with public interests’ or similar formulations.

Further, it is difficult to see that there are any clear distinctions between the two categories when it comes to the irreversible nature of a waiver: a circumstance that ought to increase the qualms. True, it may be observed that waiver of procedural rights often are irreversible: it is too late to regret a waiver of the right to a defence counsel (art 6) once a case has been decided. But this characteristic may cling to substantive rights as well: if one consents to an amputation (art 3) there is most often no way back.

Therefore, a classification of rights into procedural and substantive does not provide conclusive answers. Other criteria, such as the character and quality of the right in question, may prove to be more helpful.

1.2.4.3 Mandatory and Non-Mandatory Rights
The text of the article governing a particular right may shed light on the question of the admissibility of waiver, and the picture becomes even clearer when the text is read in its context. A distinction between mandatory and non-mandatory rules (rights and obligations) is brought in focus.

A non-mandatory rule aims at general regulation of the situation in which the right-holder finds herself. However, as opposed to mandatory rules, she can expressly or tacitly, (see 2.3 and 2.4 below), at least as a starting point, choose to abstain from utilising the established right. Some illustrations follow.

According to the text of art 5(3) ECHR ‘everyone arrested or detained in accordance with … paragraph 1 c … shall be brought promptly before a judge’ (if he is not released). A straightforward reading clearly indicates a mandatory right. Irrespective of the attitude of the right-holder, the prosecution is obliged to take action in order to obtain a judicial ruling authorising continued detention. Whether the right-holder is merely passive or actively waives a court hearing seems to be of no relevance.

A comparison with the closely related right in art 5(4) underscores the man-

43 See 4 below on the similarities between the conditions for interferences with substantive rights and waiver.
44 See 1.4 on the points of departure in case law and further elaborations generally in 4.2 and 4.3.
46 The obligatory right to a court hearing is not to be confused with the non-obligatory nature of the right of the detainee to be present during the hearing.
natory nature of the art 5(3)-right. Article 5(4) states that ‘everyone who is deprived of his liberty … shall be entitled to take proceedings … [before] a court’. The emphasised word indicates that this is a non-mandatory right, a right that the right-holder can choose not to invoke.

However, even though the text provides a starting point, closer consideration on the basis of the overriding theme – the public interest in and ultimate responsibility for the matter (see 4 below) – may subsequently be necessary: a society based on the rule of law cannot accept that a person deprived of his liberty remains so over a prolonged period of time without any form of judicial control. Especially where the deprivation of liberty initially rests on an administrative decision, this would deprive society of an important means of securing separation of powers and (thereby) preventing arbitrariness, which would strike at the very roots of the rule of law.

Similarly, when pursuant to art 6, everyone ‘[i]n the determination of his civil rights and obligations or of any criminal charge against him … is entitled to a fair hearing … by an independent and impartial tribunal …’, the public interest in the matter dictates differentiation between cases concerning civil rights and petty offences on the one hand, and cases where the accused faces serious penal sanctions on the other. In other words, the wording of the text (Vienna Convention art 31(1) on ‘ordinary meaning’) will have to be modified on the basis of general principles enshrined in the convention as a whole (Vienna Convention art 31(1) and (3) on ‘context’).

Article 6 offers ample illustrations of the need for a closer evaluation of whether or not the right is mandatory. While the basic rules in art 6(1) (fair hearing by an independent tribunal) and the right in art 6(2) (presumption of innocence) presumably lie within the realm of ex officio application, it is fair to assume that other art 6 rights, including the ‘minimum rights’ in art 6(3), to a large extent are non-mandatory in the sense that they presuppose active assertion on the part of the right-holder. Some illustrations: when art 6(3)(d) entitles the accused ‘to obtain the attendance … of witnesses…’, implicitly he must invoke the substance of the right. Similarly, if he is entitled to conduct his own defence (art 6(3)(c)) he must at least indicate a wish to do so.

In short, while a right which according to the text is mandatory should be taken on its face so that waiver is without any effect, caution ought to be displayed with inferring that an apparently non-mandatory provision can be waived under all circumstances.
1.3 Continuation: Preconditions for International Supervision

1.3.1 Relevance of the Admissibility Conditions in a Waiver Context
The conventions list a series of conditions for examination of the merits of a complaint by the competent convention bodies (see arts 34 and 35 ECHR; cf CCPR Optional Protocol arts 1-3). The requirement that the applicant must claim to be the victim of a violation and have exhausted all effective national remedies is of special relevance to the discussion of waiver: if a right-holder has waived a particular right, it seems prima facie natural to assume that he has achieved what he wanted, so that he is no longer a ‘victim’ (the victim requirement), and correspondingly odd that non-implementation of the right should give him any reason to complain before national or international bodies (the exhaustion requirement).

1.3.2 The ‘Victim’ Requirement
The victim requirement means that the applicant, as a basic rule, must be directly affected by an act or omission in contravention of the Convention. This means that the applicant must have a sufficient legal interest in a decision by the Convention bodies that his Convention rights have been breached. If he does not satisfy this locus standi test, the application will be declared inadmissible.47

The first point to be explained in relation to the victim requirement and waiver is that the right-holder may dispute that there is a waiver (see part 2 below). If this allegation is substantiated, the case proceeds with an ordinary victim assessment.

Even if, initially, a particular right is waived, the right-holder can at a later stage have an interest in arguing that her waiver should have no effect because it was given under duress or similar invalidating causes (see part 3 below).

Under certain circumstances, she can also argue that the waiver was granted under similar constraint. She may have considered it necessary to waive certain rights in order to obtain or maintain a position or a similar essential good: in order to obtain or maintain a job or position, the right-holder may initially have considered it necessary to waive her right to private life, for example, in respect of sexual orientation. Later she may consider herself not to be bound by the waiver and hence argue that to fire her for living with a person of the same gender violated her right to respect for private life.

Finally, the matter may be of such a nature that important public interests

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should block any relevance of waiver: to accept the right-holder’s waiver of integrity by donation of an eye, will probably be considered in contravention of important public interest, even if it is to the benefit of a third person (see generally chapter 4 below).

Hence, the right-holder may subsequently assert that the right in question should have been respected, either because there was no waiver or no valid waiver, or despite her waiver. The fact that there is no international supervision and decision unless the individual directly concerned – the ‘victim’ – takes action, therefore hardly sheds light on the question of the consequences of a previous waiver if such subsequent action is taken before national and international supervising bodies.48

1.3.3 The ‘Exhaustion’ Requirement
In order not to lose her opportunity to have a violation remedied by national authorities or confirmed by ECtHR (or the CCPR Committee), the right-holder has to exhaust effective national remedies. That typically means appealing to a higher national tribunal where the substance of his complaint regarding non-respect of her right is argued. In principle, however, the exhaustion rule does not shed light on the legal effects of a waiver.49 It is of a procedural nature. If the right-holder remains passive, the question of whether, despite a waiver of rights in relation to national authorities, there has been a violation, will never be brought before any judicial authority. In other words, the question of whether the right in question was waivable or mandatory (hence in principle subject to ex officio application), will remain unresolved. The ECtHR’s decision in Sadik is symptomatic:

Even if the Greek courts were able, or even obliged, to examine the case of their own motion under the Convention, this cannot have dispensed the applicant from relying on the Convention in those courts or from advancing arguments to the same or like effect before them, thus drawing their attention to the problem he intended to submit subsequently, if need be, to the institutions responsible for European supervision (see the Van Oosterwijck v. Belgium judgment of 6 November 1980, Series A no. 40, p. 19, para. 39).50

And in order to retain the possibility of international supervision, the right-holder

48 Cf De Schutter (n 14) 484, who slightly more subtly states that ‘[t]he procedural argument [implicit in Article 34] is not totally convincing.’
49 Cf ibid 488, who asserts that the local remedy rule ‘strongly argues against a prohibition of waiver under the Convention.’
50 See Van Oosterwijck v Belgium (App no 7654/76) (1980) Series A no 40 [33].
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has to react with a certain promptness. In order to be declared admissible (ECHR art 35), an application to the ECtHR will have to be sent no more than six months after national remedies have been exhausted.51

If the application is not declared inadmissible for any of these reasons, the state may still invoke the waiver argument, asserting that, because of the waiver, the right-holder is not a victim of any violation (art 34). The ECtHR will most probably consider this question together with the merits of the case, where proof of the existence and validity of an alleged waiver, and its conformity with important public interests, are scrutinised.

1.4 Points of Departure in ECtHR Case Law

ECtHR case law on waiver is quite substantial. Most often, however, the decisions are scant in terms of legal reasoning. One point of departure is found in Håkansson and Sturesson52 (concerning waiver of the right to a public hearing pursuant to Article 6(1)):

neither the letter nor the spirit of this provision (Article 6 § 1 of the Convention) prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to have his case heard in public […] However, a waiver must be made in an equivocal manner and must not run counter to any important interest.'53

Subsequent case law could be interpreted so that the Court now seems more inclined to tone down the right-owner's freedom to waive (nothing 'prevents a person from …') and instead hint at the limits. Thus, in Blake:

51 The two rules in art 35 are closely connected. The decision by the highest national body that offers an effective remedy is the starting point for the six-month time limit. The applicant cannot obtain a prolongation by use of remedies not comprised by the exhaustion rule (see, among other authorities, Oehrschlick v Austria (App no 11662/85) (1991) Series A no 204 [41-42]. In cases where there are no national remedies, the starting point is when the violation took place, see the Commission's decision in (1978) 8 DR 211, more precisely when it ended (see its decision in (1979) DR 15 5). The time limit is interrupted by the registration of the application, at the latest on the date in the sixth month corresponding to the date in the month when it started to run.
52 Håkansson and Sturesson v Sweden (App no 11855/85) (1990) Series A no 171-A.
53 Ibid [66].
The Court recalls that a waiver of a right guaranteed by the Convention – in so far as it is permissible – must not run counter to any important public interest, must be established in an unequivocal manner and requires minimum guarantees commensurate to the waiver’s importance.\(^{54}\)

The first part of the citation (‘that a waiver of a right … in so far as it is permissible’) may be interpreted so as to confirm that the Convention rights could be classified as subject to or not subject to waiver. But such rigid classifications may prove to be difficult. And, as we shall see, there are alternative roads leading to Rome. One is to link the importance of the waived right to the next element of the formulation: ‘… must not run counter to important public interest’; \(\text{prima facie}\) it appears plausible to assume that waiver of the protection against ill-treatment (ECHR art 3), for example by accepting certain working conditions, more easily will ‘run counter to important public interests’ compared to waiver of the right to wear casual clothes at work (art 8).

Such a more flexible approach to waiver of rights seems to be reflected in recent decisions returning to the \(\text{Haakansson and Sturesson}\)-phrasing.\(^{55}\) According to the Court in \(\text{Hermi}\):\(^{56}\)

\[\text{neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial.}\] \(^{57}\) \(\ldots\) However, such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance.\(^{58}\) In addition, it must not run counter to any important public interest.\(^{59}\)

\(^{54}\) See \(\text{Blake v UK}\) (App no 68890/01) ECHR 26 September 2006 [127]. See similarly \(\text{Håkansson and Sturesson}\) (n 52), [66] and \(\text{Pfeifer and Plankl v Austria}\) (App no 10802/84) (1992) Series A no 227 [37]. See also the Commission’s decisions in \(\text{Rommelfänger}\) (n 18) 151, and \(\text{Vereiging Rechtiwinkels Utrecht v Netherlands}\) (1982) 26 DR 203.
\(^{55}\) See (n 52).
\(^{56}\) \(\text{Hermi v Italy}\) (App no 18114/02) ECHR 18 October 2004.
\(^{57}\) See also \(\text{Kwiatkowska v Italy}\) (App no 52868/99) ECHR 30 November 2000.
\(^{58}\) See also \(\text{Poitrimol v France}\) (App no 14032/88) (1994) Series A no 277-A [31].
\(^{59}\) See also \(\text{Sejdovic v Italy}\) (App no 56581/00) ECHR 1 March 2006 [86] and \(\text{Elo v Finland}\) (App no 30742/02) ECHR 26 September 2006 [32].
These decisions concerned waiver of procedural rights according to art 6 ECHR. However, The Court’s statements are of a general character, and are evidently applicable mutatis mutandis on a broader spectre of rights. In DH for example the Court stated that ‘… no waiver of the right not to be subjected to racial discrimination [in casu ECHR Article 14 read in conjunction with Article 2 of Protocol No. 1] can be accepted, as it would be counter to an important public interest’. And in Ivanova the Government’s allegation, that there was a waiver of the freedom of religion (ECHR art 9) in an employment context, was rejected because ‘the applicant was pressured … to renounce her religious beliefs in order to keep her job’.

1.5 Outline for Further Presentation

On the basis of ECtHR’s general formulations referring to different rights, it is fair to assume that the basic elements to be considered are whether there is proof for a waiver that is valid and in conformity with important public interests. The latter requirement includes, in addition to the basic substantial aspect, also a procedural aspect: the deviation from the right in question may run counter to ‘important public interests’ because waiver is given without safeguards – typically a legal assistant – which under the circumstances is needed. Naturally, it depends on the particularities of the case before it, which of the cumulative conditions is subject to the most thorough examination. Often, and it may be possible to discern when, the Court avoids the difficult evaluation of whether the right at issue can be waived at all, because it finds that there is insufficient proof for a waiver or that the waiver in any case is null and void.

I will proceed with an investigation of these main questions related to the existence of a valid and socially acceptable waiver generally in chapters 2 – 4. Then, still at a general level, I address the question of whether the state may not only have the liberty, but also the obligation to respect a waiver (chapter 5).

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60 DH and others v The Czech Republic (App no 57325/00) ECHR 13 November 2007.
61 Ibid [204].
63 Ibid [84].
64 On the basis of the findings in the general sections I will, in two subsequent articles, embark on an investigation of (a right to) waiver of selected rights.
2. When is there a Waiver?

2.1 ‘Self-Inflicted’ Conditions

2.1.1 No Waiver if there is Only a Remote Causal Link between the Interference and the Right-Holder’s Choice of Action

Clearly, there can be no question of waiver by the mere fact that an individual could have avoided the situation that led to the violation by acting differently: if he had followed a pure path there would never have been a charge and an unfair trial (art 6(1)); by staying at home instead of going to Pakistan to be educated in Islam, he would not have been subjected to torture and indefinite detention as a terrorism suspect; by marrying, she would have avoided the laws discriminating co-habitants (arts 8 and 14), and so on.

2.1.2 The Situation in which the Right-Holder’s Actions More Directly Hinder Enjoyment of her Rights

The situation is quite different where the right-holder’s actions are what directly hinder the exercise of her rights. It is natural to say that she has herself to thank for the non-implementation of the right in the particular situation – and consequently that she implicitly has waived it. For example, to the extent that false and misleading statements from an accused hamper the investigation, a corresponding delay in the determination of the case should not be considered ‘unreasonable’ (ECHR art 6(1)). Or, due to serious threats from the accused, it might be necessary to protect a witness by granting anonymity that in turn renders it impossible for the accused to cross-examine the witness (ECHR art 6(3)(d)). But since the situation is directly due to his own actions (threats), it is fair to say that it is equivalent to a waiver (of the right to cross-examine the threatened witness). Furthermore, a right-holder who participates in illegal or otherwise reprehensible activity, and thereby places himself outside the community, cannot claim assistance from the organs of the same society to enforce a civil claim arising from such activity.

65 Amongst others, Amnesty reports of this (the Mohammed al-Amin-case) and similar cases in a report on human rights and the war on terror dated 23 June 2006.
66 Compare examples by De Schutter (n 14) 485.
67 Such waivers may nevertheless be invalid due to constraint, see generally 3.2.3 below.
2.1.3 Borderline Situations

There are borderline situations in which the evaluation is more complex. If a prisoner goes on a hunger strike, it is not obvious that the authorities should be relieved by arguing that the fatal outcome was self-inflicted. The same holds true for self-inflicted ‘dirty protest’ against prison conditions, such as in the McFeely case. IRA prisoners had protested, *inter alia* by means of defiling their cells with food waste and by smearing their faeces on the cell walls. The Commission left no doubt that the conditions, if imputable to the state, would have amounted to inhuman treatment. But, because the conditions were considered to be self-imposed, no violation was found to have taken place. In other words, the applicants had in reality revoked the art 3 protection in the particular circumstances.

As a matter of principle, it seems correct that the state cannot be considered responsible for any harm a person inflicts on himself. In other words it may be reasonable to infer from the right-holder’s conduct that he waives a certain protection.

2.2 Passivity as Evidence of Waiver – Introductory Remarks

2.2.1 Excursus: The Right-Holder’s Passivity is Irrelevant in Relation to Mandatory Rules

The distinction between mandatory and non-mandatory rules is of importance in relation to the legal basis of a waiver. Evidently the mandatory character of the right renders the right-holder’s passivity irrelevant: the right must be implemented notwithstanding. Such is the case for the right to judicial control of arrest: the arrested ‘shall be brought before a court’ (see art 5(3)).

2.2.2 Rights that Presuppose Active Assertion

On the other end of the scale are rights that the right-holder is totally free to decide whether or not to utilise. The right (freedom) to marry (art 12) is illustrative. This right presupposes an initiative or activation by the right-holder. Take the freedom of expression as another example: the plain fact that the right-holder remains silent does not by itself create any presumption that he intends to waive the right he has if he wishes to speak. The considerations will in these cases concentrate on whether passivity (silence) is caused by a fear of speaking and hence re-

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69 Again, such waivers may be invalid due to constraint, see 3.2.3 below.
70 See 1.2.4.3 above.
present an invalid waiver. Similarly, the mere fact that a (potential) voter remains passive (on his sofa) does not, by itself, indicate any waiver of the right to vote (art 3 of the First Protocol). Again the consideration will concentrate on whether the right-holder’s passivity is due to threats, coercion or the like, rendering a waiver invalid (see chapter 3 below).

2.3 Continuation: Tacit Waiver

2.3.1 When Can a Waiver Reasonably be inferred from the Right-Holder’s Passivity?

In some cases the right-holder’s passivity in a given situation may shed light over his intention to waive because it is reasonable, given the circumstances, to infer that he had an invitation to perform actively if he had wished to utilise the right in question. The accused’s right to obtain the attendance of (more) defence witnesses (art 6(3)(d)) offers an example. It goes without saying that such inferences are often uncertain and hence should be applied with caution, especially where a clarification can easily be obtained.

In terms of proof and evidence, a tacit waiver represents more of a challenge than an express waiver. The test, admittedly vague, ought to be whether the waiver, although tacit, is sufficiently unequivocal to be taken as evidence of the right-holder’s informed will to renounce a particular right. The ECtHR has used the even vaguer term ‘whether it is reasonable in the circumstances of the case’ to infer a waiver from the right-holder’s passivity.71

While still vague, the assessment of whether a waiver can ‘reasonably’ be inferred from passivity can begin by asking if the situation invites the right-holder to invoke a particular right actively if she wishes it implemented, typically because it is the ‘normal thing’ to do in a given situation. This, in turn, depends both on the right in question and on the (internal) rules governing its exercise.

In Håkansson and Stureson,72 the right-holders did not claim a right to a public hearing (Article 6(1)) despite the fact that they, in the Court’s opinion, had every opportunity to do so. The reasoning is rather brief:

No express waiver was made in the present case. The question is whether there was a tacit one. …, in the present case the Swedish law expressly

72 Håkansson and Stureson (n 52).
provided for the possibility of holding public hearings: the Code of Judicial Procedure gave the Göta Court of Appeal power to hold public hearings ‘where [this was] necessary for the purposes of the investigation’ (see paragraph 39 above). … Since the applicants’ appeal mainly challenged the lawfulness of the 1985 auction and since in Sweden Law such proceedings usually take place without a public hearing, the applicants could have been expected to ask for such a hearing if they had found it important that one be held. (emphasis added)73

Apparently, it was basically the fact that such proceedings usually took place in camera, combined with the possibility in law of an open hearing, that was considered to ‘invite’ the applicants to act if they wanted an open hearing.74 Hence, their passivity could reasonably be interpreted as a waiver. However, there is still a risk of the right-holder’s rights being deviated from despite his having had no intention to waive.

In a number of subsequent cases, the Court elucidates the standard to be applied to the evaluation of whether passivity can reasonably be held to be an expression of an acceptable waiver of the right to a public hearing. A connecting thread is whether or not the passivity can be explained by the fact that general rules exclude publicity, so that a request for publicity would in any case have been in vain.75 Hence, in **Diennet**,76 the Court found that, because the law excluded a hearing (particularly para 34), the right-holder’s passivity could not in any event be interpreted as a waiver. The same rationale applies in cases where the national court’s practice is never to hold a hearing. In **Werner**,77 the Court stated:

> Even if the relevant provisions did not expressly rule out holding a public hearing as they did in the **Diennet** case (see the judgment cited above, p. 15, § 34), the Court, like the Commission, considers it established that in practice there is never a public hearing in such proceedings under section 6 (2) of the Compensation (Criminal Proceedings) Act (see paragraph 19 above) where criminal proceedings have been discontinued by the investigating judge. That is clear both from the spirit of the Act and from

73 See **Håkansson and Stureson** (n 52) [67].
74 See also **Zumtobel v Austria** (App no 12235/86) (1993) Series A no 268-A [34] and **Rolf Gustafson v Sweden** (App no 23196/94) ECHR 1997-IV [47].
76 **Diennet v France** (1996) Series A no 325-A.
77 **Werner v Austria** (App no 216835/93) ECHR 1997-VII 2496.
the analyses of it by legal writers. … That being so, the applicant cannot be blamed for not having made an application which had no prospects of success. [48]78

Not surprisingly, the outcome of the evaluation is the opposite where the ‘law’, including the practice by national courts (in the particular field), opens for a waiver. The statements in Pauger79 are illustrative:

However, the Constitutional Court does not as a rule hear parties unless one of them expressly asks it to do so. The applicant could consequently have been expected to ask for a hearing if he found it important that one be held (see the Håkansson and Sturesson judgment previously cited, pp. 20-21, para. 67).

As the applicant made no such request he must be considered to have unequivocally waived his right to a public hearing (see the Håkansson and Sturesson judgment previously cited, p. 21, para. 67).80

A precondition should be that the information about the law/practice is accessible to the right-holder. By way of an analogy with the law requirement for interferences, whose object and purpose is ‘to enable the citizen to regulate his conduct’,81 the accessibility requirement encompasses a subjective and an objective element. The objective element focuses on institutional accessibility, namely the means chosen by the relevant institutions to ensure that any right-holder in that situation has an effective possibility of acquiring knowledge about the state of the relevant law. The subjective element opens up, to a certain extent, to taking the right-holder’s special qualifications into consideration. Again ECtHR’s statements in Pauger are illustrative:

Mr Pauger is moreover a professor of public law and is therefore familiar with Constitutional Court procedure (see, mutatis mutandis, the Melin v. France judgment of 22 June 1993, Series A no. 261-A, pp. 11-12, para. 24).82

78 Ibid [47] and similarly Gautrin and others v France ECHR 1998-III [38].
79 See Pauger v Austria (App no 16717/90) ECHR 1997-III.
80 See Pauger (n 79) [60-61] and similarly Zumtobel (n 74) [34] and Rolf Gustafson (n 74) [60-61].
81 See Sunday Times (n 34) [49].
82 See Pauger (n 79) [60].
2.3.2. Clear Indications are Necessary to Infer Waiver from Passivity

In accordance with the line of reasoning in Pauger,83 one cannot simply presuppose the right-holder's knowledge about his legal choices. Without clear indications that he understands or ought to understand the legal situation (that he is in the position to waive) one should refrain from such an inference.

In Hermi,84 the Court emphasises the fact that the applicant was represented by two lawyers. In the Court’s view this could fairly be taken so that he understood the consequences of opting for a summary procedure. In Dorozhko,85 on the other hand, it did not find a sufficiently firm basis (in the applicants’ conduct) to conclude that they had waived the right to contest the qualification of the judge. The second applicant had voiced his doubts at the hearing before the city court and both the applicants raised the issue in their appeals.

To raise the issue (in substance) before national authorities is a precondition for the examination of the case at the international level (see 1.3.3 above). This means that if the applicants had not made an appeal concerning the matter, there would have been no case before ECtHR. However, Dorozhko86 should not be interpreted so that the absence of any voicing of doubts or objections against a certain conduct before or when it is taking place equals acceptance. It is suggested that, as a rule, the authorities should take active steps in order to clarify the right-holder’s position. For example, a presiding judge considering whether to proceed in camera should be required to ask the right-holder whether or not he wants an open hearing. Procedural economy (or similar objections) can hardly count heavily against such a mechanism for ‘provoking’ an express waiver.

Hence, when the Court in Håkansson and Stureson87 emphasises that ‘no important public interest’ spoke against a waiver given the circumstances of the case, this is clearly relevant when there is sufficient proof of a valid waiver, but skips the question we are concerned with here: whether there is sufficient proof. In Protopapa,88 on the other hand, it appears unproblematic to take the applicants conduct into account (and to conclude that the proceedings were ‘fair’): the applicants were offered the opportunity inter alia of legal assistance and of calling and cross examining witnesses, but chose to abstained from the benefit of any of these rights.

83 Pauger (n 79).
84 See Hermi (n 56).
85 See Dorozhko v Estonia (App no 14659/04; 16855/04) ECHR 24 April 2008.
86 Ibid.
87 Håkansson and Stureson (n 52).
88 See Protopapa v Turkey App no 16084/90 (ECtHR, 24 February 2009) [84].
Storck\textsuperscript{(99)} (concerning deprivation of liberty) is also illustrative at this point. As a result of several unsuccessful escape attempts, it was clear beyond doubt that the right-holder’s initial consent to stay in a clinic at any event should be considered to have been withdrawn (see 3.5 below).

A certain reluctance to accept a tacit waiver as the basis for deviation from rights ought to be the general rule. In criminal cases (and comparable cases that involve a similar public responsibility), there are especially good reasons for being wary of accepting a tacit waiver by placing the ‘burden of initiative’ on the right-holder.

Case law confirms this, at least in principle. In Hermi\textsuperscript{(90)} (concerning absence from hearing) the Court held that:

a person ‘charged with a criminal offence’ must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to force majeure (see Colozza, cited above, p. 16, § 30). At the same time, it is open to the national authorities to assess whether the accused has shown good cause for his absence or whether there is anything in the case file to warrant finding that he was absent for reasons beyond his control (see Medenica, cited above, § 57; see also Sejdovic, cited above, §§ 87–88).\textsuperscript{(91)}

Naturally, there is a special need for clarity where the right-holder is under age or for other reasons vulnerable. This point is underlined in Panovits\textsuperscript{(92)} (concerning fair trial):

\begin{itemize}
  \item \textsuperscript{89} See Storck v Germany App no 61603/00 (ECtHR 16 June 2005).
  \item \textsuperscript{90} Hermi (n 56).
  \item \textsuperscript{91} See Hermi (n 56) [75]. However case law is not consistent. In Khametshin (App no 18487/03) (Judgment date 04.03.10) the majority expressed that ‘there is no reason to believe that the applicant did not understand that his consent to the reading out of the statements implied the waiver of the right to examine them in the subsequent proceedings at the trial’ (para 40). This test was, in my opinion correctly, described by the minority as wrong. The minority, in my opinion correctly, recommended that ‘[i]nstead of taking as a starting point that ‘there is no reason to believe that the applicant did not understand...’ the Court should be satisfied that the applicant did understand that his consent to the reading out of the statements implied the waiver of the relevant right. In other words, it should transpire from the file that the waiver was ‘unequivocal’. Then, and only then, should the Court accept any waiver as ‘unequivocal’.
  \item \textsuperscript{92} Panovits v Cyprus (App no 4268/04) ECHR 11 December 2008.
\end{itemize}
before an accused can be said to have impliedly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (see *Talat Tunç v. Turkey*, no. 32432/96, 27 March 2007, § 59, and *Jones v. the United Kingdom* (dec.), no. 30900/02, 9 September 2003). The Court considers that given the vulnerability of an accused minor and the imbalance of power to which he is subjected by the very nature of criminal proceedings, a waiver by him or on his behalf of an important right under Article 6 can only be accepted where it is expressed in an unequivocal manner after the authorities have taken all reasonable steps to ensure that he or she is fully aware of his rights of defence and can appreciate, as far as possible, the consequence of his conduct.93

2.3.3 Application of the Principles: Public Figures’ Tacit (Implicit) Waiver of the Right to a Private Life

The right to a *private life* has revealed a whole spectrum of difficult themes that can be seen in a waiver perspective. By way of example: is there an implicit waiver of right to privacy when the right-holder seeks publicity, for example by taking on political or other influential positions?

The Court is, with good reason, eager to stress the importance of the freedom of expression (and information), especially where the press exercises a watchdog function vis-à-vis powerful persons or institutions. A central argument is that this control serves a fundamental societal role in controlling power, and that persons representing power have to bear the burden that the media’s critical spotlight carries with it because they have sought the public spotlight. An example, among other authorities is *Egeland and Hanseid*94 where the Court, by contrast, found that the national conviction of the applicants for having published pictures of the accused did not violate art 10. Emphasised was the fact that the publications concerned persons who had not sought the public light (thereby waiving or reducing the protection of art 8):

The Court is unable 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

93 See Ibid [68].
94 *Egeland and Hanseid v Norway* (App no 34438/04) ECHR 16 April 2009.
who voluntarily exposes himself or herself by virtue of his or her role as a politician95… … or as a public figure.96 (emphasis added)

More recent case law indicates an even stronger protection of private life. In other words the Court is not so willing to accept that a public figure – by becoming a public figure – waives his right to protection of his private life. In Standard Verlags GMBH (No 2)97 no violation of art 10 was found in the case where a newspaper had been convicted for having published pieces of gossip concerning a politician.

This development is to be applauded. Especially where the deviation from the right in question (private life) is not important for the protection of the conflicting interest (freedom of expression), it is correspondingly more problematic to infer a waiver of the same right. While a politician who is caught in practising double standards will have to accept focus on his private life, the situation is different where a person’s private life is violated by an utterance not supported by any political dimension. In Von Hannover,98 the ECtHR attached importance to the fact that the applicant (Princess Caroline of Monacco) had not sought the public spotlight and found it decisive that the pictures of and reports about her had no (political) public interest. Hence there was a violation of art 8. In waiver terms, this can be put as follows: a waiver of private life could not reasonably be inferred from the applicant’s conduct.

2.3.4 Application of the Principles: Tacit Waiver of Private Life in an Employment Context

In its landmark decision in Niemietz,99 the Court confirmed that the keywords ‘private life’ and ‘home’ in art 8 not only cover interferences that take place at home in the classical sense of the habitual residence, but also interferences at work. In this case, a search of the right-holder’s office was held to have violated art

95 See Lingens v Austria (App no 9815/82) (1986) Series A no 103 [42].
96 See Egeland and Hansen (n 94) [62]. See also Fressoz and Roire v France (App no 29183/95) (ECHR 21 January 1999 [50] and Tønsberg Blad AS and Haukom v Norway (App no 510/04) ECHR 1 March 2007 [87].
97 See Standard Verlags GMBH v Austria (No. 2) (App no 21277/05) ECHR 4 June 2009. In the balancing between the right to private life and the freedom of expression ECtHR has always attached importance to whether the press coverage contributes to public debate or not. A distinction also has to be made between public figures and private persons. In particular, politicians have to put up with more.
98 See Von Hannover v Germany (App no 59320/00) ECHR 24 June 2004.
99 See Niemietz v Germany (App no 13710/88) (1992) Series A no 251-B.
8. Apparently, art 8 is relevant in employment, which opens for the evaluation of a wide range of conflict situations in that context.

The mere fact that an employee willingly (otherwise art 4 is applicable) puts his labour at his employer’s disposal does not mean that the employer can unilaterally limit his remaining rights, unless that is a clear and reasonable consequence of the very essence of his primary obligation: to supply labour. To argue otherwise would be tantamount to saying that, by choosing to live in a society, everyone gives up every right the government finds it necessary to interfere with. Or, in somewhat more limited terms, that everyone who installs a telephone (or buys a mobile phone), thereby accepts tapping.

Nevertheless, depending on the circumstances, taking on work may reasonably entail self-imposed limitations. The questions of whether and to what extent the right to a private life (art 8) can implicitly be considered to have been waived are not uncommon, especially in the employment context. It can be argued that private life is a right that, more than other rights, is special in that its content is determined by the right-holder’s wishes (his self-determination). As a preliminary observation, this position can only be confirmed to some extent. Presumably, as in the case of other rights, the evaluation has to focus on whether or not the attitude (passivity) of the right-holder can reasonably be interpreted as a waiver of (a certain aspect of) the right.

In the same way as interferences by public authorities must be lawful (and necessary for specific purposes), it is, as a starting point, reasonable to demand that a restriction imposed by an employer must find its justification either in a clear legal provision or in a correspondingly clear statement from the (autonomous) right-holder. It is at any rate a precondition that the waiver does not run counter to any public interest (see 4 below).

However, to continue the analogy with the requirements for interferences, it is neither desirable nor possible to regulate every aspect of legal conditions or consequences of a commitment in minute detail. Instead, the answer to the question of whether or not a certain aspect is covered often emerges when the text of the contract is read in its context on the basis of its object and purpose.

The more the situation indicates that the right-holder cannot have entered into it without expecting the (now) disputed limitation, and the more apparent it is to an observer that the said limitation is necessary for the realisation of legitimate and apparent interests of the right-holder’s counterparty – his employer

100 Compare inter alia Kyriakides v Cyprus (App no 39058/05) ECHR 16 October 2008 where the applicability of art 8 to activities of a professional or business nature is confirmed.
who has imposed the limitation – the more it is reasonable to infer a waiver with respect to that specific aspect of the right. Obviously, a teacher has waived his right to stay at home (art 8) during working hours. Another example is a pilot's tacit acceptance of wearing the company's uniform during working hours. He thereby waives the right to wear jeans as part of his right to self-determination with regard to clothing, also a part of his private life.

2.3.5 A Tenuous Distinction between Tacit and Express Waiver

The distinction between express and tacit waiver is often tenuous. If the presiding judge at the outset of a hearing reads the names of the sitting judges, and the accused does not object, his waiver of the right to an impartial tribunal is tacit. If the accused is asked whether he has any objection to the composition of the court, a negative answer is an express waiver. As suggested above, there are good arguments in favour of provoking an express waiver.

In McGonnell,\(^1\) the Court emphasised that the question of whether the applicant should have raised the question of partiality before national courts depended on whether it was reasonable in the circumstances. His failure to do so was found not to be unreasonable and not to amount to a tacit waiver. The Court's approach seems to be influenced by the fact that the prospect of succeeding with such an objection was modest, to say the least.

In Hennings,\(^2\) the Commission points to the relationship with protection against self-incrimination: safeguards must exist so that national authorities do not evade their responsibility to conduct a fair trial by asserting that the accused (or other party) is free to object and thus bring proceedings in order.

The Commission considers that the responsibility for the institution and due conduct of criminal proceedings against a person lies in principle with the competent authorities themselves, and it cannot be expected from the defendant to contribute towards his own conviction. [51]

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101 McGonnell (n 71).
2.4 Express Waiver

2.4.1 Express Waiver is Evidentially Advantageous
If there is an express waiver, the evidential situation is most often clear, especially if the waiver is given with reference to a current situation, as opposed to a future situation (see 2.4.2 below). In *Deweer*, the ECtHR applied, for the first time, the principles for access to court in criminal cases. There was no doubt that a waiver had been given. The applicant had signed and returned a form sent to him by the prosecution in which he expressly and in writing waived the right to institute criminal proceedings in a current situation:

Kindly note that I am today paying the sum proposed in your letter of 30 September 1974 by way of friendly settlement; consequently, the criminal proceedings become barred once and for all (section 11 par. 1 of the Act of 22 January 1945) and the closure of my establishment will no longer be put into effect. (emphasis added)

It is assumed that the *Deweer* case is symptomatic in this respect. Whereas there may often be disputes about the existence of a waiver of particular art 6 rights during the proceedings (because it is tacit, inferred from passivity), disputes over the existence of a general waiver of the access to court are more seldom, probably because an express and written form is normally required by national law. Nevertheless, disputes over the validity of such waivers (as in *Deweer*) and their conformity with important public interests are not uncommon.

2.4.2 Express Waiver with Reference to a Future Situation: Relationship to Faulty Assumptions
There is often a prior express statement or agreement whereby the right-holder expressly waives a particular right with reference to a future situation. Typically, he signs an employment contract that commits him to keep professional information secret (he waives the freedom of expression in a particular context). If that is the case, the question of proof is unproblematic. *Rommelfanger* is a good

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104 The Court had the benefit of its previous decisions, especially *Golder* (n 3939) and *Airey v Ireland* (App no 6289/73) (1980) Series A no 32 concerning access to court in civil proceedings.
105 See *Deweer* (n 103) [10].
106 *Deweer* (n 103).
107 *Rommelfanger* (n 18) 151 et seq.
example. The applicant, who was a physician employed by a Catholic hospital, had been dismissed for having expressed an opinion on abortion, in the press, supporting existing legislation. The opinion was in contravention of the position of the church, his employer, to whom he had expressly pledged loyalty.

Although such waiver is unproblematic as a starting point, it may, even if explicit, be hard to prove that it was meant to cover the current situation in which it is activated. Blake is illustrative:

The applicant made an undertaking in 1944 not to reveal information obtained as part of his employment. The Court does not consider that, in so doing, he can be said to have unequivocally waived his right to complain, under a Convention that had not yet been drafted, about any 'penalties' that he might suffer, no matter how severe, arising from an infringement of that undertaking. (emphasis added)

Additionally, even if proven, the relevance of a previous waiver may be weakened with the passing of time. There is a gradual transition from the question of proof to the question of validity, more precisely the question of faulty assumptions (see part 3 and especially 3.4 below).

3 When is there an Invalid Waiver?

3.1 Introduction

What we are about to examine are the legal consequences of a right owner’s dispositions. In legal terms, an action that does not reflect the free and informed will of the person concerned is invalid and hence without consequences. What we know about declarations of intention from contract law is relevant here.

A waiver may be given ‘on the spot’ with the intention of having an immediate effect on the right-holder’s rights in a current situation. It may also be intended to have effect in a (hypothetical) future situation. This could presumably have a bearing on the assessment of the validity of a waiver (see 3.4 below).

108 Blake (n 54)
109 Ibid [128].
110 It may also have relevance to a past situation, in terms of a friendly settlement whereby the right-holder renounces the right to a judgment by the ECtHR, see 1.2 above.
Furthermore, objections as to the subject matter of the waiver, the right-holder’s incompetence and various forms of coercion and duress are all causes capable of rendering a waiver null and void (see 3.2 and 3.6 – 3.9). In extension of duress, another factor emerges, namely whether the right-holder is ‘forced’ to obtain an essential good, a job for example (see 3.2.5).

3.2 Coercion

3.2.1 Torture and Similar Grave Methods Causing Harm or Suffering
Different kinds of qualified duress or illegal pressure on the right-holder will render the waiver invalid. Obviously, torture or other kinds of ill-treatment will have this effect. But the same can also apply to less grave methods aimed at influencing the right owner’s will, such as isolation or similar detention conditions aimed at extracting a confession from a suspect and hence forcing him to waive the privilege against self-incrimination (anchored in art 6(1)). This situation must be distinguished from the legitimate use of such measures as detention and isolation for evidential or similar purposes.

Similarly, threats and shock methods are capable of rendering a confession invalid. An example from Norwegian case law is illustrative. The suspect was woken up in the middle of the night by police officers in cognito. Without further notice and with some brutality, he was brought to the scene of the crime. Evidently the arrangement aimed giving the accused the impression that he was about to be assassinated, and he confessed. The Supreme Court expressed criticism, but refused to quash the conviction because the remaining evidence was sufficient for conviction.111 Presumably the ECtHR would have applied similar reasoning and concluded that no violation had occurred.112

3.2.2 Reprisals and the Like
Less grave methods, even (too active) attempts to persuade the right-holder to waive a right, ought to render the waiver invalid.113 Further, it may be relevant to

111 See RT-1948-46.
112 But compare US Supreme Court in Brewer v Williams 430 US 387 97 S.Ct. 1232 (1977) where incriminating statements during a car trip given to police officers despite the latter’s promise not to interrogate and in the absence of a lawyer was considered a violation of the protection against self-incrimination.
113 Compare Frumer (n 3) [118], commenting on pressure aimed at constraining a victim to withdraw an application to Strasbourg.
take the right-holder’s particular situation into consideration. In Kurt\textsuperscript{114} ECtHR took account of the special vulnerable situation for inhabitants in South East Turkey, a region where anyone who took legal action ran the risk of reprisals. Consequently, to refrain from such action could hardly be regarded a waiver, and in any case an invalid one. Similarly, the fact that the right-holder belongs to a minority-group may urge special caution on the part of the authorities in order to avoid any legitimate perception of constraint.\textsuperscript{115}

3.2.3 Pressure Inherent in the Situation

What \textit{prima facie} appears as a self-imposed condition, and hence as a waiver of a protection, may nevertheless have to be regarded an invalid waiver because the situation compels the right-holder to act as he does.

In McFeely\textsuperscript{116} the conditions complained of (the dirty protest instigated by IRA-prisoners) was well known to the prison authorities.\textsuperscript{117} And it can be held that the prisoners’ actions were a last resort – touching on freedom of expression and amounting to compulsion – aimed at highlighting unacceptable conditions in the prison and seeking improvement. In such a situation it may be argued that even assuming that there was a waiver, the authorities were under an obligation to disregard it because it ought to be considered invalid. This seems to be the Commission’s approach, as it considered the specific situation but was satisfied that the measures taken in response were appropriate and sufficient.

Even though the state is under an obligation to \textit{make efforts} to prevent a right-holder’s destructive action, ‘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\textsuperscript{118} argues against rigid obligations in this respect.

\begin{flushleft}
115 See similarly \textit{Frumer} (n 3) [119].
116 McFeely (n 68).
117 We remember the relevance of these criteria for the consideration of state responsibility (see 2.1.3 above).
118 See \textit{Keenan} (n 29) [90]; see also \textit{Trubnikov v Russia} (App no 49790/99) ECHR 5 July 2005 where ECHR concluded that the authorities neither knew nor should have known about the risk of the suicide and \textit{Dedov v Bulgaria} (App no 59548/00) ECHR 17 January 2008 where the actions taken in a case concerning the disappearance of the applicant’s mother from a nursing home were found to be adequate so that no violation of art 2 was found.
\end{flushleft}
3.2.4 Attainment of Advantages in Criminal Proceedings

3.2.4.1 Points of Departure
A variety of different legal systems offering the accused certain advantages, such as a more lenient sanction, less publicity and a speedier determination based on a summary procedure in return for the evidential advantages of his confession, are common. Such arrangements are not established only (or even primarily) in the interest of the accused. They are necessary in order to avoid a breakdown of one of the most vital state functions: the enforcement of criminal law.

3.2.4.2 Disproportionate Advantages
Nevertheless, this win-win situation entails risks. The offer may appear so advantageous that the accused is ‘cajoled’ to accept it, even though he should have awaited an ordinary trial.

In *Deweer,*119 the Court emphasised that the right to a court hearing (art 6 (1)) has a prominent place in a democratic society, and that any measures alleged to be in breach of the provision call for particularly careful review (para 49). The applicant’s allegation was that his waiver of the right to a court hearing to determine the criminal charge against him was given under duress. The *Deweer* court’s opinion seems to be that the ‘relative moderation’ of the sum demanded, namely 10,000 BF (approximately 200£) instead of risking maximum 3,000,000 BF, led to a:

[F]lagrant disproportion between the two alternatives facing the applicant. The ‘relative moderation’ of the sum demanded in fact tells against the Government’s argument since it added to the pressure brought to bear by the closure order. The moderation rendered the pressure so compelling that it is not surprising that Mr Deweer yielded.

Despite these potentially far-reaching words, it is apparent that the disproportion in this case stemmed from the combination of the threat of immediate closure and the (disproportionately) reduced penalty, but primarily the former.120 The applicant’s fear of losing his bread and butter overnight was well-founded and the reduction

119 *Deweer* (n 103).
120 The Commission’s reasoning in the case may be conceived so that it above all was the closure order that constituted the unacceptable constraint invalidating the right-holder’s waiver. See also De Schutter (n 14) 504.
was significant. In sum these features clearly went beyond the 'constraint' that is always implicit when an accused is offered the option of accepting a fine.

A waiver of the right to an ordinary court hearing must be considered unconstrained unless the right-holder's will is unduly influenced, such as in *Deweer*.121

Clearly, ordinary advantages by accepting a ticket or a summary trial instead of a full trial, such as a more lenient sanction, less publicity and a speedier determination, cannot constitute a constraint invalidating the agreement, even though they certainly prompt a willingness on many accused to waive. This is evident, since the individual's self-determination argues for giving him the option of obtaining certain advantages by trading off rights, the right to a hearing for example.122

The subject for consideration is whether the advantage by trading off an ordinary trial is 'flagrantly disproportionate' (cf *Deweer*123). In the assessment of proportionality a balancing of interests is always what matters. Here, it is the comparison between the advantages by choosing the simplified procedure and the disadvantages connected to the ordinary procedure that counts. Different combinations of the main variables (the simplified and the ordinary procedure) are imaginable, some acceptable, even desirable, others more worrying, perhaps in contravention with the Convention. The matter is pushed to extremes if the simplified procedure is particularly advantageous (one avoids enforcement measures, is offered a striking penalty-reduction) while the ordinary procedure simultaneously is particularly unfavourable (risk of a heavy penalty according to a decision without reasons after a tedious process surrounded with much publicity).

The weight of these factors will have to be considered concretely in each particular case. Hence, it cannot be generally assumed that a system like the American 'plea bargaining' is in contravention with 'fair trial'. But its element of a prosecutorial promise binding the court as to the sanctioning increases the reservations (from a European perspective).124

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121 *Deweer* (n 103).
122 See generally 5.2.2 below.
123 *Deweer* (n 103).
124 One should, for that matter, not overestimate the differences between the several European systems on the one hand and the American on the other: in Germany, for example, the prosecution (under the supervision of the court) is empowered to refrain from bringing forward an indictment if the accused in return accepts to fulfil certain conditions, such as the payment of compensation (Criminal Procedure Code section 153a). Furthermore, there are, or may be, elements of negotiations between the prosecution and the accused connected to sentencing in summary judgments or penalty orders in many European states. In Norway we have, so far, yielded to accepting any competence for the prosecution to promise a penalty that will bind the court (such as the proposal by the Ministry of Justice for an amendment of The Criminal Procedure Act, section 233a (2006)).
Although the particularities may differ between European national legal systems, the competence to decide the sentence normally rests with the courts.\textsuperscript{125} Correspondingly, the prosecution has no competence to promise the defendant a specific (lenient) penalty in return for a confession.\textsuperscript{126} It cannot be excluded, however, that the investigating and prosecuting authorities occasionally go too far in making such promises. If this is proven, the defendant is misled and the waiver invalid. Realistic information, at a general level, about a reduced need for detention or of the prospects of a more lenient sanction in case of confession will, at least as a point of departure, not constitute invalidating duress.

\subsection*{3.2.4.3 The Importance of an Overall Assessment}

In \textit{Thompson},\textsuperscript{127} the Court went a long way towards setting aside a waiver by carrying out an overall assessment of the circumstances surrounding it. In my opinion, it is doubtful whether any of these four circumstances, in themselves, should warrant the conclusion that the waiver was invalid.

The applicant was sanctioned in a summary trial. He could, alternatively, have opted for a trial by court martial. In the Court’s opinion, the fact that he did not was partly due to his subordination and close structural proximity to his commanding officer, the person who had suggested the summary trial. It is not evident that such a suggestion puts the right-holder under unreasonable constraint. A ‘constraint’ inherent in such a suggestion does not differ essentially from a situation in which the accused in ordinary criminal proceedings is informed about the option of a summary trial if a confession is made.

Moreover, the Court attaches weight to the fact that the prospects of a more lenient penalty (unduly) influenced him to choose the summary procedure. Again, it may be argued that this in itself cannot be considered sufficient to render the waiver invalid, because a more lenient sanction is an ordinary feature of summary proceedings. Admittedly, however, the reduction in this case was substantial: 28 days (exceptionally 60) compared to two years.

Thirdly, the Court attaches weight to the fact that the options (a summary hearing or a court martial procedure) were presented to the applicant at a time when the latter procedure, found in previous case law to be in violation of art 6, was still in force. However, the new legislation aimed at remedying these shortco-

\begin{itemize}
\item \textsuperscript{125} See ECHR art 6, which requires that a criminal charge be determined by a tribunal.
\item \textsuperscript{126} However, \textit{the law} may more or less directly require a confession to be taken into consideration when deciding the penalty, see the Norwegian Civil Penal Code section 59.
\item \textsuperscript{127} See \textit{Thompson v UK} (App no 36256/97) ECHR 15 June 2004.
\end{itemize}
nings had been adopted. Even assuming that the right-holder would have been tried pursuant to the old procedure, it is difficult to see how this risk in reality, affected his choice.

This judgment and the subsequent Bell judgment may be explained, and can be defended, if one adopts an overall perspective where the combined effect of the different concerning features is clarified. Especially the fact that there was a substantial penalty reduction and that the right-holder’s ability as a layman to evaluate the different options to be pursued was modest, are of importance.129

3.2.5 Continuation: Employment or Similar Essential Good at Stake

3.2.5.1 Introduction
The fear of losing an essential good that can be obtained (or maintained) may constitute constraint invalidating a waiver of rights that is a precondition for obtaining it: if an essential material good is at stake, typically the right-holder’s bread and butter, he will be tempted to accept the (later) disputed condition (that entails waiving a right), and instead confront it once the good has been obtained.

In a situation in which the right-holder, by refusing to waive (an aspect of) a right, loses an essential good, he may be under considerable constraint to accept the disputed condition. Typical examples are where he is forced to accept surveillance or phone-tapping, or to answer questions considered to be intrusive in relation to his private life, sexual orientation (art 8) or religious conviction (art 9) for example.

3.2.5.2 Licenses and the Like
ECtHR case law clearly shows that conditions allegedly in contravention of the convention can be subsequently disputed. In Sigurjonsdottir130 the applicant, an Icelandic taxi driver, claimed a negative right131 to association. In order to be able to obtain the necessary driving licence, he had to agree, and had initially agreed, to join a particular association. The Court attached little weight to that fact, emphasising that he was not thereby prevented from claiming that, especially since his bread and butter were at stake, this constituted a constraint invalidating his waiver.

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129 In Bell (ibid) new legislation aimed at bringing the summary procedure in conformity with the requirements of art 6 had been implemented. ECtHR found nevertheless that the first mentioned circumstances left the waiver invalid [50].
131 See generally section 5 below.
3.2.5.3 Dismissal and Debarment

Alternatively, the situation may be that the right-holder refuses to give in to pressure, refuses to answer intrusive questions regarding his convention rights: religion, sexual orientation, political convictions or family life. In such cases, ECtHR case law appears to distinguish between dismissal and debarment by taking a more liberal approach in favour of the state in the latter case, holding that denial of employment does not constitute interference with convention rights; see Kosiek, among other authorities. This line of reasoning is open to criticism.

Vogt concerned a dismissal motivated by the right-holder’s opinions and utterances (‘Berufsverbot’), namely active association with the communist party. The ECtHR underlines that public employment under no circumstances is a right under the Convention (cf art 20 CCPR). By contrast, in Glasenapp and Kosiek, the applicants were barred from employment because of (otherwise) similar circumstances.

True, employment is no right under the Convention. But then it can correspondingly be held that there is no right under the Convention to stay in a job either. Debarment and dismissal are negative consequences of utterances, with the likely effect that the right-holder is coerced to give up the exercise of that freedom. What matters, therefore, is not (the absence of) a right to employment, but the freedom of expression.

The less impressive quality of the Court’s reasoning is demonstrated if applied to another field: why should an employer be allowed to ban homosexuals from employment, but be in conflict with the Convention if he dismisses them once employed.

Due to the underlying rationale for invalid waiver, the element of constraint, there are no good reasons for distinguishing between debarment and dismissal that appears as a sanction for breach of a commitment, or an unwillingness, to renounce rights.

3.2.5.4 Contract Provisions ‘in Abstracto’

The normal situation giving cause to consider whether constraint renders a waiver invalid is an interference in concrete: the right-holder is debarred or dismissed because of non-compliance with a condition that is in contravention of the Con-

132 See Kosiek (n 19).
134 See both Kosiek and Glasnap (n 19).
135 A fact on which the Court relied heavily, see paras 53 and 39 respectively.
vention. However, even contractual restrictions *in abstracto* may give rise to the same concern because, although not implemented in any way *in concreto*, they are so ‘directly influential’ in relation to the right-holder. An example would be a homosexual who refrains from living out his sexual orientation for fear of losing his job. To my knowledge, this element has not been tried by the ECtHR. But an obvious parallel can be drawn to its case law concerning interferences with private life by law provisions *in abstracto*. The two ought to be regarded equal because both has the potential of constraining the committed to act in contravention with his rights.

It depends on the circumstances whether or not the right-holder can be said to be in a situation amounting to constraint. Among important factors to be evaluated is the position of his employer. If the employer has a monopoly or quasi-monopoly, the right-holder has fewer options, and it is natural to assume that his choice between contract and human rights is made under constraint. To some extent the inequality in bargaining power in favour of the employer inherent in the relationship indicates more generally that an element of constraint is present.

Factors connected to the right-holder are also of importance. He is in a weaker position and more susceptible to constraint if he, having accepted the now disputed limitation, is on his own compared with a situation where the disputed condition is accepted by his trade union on behalf of a large number of workers. Due to the bargaining power of the union, there may be a presumption that a condition accepted by collective agreement rests on grounds considered to be in the interest of the members rather than being the result of constraint. This is not to say, however, that a right-holder is precluded from claiming that a waiver emanating from a collective agreement violates his rights.

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136 See also 4.2 below on this distinction.
137 In *Dudgeon v UK* (App no 7525/76) (1982) Series A no 45, that has been guiding for subsequent case law (*inter alia* *Norris v Ireland* (App no 10581/83) (1989) Series A no 142, *Modinos v Cyprus* (App 15070/89) (1993) Series A no 259, the Court held that criminalisation of homosexual acts between consenting adults constituted a disproportionate interference with the applicants private life, even though the provision was not in any way applied *vis-à-vis* him *in concreto*.
138 Morris (n 7) 69, mentions as an example that a measure of surveillance ‘was considered by the preponderance of the workforce to contribute to their personal safety or to be otherwise acceptable in the circumstances’.
139 See *Young, James and Webster* (n 18) where the disputed closed shop agreement was negotiated and concluded between the unions and the employer.
3.3 Waiver with Reference to Future Situations: Points of Departure

3.3.1 Introduction
A waiver of a particular right in a current situation will presumably hold a stronger position compared to a waiver in relation to a future situation, because the right-holder normally will have a better perspective and overview of the consequences of the effect of his renunciation. Correspondingly, the right-holder will have an overview of a situation in which he turns down a proposal to waive a particular right in a current situation in order to achieve certain advantages. For example, where the accused refuses to accept a fine for speeding ‘offered’ to him by the police, his choice will be informed, that is, he will be informed about the alternative: to have the charges decided in a criminal trial with the ordinary exercise of rights pursuant to ECHR art 6. For the accused to accept the fine is rational if the evidence against him is strong and he wishes to avoid publicity and attention. To refuse the fine may be a rational option if the prospects of acquittal are fair.

3.3.2 Example: Article 6 – Criminal Cases
Both the public interest in and responsibility for criminal justice and the relative power of the parties requires that waiver of the right to a court hearing in criminal cases only can be considered valid insofar as it is made in relation to a current situation. It is difficult to imagine a deal between the prosecuting authorities and individuals (or companies for that matter) to the effect that any criminal charge that may be brought in future will be decided by a ticket, a summary trial or the like. This must be considered common ground.

3.3.3 Example: Article 6 – Civil Cases
Although the point of departure in most legal systems is the opposite in civil cases,140 in such cases too, it probably depends on factors related to those relevant in criminal cases whether or not it is reasonable to attach consequences to a waiver of access to court.

If a case, according to national law, is of such a character that the parties can-

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140 See, for example the British Arbitration Act 1996 ss 1(b) and 4, and the Norwegian Arbitration Act 2004, s 9. The point of departure in both acts is that the parties are free to agree how their disputes, present and future, are to be resolved. There are several exceptions to this, most notably in the form of mandatory provisions.
not dispose over it (compare the nature of offence and the gravity of sanction in criminal cases), the underlying rationale most often is that there is a public interest in the matter barring waiver of access to court (art 6(1)). Even if the subject as such can be negotiated, and hence the right to a court can be waived, the qualms increase when it comes to waiver before there is a dispute.

In cases concerning employment, consumers’ contracts, lease of house, delivery of essential goods, such as water or electricity, essential transport services, mandatory provisions prohibiting arbitration clauses with reference to future disputes are quite common. This tendency reflects an effort to protect right-holders in a vulnerable position against waivers with a future effect. The efforts are internationally enhanced by the provision in UNCITRAL Model Law prescribing that arbitration-clauses in contravention with provisions in national law shall be considered invalid. The same holds true for consumer- and employer-protection cases.

Employment-contracts frequently contain provisions concerning waiver of substantial rights too, typically where the employer signs that he will abstain from expressions related to his work.

The qualms connected to waivers with future effect reaches beyond these instances typically regulated in national law. The passing of time will often increase the probability for changed circumstances to a degree that it will be unreasonable (disproportionate) to maintain a waiver, even if it originally was validly entered into (see 3.4 below).

3.3.4 Example: Article 2

Even more dramatic is a waiver of the right to life, more pertinently a right to be kept alive, in a hypothetical future situation. While a right-holder in a current situation can waive medical treatment necessary to keep him alive, the consideration is more challenging when it comes to his dispositions to that effect in

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141 In Norwegian labour law, arbitration clauses are prohibited, except in cases concerning the chief executive’s role as an employee, see the Working Environment Act, ss 15-16.

142 In Norwegian law, arbitration clauses with reference to future disputes are not binding for consumers. Thus, consumers may agree to solve present disputes only through arbitration, see the Arbitration Act, s 11.

143 See for example the Norwegian Transportation Act, s 429 and the Norwegian Arbitration Act, s § 11(b).

144 UNCITRAL Model Law on International Commercial Arbitration Art 34 regulates exhaustively when arbitration may be set aside by the ordinary courts.

145 We shall return to such questions connected to passive euthanasia in a forthcoming second Article.
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advance. This has assumed practical importance through ‘living wills’: ‘if I end up in a vegetative state, any efforts to keep me alive shall cease.’ In some respect this is respect for the right-holder’s autonomy and self-determination. At the same time there is an undeniable dilemma: how can one know that the right-holder’s past waiver reflects his preferences today? Even though he cannot communicate it, he may appear able to enjoy life despite his handicap.\textsuperscript{146}

Briefly, a waiver with reference to a future situation is troublesome both because it in the presence is difficult intellectually to have a sufficient grasp of its consequences and because the circumstances that formed the basis for waiver \textit{in reality} may have changed (further 3.4 below).

3.4 Future situations: Material Change in Circumstances (Faulty Assumptions)

3.4.1 Introduction

There is a gradual transition from the difficulties the right-holder may encounter in calculating the effect and importance of a waiver in the future to a situation where increased qualms are connected to the fact that the situation actually has changed.

The question of when a waiver with reference to a future situation should be set aside because of frustration encompasses several aspects. Of special importance seems to be how far-reaching the waiver is in time and its intrusiveness (including the importance of the right in question), and whether the right-holder is in a vulnerable position. Although an overall assessment is required, we shall exemplify the importance of these factors by their significance in respect to three different rights.

3.4.2 Example: Article 1 of Protocol No 1

‘Possessions’ is a wide concept, covering not only the owner’s right, but the holder of more limited rights as well.\textsuperscript{147} It is obvious that a right-holder is free to give up or otherwise limit his possessions by contract, e.g. by letting. Such contracts may be seen as waiver of one’s property. As we are in the sphere of relations between in-

\textsuperscript{146} See further elaborations in the mentioned follow up Article.

\textsuperscript{147} Certainly not only real estate, but also movables and even claims are covered. See the Court summarising in \textit{Gratzinger and Gratzingera v the Czech Republic} (App no 39794/98) ECHR 2002-VII. See also in general \textit{Jacobs and others} (n 11) 481-488; \textit{Harris and others} (n 11) 656-652 and \textit{van Dijk and others} (n 32) 865-872.
individuals in the economic field, the threshold for public intervention is relatively high.\textsuperscript{148} The owners’ waiver of the right to use their property will be considered valid if it is not manifestly unreasonable to enforce it.\textsuperscript{149} Normally it is the tenant’s equivalent waiver of their property (the obligation to pay rent) that balances the mutual rights and obligations according to the contract.

Due to a material change of circumstances (increase of prices) and increased attention on protecting consumers or similar parties in a vulnerable position the legislator may be expected to intervene to the benefit of the tenants, even with effect for contracts already entered into (‘quasi retroactivity’). Mellacher\textsuperscript{150} is illustrative: the applicants were owners dissatisfied with national rent control legislation reducing the value of their rental agreement with tenants. By reaching the conclusion that the interference, the reduction of the contractually agreed rent, did not violate the owner’s right to peaceful enjoyment of their possession, the Court indirectly said that the tenants were entitled to a revision of their waivers (obligations to pay).

A wide range of similar situations dealing with legislation revising contractual obligations have been decided by the Court,\textsuperscript{151} and even more can be imagined. Again the general conditions for the acceptance of such controls are likely to be that they are prescribed by law and hence deemed by the state and accepted by the Court to be ‘necessary in the public interest’.

3.4.3 Example: Article 6

While the question above was related to changes concerning an agreed economic obligation, we shall here have a brief look at changes related to agreement on procedural requirements.

A waiver of the right to a court is, under certain circumstances, valid both in civil and criminal cases. However, normally the waiver is given with the know-

\textsuperscript{148} It is worth noting that CCPR contains no provision equivalent to art 1 of ECHR Protocol No 1 and, so, that this right was not included among the original rights and freedoms of ECHR. Already the text calls the tune, see first paragraph, according to which deprivation of property must be ‘in the in the public interest’ and the second paragraph, according to which the state control the use of property as ‘it deems necessary’. Case law confirms that the state’s margin is considerable. See generally for example van Dijk and others (n 32) 864.

\textsuperscript{149} An action for revision may be successful according to national legislation such as the Norwegian Contract Act (avtaleloven No 4 1918), s 36.

\textsuperscript{150} See Mellacher and others v Austria (App no 10522/83, 11011/84, 11070/84) (1989) Series A no 169.

\textsuperscript{151} See\textit{ inter alia Spada and Scalabrino v Italy} (App no 12868/87) (1996) Series A no 315-B and\textit{ Scollo v Italy} (App no 19133/91) (1996) Series A no 315-C.
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ledge and on the condition of an alternative dispute settling mechanism. If this alternative fails, the right-holder, arguably, is in a situation of frustration, and the question of the consequences of this frustration arises. Since 'Article 6 holds a prominent place within the Convention', it is suggested that a breach with the agreed procedure will constitute a failed assumption that relatively easy will render the original waiver invalid (or revocable). In order to remedy this frustration it is probably sufficient (for ordinary courts) to quash the contested arbitration decision and (for the arbitration court) to conduct a new arbitration procedure in compliance with the right-holder’s expectations.

3.4.4 Example: Article 10
A right-holder who enters into an agreement whereby he accepts a sanction (eg to pay a fine or compensation) because of an utterance already made, accepts that his utterance was a violation of general legal obligation or a commitment undertaken by contract. Examples are where the right-holder accepts a fine for discriminatory statements and confiscation of the book where they are expressed (he waives his rights according to arts 6 and 10) in a current situation. The typical situation when it comes to the freedom of expression, however, concerns waivers meant to have effect in the future, such as where an employee accepts curtailment on his access to criticize his employer (‘whistle blowing’).

Whistle blowing may (pertinently) be seen from the perspective of faulty assumptions. If an employee gets wind of censurable working conditions or the like, this may constitute a new circumstance capable of relieving him of his self-imposed obligation to remain silent about job-related matters. It is one of the important functions of the freedom of expression in the society to be a tool for progress in a broad sense. This function will be unduly hampered if a past waiver by persons in the best position to discover and expose unacceptable conditions (in a particular context, employees), were to be decisive regardless of the importance of the information they possess. The important control function of freedom of expression requires that employers and society as a whole respect whistleblowing, despite prior waiver of freedom of expression, and even if the utterance is harmful to the employer.

152 See Golder (n 39) [35].
153 To be followed up in third article.
154 See generally Jacobs and others (n 11) 440-444.
155 Arguably, not only employees, but contract workers too ought to be covered by such protection.
In *Blake*,\(^{156}\) the Government had argued that the applicant had waived his right to publish material obtained through his employment by the secret service by signing an undertaking of confidentiality, while the applicant asserted that to accept a waiver as the basis for an exception from the right to freedom of expression ‘would run contrary to the public interest’.\(^{157}\) The Court emphasised that the statement was made a long time ago:

The applicant made an undertaking in 1944 not to reveal information obtained as part of his employment. The Court does not consider that, in so doing, he can be said to have unequivocally waived his right to complain, under a Convention that had not yet been drafted, about any ‘penalties’ that he might suffer, no matter how severe, arising from an infringement of that undertaking.\(^{158}\)

### 3.5 Future Situations: Withdrawal

(a) The distinction between discontinuation of a commitment as a consequence of changed circumstances and as a consequence of withdrawal is material. The right-holder may choose to withdraw consent even though the circumstances (at least in a narrow sense) are unchanged (the patient is still ill and in need of treatment). However, the two causes may coincide, or the distinction may at least become tenuous, as in a case where the patient withdraws his consent to treatment in a locked ward (art 5) because the circumstances have changed (he considers himself well). If his assessment is well founded, both the withdrawal of consent and the materially changed circumstance argue against continued (waiver-based) detention. If it is not, one is left with the withdrawal of consent. Continued detention will then have to be justified pursuant to the conditions for deprivation of liberty (art 5(1)(e)).

(b) Although the situations in which waiver may be topical vary substantially, it is probably correct to formulate as a starting point that an originally valid waiver may be revoked. This point of departure holds a strong position as far as personal rights (especially freedom and integrity) are concerned. When it comes to econo-

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156 *Blake* (n 54)
157 See 4 below; cf 2.4.2 above on problems connected to waivers with reference to future situations.
158 See ECtHR’s decision on admissibility: *Blake* (n 54) [126].
mic and procedural rights the picture is more faceted: a contractual commitment to let a neighbour use my car cannot be revoked without further ado. The same holds true, to a certain extent, for an agreement between two parties to have future disputes decided by arbitration.

In general, less doubt attaches to waiver if it can be revoked. In many situations, revocability is particularly well founded, and it may be a remedy to allow the right-holder to achieve what he (legitimately) seeks, while at the same time allowing him to be released from his commitment to waive certain rights, if the circumstances so require.

(c) An employee may consider it necessary to accept a contractual term, implying a waiver of one or more of his substantial rights, for example to abstain from homosexual activity or to be subject to surveillance (art 8), in order to obtain or keep a particular position. Depending on the circumstances, especially if the limitation is short of an acceptable purpose or proportionality, such waiver may be revoked once the position is obtained. With regards to the employee’s procedural rights a revocation may also be topical: protective legislation prohibiting arbitration clauses is quite common.

Even where such legislation does not exist, the underlying rationale will often admit the right-holder to revoke an original waiver of a right to have future disputes determined by ordinary courts. The Richard case is illustrative. The applicant, who suffered from AIDS, had withdrawn an application to the Commission and, in a friendly settlement with the government, agreed not to institute new proceedings against the state. It turned out that the national proceedings, even after this settlement, were unreasonably delayed. In the second application, the Court did not accept the government’s argument that the applicant’s waiver relating to the first application could be invoked:

It is highly unlikely that the applicant would have accepted a friendly settlement proposal that allowed the outcome of the proceedings to be delayed with impunity.

(d) A more dramatic example of the importance of revocation of consent to what otherwise would have been a violation of integrity (art 3) is this: a woman states: ‘take me if you can’, but regrets and begs the man to stop. There can be no doubt,

159 See Richard v France ECHR 1998-II.
160 Ibid [49].
de lege lata (in contemporary society), that the revocation is binding, so that, if the culprit proceeds, punishment is in compliance with (and even required by) the Convention.161

Similarly, a person who applies for treatment in a hospital will not be deprived of his liberty (ECHR art 5), even if the treatment necessitates isolation. But as soon as the consent to stay is revoked, there will be a deprivation of liberty (that has to be justified with reference to the conditions in art 5(1)(e) in order to be in accordance with the convention). Storck162 illustrates this point. A young woman had initially called at a clinic for treatment. After a certain time had elapsed, she tried on several occasions and finally succeeded in fleeing. It was considered necessary to use force to prevent this and to bring her back. Under such circumstances, no waiver could still be in force, even if it were presumed to be a valid waiver at the outset.163

3.6 Mental Disability and Unconsciousness

3.6.1 General questions

Storck164 is illustrative also in relation to mental disability. With reference to an attempted escape, ECtHR arrived, as mentioned, at the conclusion that there was not any consent to the stay in the clinic. As an alternative argument for considering the continued stay to be a deprivation of liberty, the Court referred to the fact that Ms Storck, due to heavy medication, could hardly be considered to be competent to consent to the stay.

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.165

161 The decisions of the ECtHR in SW and CR v UK (1996) Series A no 335-B and no 335-C can be construed in a revocation-of-consent-context: husbands argued that they were entitled to sexual intercourse with their wives, and that the national courts’ decision to lift the immunity of a man from prosecution for rape of his wife was foreseeable. It seems to have been of importance to the ECtHR’s decision that the punished conduct attacked the core values protected by the convention, namely the right to sexual integrity. Even if marriage in principle can be taken as a ‘yes’, everyone retains the option at any time of saying ‘no’ (to be followed up in second article).
162 See Storck (n 89).
163 See 3.6.2 below on revocation from an incapable.
164 Storck (n 89).
165 Ibid [76].
The same rationale applies to persons with mental handicaps. *HL*166 concerned hospital detention. In contrast to the applicant in the *HM*-case,167 *HL* had been subjected to a rather rough regime:

\[\text{[t]he applicant was under continuous supervision and control and was not free to leave. Any suggestion to the contrary was, in the Court's view, fairly described by Lord Steyn as 'stretching credulity to breaking point' and as a 'fairy tale'}.\]168

As she was considered incapable of disposing over her right to personal freedom and the deprivation in question was not justified according to the criteria in art 5, there was a violation of the same article.

*HM v Switzerland* concerned a similar case.169 Although the right-holder’s personal freedom was encroached upon to a lesser extent than *HL*’s, she was compulsorily placed in the clinic with the assistance of the police. And she had no conception of being, formally and only probably, free to leave. Arguably, she was therefore not competent to waive her personal liberty.

### 3.6.2 Revocation by an Incompetent

(a) While mental competence is required for a waiver to be valid, the same requirement cannot generally apply to the revocation of a waiver. If a waiver is revoked, even if by an incompetent right-holder, there is no waiver, so that a continued stay will be considered a deprivation of liberty. This also seems to be the reasoning in *Shtukaturov*170 where the applicant was declared to be without legal capacity. In the Court’s opinion this did not mean that he *de facto* was without capacity to decide for himself when it came to revocation:

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168 See *HL* (n 166) [91].
169 See *HM* (n 167).
170 See *Shtukaturov v Russia* (App no 44009/05) ECHR 27 March 2008.
The Court notes in this respect that, indeed, the applicant lacked *de jure* legal capacity to decide for himself. However, this does not necessarily mean that the applicant *was de facto* unable to understand his situation ... Thus, on several occasions the applicant requested his discharge from hospital, ... even though the applicant was legally incapable of expressing his opinion, the Court in the circumstances is unable to accept the Government’s view that the applicant agreed to his continued stay in the hospital.171

On the basis of the above, the Court found that the applicant resisted a continued stay, and hence that there was a deprivation of liberty.

(b) In most cases the problem is not pushed to extremes. There is no violation of an incapable right-holder’s self-determination if one accepts that his original waiver is revoked. If a person like *Storck*172 revokes her consent to stay in the clinic, she will suffer no violation if one proceeds from the assumption that a continued stay has no basis in the right-holder’s self-determination. Hence, she will either have to be released or detained in accordance with the general provisions in art 5(1)(e).

(c) But there are situations where the right-holder’s whole purpose with a waiver in advance is to determine the issue for a then hypothetical situation where he is no longer able to make that decision. The most important example is his ‘living will’ whereby he decides that if he enters into a vegetative state, no efforts shall be made to keep him alive (art 2). At first sight it may appear logical to assume that the now incapable right-holder has no competence to validly revoke his past decision. However, this is not necessarily and under all circumstances the case.173

3.6.3 Representation
Mentally disabled and unconscious persons cannot dispose over their rights. They need someone to do so on their behalf and to their benefit. But how far can society accept such representative acts, even if made in good faith and in the best interest of the right-holder, as the sole basis for serious interferences with the right-holder’s rights?

The question of representation is dramatically accentuated in cases of euthanasia, where the right-holder is unconscious or for similar reasons unable to attend to her own situation.

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171 Ibid [108-109].
172 *Storck* (n 89)
173 We shall discuss these questions further in the second article.
As far as personal liberty is concerned, the Jon Nielsen\textsuperscript{174} case is illustrative of both mental incapacity and being a minor as justification for representation, but it turns on the latter.

### 3.7 Minority: Representation

In one case, namely concerning the right to marry (art 12), the Convention itself makes it clear that the individuals concerned must have reached a certain (‘marriageable’) age. However, the underlying rationale supporting this rule extends further: it is a virtually universal legal principle that an individual cannot commit himself before he is mentally capable of understanding the consequences of the commitment. The age of majority\textsuperscript{175} is not necessarily decisive in relation to waiver of rights. What matters is the conviction that the right-holder grasps the extent of his dispositions. Consequently, both the personal capability of the right-holder, the complexity of the situation and what is at stake are relevant factors for the consideration of the validity of the right-holder’s own waiver: To allow a sixteen year old to get her hair cut (waiver of bodily integrity, ECHR art 8) is something different to allowing her to determine the termination of life prolonging medical treatment (art 2).

At the same time as the case may necessitate that someone else, typically the parents (art 8), take care of the right-holder’s interests, vigilance is required when such care entails the right-holder’s rights being dispensed with, such as in case of the right to life and passive euthanasia, the protection against inhuman treatment and circumcision and deprivation of liberty.\textsuperscript{176}

### 3.8 Informed Waiver: Especially about the Importance of Representation

(a) The situations described in 3.6 and 3.7 above are characterised by a more general incapability on the part of the right-holder of handling his own affairs. Arrangements are therefore required for his representation. A related line of reasoning can be applied where a normal adult enters an area that presupposes special


\textsuperscript{175} The UN Convention on the Rights of the Child (adopted 20 November 1989, in force 2 September 1990) gives an indication when, in art 1 ‘[f]or the purpose of this Convention’ defines a child as ‘every human being below the age of eighteen years unless the law applicable to the child, majority is attained earlier.’

\textsuperscript{176} These issues will be addressed in the second article.
knowledge. We can speak of special incapability. This will typically relate to procedural rights (see (b) below), but may also have bearing in relation to substantive rights ((c) below).

(b) The Court tends to decide the question of waiver of procedural rights by referring to the lack of (informed) consent, thereby rendering it unnecessary to decide whether or not it would ever be permissible for individuals to waive the right(s) involved. The point is illustrated by Thompson. The applicant, a British soldier, was given the choice between a trial by Commanding Officer and by court martial. The Court considered that several circumstances deprived the applicant’s waiver of any validity. Of particular relevance here is the Court’s underlining of the fact that he ‘was a layman not in the position to evaluate his legal position’. It is not clear whether the Court for that reason considered no waiver to have been given, or whether a given waiver in any case was invalid (the distinction seems to be without consequence).

In Pfeifer and Plankl, the applicant could not be expected to understand the possible effect of the trial judge’s prior involvement in the case on the right to have his case tried and decided by an ‘impartial tribunal’ (art 6(1)). The presiding judge, who was one of the two judges whose qualification was questioned, had approached the applicant in the absence of any defence lawyer and put a purely legal question to him. The applicant did not protest the composition of the court. But his qualifications to understand what he thereby consented to was modest. Consequently, his waiver was regarded as being uninformed, and hence null and void.

Similarly, in Young the Court arrived at the conclusion that the applicant had not waived the right to legal representation:

According to the Government’s own account, the applicant was asked if she wished to have ‘help’ at the hearing and the record of the adjudication

177 Hence, see generally ECtHR’s formulation that for a waiver to be valid it ‘must be attended by minimum safeguards commensurate with its importance’ (chapter 1.4 above) and especially about the importance of legal assistance for the accused under interrogation (a topic which will be addressed in the third article).
178 The question of informed waiver is to be distinguished from questions related to tacit waiver (discussed in 2.3 above), although the two may be present in the same case: while the question related to tacit waiver is whether there in fact is a waiver, the question when it comes to informed waiver is whether the right-holder understood the implications of his waiver.
179 See Thompson (n 127)
180 Pfeifer and Plankl (n 54)
181 See Young v UK (App no 60682/00) ECHR 16 January 2007.
indicated that, if she answered in the affirmative, she would be informed of the assistance and legal representation ‘possibilities’. There is therefore no indication she was in fact clearly offered legal representation for the hearing as opposed to the assistance of a friend/layperson. In addition, given the applicable domestic law and practice (outlined in the Ezeh and Connors judgment, §§ 59-62), any outline of the legal presentation ‘possibilities’, in the event of such an affirmative response from her, would not have indicated with any certainty that such representation would be available. Moreover, any choice would have been put to her at the adjudication hearing itself at which she was unassisted. Furthermore, she would have been required to respond to the Governor who conducted the hearing and who was charged with maintaining prison discipline and was responsible for the pursuit of the charges against her, for determining guilt or innocence and for fixing her sentence. The Court does not consider that, even accepting the Government’s submissions, the circumstances demonstrate that any choice by the applicant as regards legal representation could be considered unambiguous and free. Accordingly, and in so far as such a waiver would be permissible and not run counter to any important public interest, it is not established to have been unequivocal and accompanied by guarantees commensurate to its importance.182

Evidently, the importance of legal assistance, not only for securing that a waiver is informed, but also that it is unconstrained, dictates certain positive obligations on the presiding judge.183

(c) The Court’s statement in Blake184 is illustrative for the importance of informed waiver of substantive rights:

The Court considers that it is not necessary to determine whether or not it would ever be permissible for individuals to be able to waive their right to freedom of expression because, in any case, any waiver was not sufficiently unequivocal.185

182 Ibid [41]; cf the Thompson judgment (n 127) § 44.
183 Cf De Schutter (n 14) 491.
184 Blake (n 54).
185 ECtHR’s decision on admissibility: Blake (n 54) [127].
DH\textsuperscript{186} too, shed light over the question of validity of waiver (informed consent) regarding substantive rights, this time the protection against discrimination. The applicants, a group of gypsies claimed that they were subject to discrimination in connection with education because their children were placed in special schools. Even though the parents had signed a form completed in advance, ECtHR agreed that there was a violation of art 2 of Protocol No 1 in combination with art 14 of the Convention. The Government did not dispute that parental consent was the decisive factor without which the applicants would not have been placed in special schools. Hence, the crucial questions were whether or not there was an informed consent to the discriminatory treatment, and whether, eventually, such waiver in any case ‘ran counter to important public interests’ (see 3.9 below). The Court decided the case already on the first-mentioned basis:

In the circumstances of the present case, the Court is not satisfied that the parents of the Roma children, who were members of a disadvantaged community and often poorly educated, were capable of weighing up all the aspects of the situation and the consequences of giving their consent. The Government themselves admitted that consent in this instance had been given by means of a signature on a pre-completed form that contained no information on the available alternatives or the differences between the special-school curriculum and the curriculum followed in other schools. Nor do the domestic authorities appear to have taken any additional measures to ensure that the Roma parents received all the information they needed to make an informed decision or were aware of the consequences that giving their consent would have for their children’s futures. It also appears indisputable that the Roma parents were faced with a dilemma: a choice between ordinary schools that were ill-equipped to cater for their children’s social and cultural differences and in which their children risked isolation and ostracism and special schools where the majority of the pupils were Roma.\textsuperscript{187}

\textsuperscript{186} DH (n 60).
\textsuperscript{187} Ibid [203].
3.9 Invalidity due to Substance (Link to ‘Public Interest’)

3.9.1 The Court’s Statements

Most often, the wording used by the ECtHR indicates that the validity of waiver and its conformity with important public interests are two separate issues. In Hermis\(^\text{188}\) the Court underlines that:

\[\text{n}e\text{ither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial \ldots \text{ However, such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance. In addition, it must not run counter to any important public.}^{189}\] (emphasis added)

In the just mentioned DH case\(^\text{190}\) the Court stated (obiter dictum) that the protection against racial discrimination cannot be waived:

In view of the fundamental importance of the prohibition of racial discrimination (see Nachova and Others, cited above, § 145; and Timishev, cited above, § 56), the Grand Chamber considers that, even assuming the conditions referred to in paragraph a 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.\(^191\) (emphasis added)

In Blake,\(^192\) the Court points out that waiver of a right guaranteed by the Convention, insofar as it is permissible, must not run counter to any important public interest, must be established in an unequivocal manner and requires minimum guarantees commensurate with the waiver’s importance.

188 Hermis (n 56).
189 Ibid [73].
190 DH (n 60)
191 Ibid [73].
192 Blake (n 54).
3.9.2 Relationship between Validity (in a Narrower Sense) and ‘Public Interests’

Objections connected to a right-holder’s lack of capability or any constraint he may have been subjected to may obviously render his decision to waive invalid. The question of whether or under which circumstances a waiver runs counter to any important public interest can be construed as a question concerning validity as well.\textsuperscript{193} Hence, in principle all aspects of the question of admissibility of waiver could have been resolved under the heading of validity, just as they could have been evaluated under the heading ‘public interest’: to give effect to a waiver given by a minor, a mentally retarded person or a waiver given under duress, will normally run counter to ‘public interests’ and, if a waiver runs counter to public interest because of its subject matter, it must be considered invalid.

The way in which the overriding question is analysed is not decisive. Under all circumstances the requirement that waiver not ‘runs counter to important public interests’ is essential. This subject is inseparably linked to the involved right and the context in which it operates. Nevertheless, it seems useful to present its general characteristics first.

4 Waiver of Rights Must Not Counter to any Important Public Interest: Points of Departure

4.1 Introduction

Apparently, the question of whether and to which extent rights may be deviated from on the basis of waiver depends, to some degree, on similar considerations

\textsuperscript{193} Mandatory provisions invalidating contracts because of their contents/subject matter are common in national legal systems. Typical examples will be contract-clauses in contravention with ‘ordre public’, ‘decency’ or ‘reasonableness’. To some extent, the Vienna-convention also opens not only for invalidity of declarations of intention because of lack of competence or coercion (arts 46 and 47), but also because of circumstances connected with content (to the extent that it runs counter to jus cogens, art 53, see also art 64 (termination)). Moreover, arts 61 and 62 are also of some relevance. They open for termination (invalidity \textit{ex nunc}) of a treaty (commitment) due to a fundamental change of circumstances. The Vienna Convention, however, does not open for revision based on reasonableness more generally, and is hence clearly less far-reaching than common national provisions.
as for heterogeneously enforced interferences with the same rights.\textsuperscript{194} As in the case of interferences, a first question will be whether the lower \textit{threshold} for the activation of the right in question has been overstepped at all (4.2 below), and if so whether the exception is \textit{justified} (4.3 below).

4.2 When is a Justification in Waiver (or law) Necessary?

4.2.1 Interferences ‘\textit{in Abstracto}’

A law or contract provision \textit{in abstracto} is generally not an ‘interference’. For that it will have to be implemented in relation to the right-holder: the existence of a provision authorising closed hearings or trial without a defence lawyer (art 6(1)) does not constitute an interference unless applied to the right-holder. However, in exceptional cases, the mere existence of a provision may be so directly tangible to the addressees that the outcome of the consideration is the opposite. A contractual commitment to remain silent about job matters may, by virtue of its very existence, be considered to be an interference, or rather, a matter activating the state’s positive obligation to secure the freedom of expression.\textsuperscript{195} Because of its cooling-off effect, it might be appropriate to allow a law suit to have a non-enforced provision declared null and void, be without effect vis-à-vis the right-holder or other mechanisms allowing the right-holder to challenge it in the same way as the courts are obliged to protect the right-holder against unfair dismissal.

There is a gradual transition from interferences \textit{in abstracto} to interferences \textit{in concreto}, such as where an employee in a job interview refuses to answer questions related to sexual orientation or religious beliefs. If such affairs are applied to the employee’s detriment once employed, he would undoubtedly have been subjected to an interference \textit{in concreto}.\textsuperscript{196}

4.2.2 Interferences ‘\textit{in Concreto}’

The main rule is that an interference \textit{in concreto} is needed to activate the question we are considering here. Such interferences may be so trifling that no Convention

\textsuperscript{194} Consider our discussion in 1.2.4 above concerning similarities between conditions for exception from rights on the basis of waiver and ordinary interferences.

\textsuperscript{195} See ECtHR case law, eg in Klass and others v Germany (App no 5029/71) (1979) Series A no 28 where the possibility of telephone interception was sufficient for there to be an interference with the applicant’s correspondence (art 8), and Modinos (n 137) where the existence of a criminal law provision directed against homosexual activity constituted an interference with private life (again art 8).

\textsuperscript{196} Such interferences will probably in most cases be considered unfair.
protection is activated: if the authorities allow the construction of a new road, there is normally no interference with the neighbours’ property (art 1 of Protocol No. 1). Consequently, there is no need for justification either by the general law and proportionality requirement, or, alternatively, by a waiver. The conclusion may be different if the activity is so intrusive that the peaceful enjoyment of possession is disturbed. Correspondingly, if the police simply hold a person or his home under supervision for a shorter period of time, there is no interference with art 8. If, on the other hand, property rights are transmitted or a house searched, a justification in law or consent is needed.

4.3 The Justification

4.3.1 Introduction

As seen, justification for an interference with a right (without waiver or consent) normally is regulated by the second paragraph of the same article that proclaims the right. Typically, the interference must be in accordance with law and necessary in the interest of health, morals or a variety of similar purposes (see for example art 8(2)). At least as the main rule, waiver is capable of substituting law as a basis for the interference with the right, while the further requirement that the exception is necessary for certain purposes or complies with fairness (art 6(1)) corresponds to the condition that the waiver based deviation is ‘in conformity with public interests’. It is assumed that the interests involved in the particular case may count both in favour of (see 4.3.3) and against respecting waiver (see 4.3.2).

197 See 1.2.4 above.
198 This topic has its clear parallel in the ‘protected interest doctrine’ in criminal law. No one can validly consent to violation of provisions adopted to protect public interests. Obvious parallels can also be found in civil law as well, where especially the doctrines dealing with the invalidity of contracts because of their substance are relevant. Waivers in contravention of ‘laws or morals’, ‘reasonableness’ and the like, eg in contract law or property leasing law, aims at protecting the weaker party (typically the consumer or the tenant) are often mandatory. In other words, these interests are considered (too) important public interests (to be traded off by the individual, who often is in a situation of constraint).
4.3.2 Factors Arguing Against Waiver

4.3.2.1 The Importance of the Intensity of the ‘Interference’: General
Assuming that the right is activated (4.2 above), the next question to be considered is the importance of the intensity of the interference. The more intense the interference, the more thorough the judicial control of its lawfulness and proportionality must be. Correspondingly, the more intense the interference, the more thorough must be the judicial control of the proof for and validity of waiver and its conformity with public interests.

4.3.2.2 The Importance of the Intensity of the ‘Interference’: The Right Involved
(a) Naturally, this variable – the intensity of interference – encompasses the right involved. While the Court, perhaps not surprisingly, never has described a right as unimportant, it has done the opposite. One example is the statements in McCann\textsuperscript{199} where articles 2 and 3 are described as especially important:

It must also be borne in mind that, as a provision (art. 2) which not only safeguards the right to life but sets out the circumstances when the deprivation of life may be justified, Article 2 (art. 2) ranks as one of the most fundamental provisions in the Convention - indeed one which, in peacetime, admits of no derogation under Article 15 (art. 15). Together with Article 3 (art. 15+3) of the Convention, it also enshrines one of the basic values of the democratic societies making up the Council of Europe (see the above-mentioned Soering judgment, p. 34, para. 88). As such, its provisions must be strictly construed.\textsuperscript{200}

I assume that it corresponds to a general comprehension that rights such as the right to life, personal liberty or integrity hold a stronger position compared to property rights. Even if one assumes that waiver is not excluded, the need for a particular intensive judicial review with any interferences (waiver-based or otherwise), is plausible.

It seems to be at variance with any such ranking of rights when the Court (as well as the former Commission) from time to time has referred to the Conven-

\textsuperscript{199} See McCann \textit{and others v UK} (App no 18984/91) (1996) Series A no 324.
\textsuperscript{200} Ibid [147].
tion, as a whole, as ‘an instrument of European public order’. Such expressions may be held to argue against a hierarchy of rights. At the same time, case law from the same body(ies) show(s), as we shall see, that waiver is at least sometimes allowed. Consequently, the reference to a ‘public character’ cannot be intended to mean that the Convention rights en bloc are not ‘waive-able’. This becomes even clearer by statements such as those in Galstyan:

While the nature of some of the rights safeguarded by the Convention is such as to exclude a waiver of the entitlement to exercise them (see De Wilde, Ooms and Versyp, cited above, p. 36, § 65) … the same cannot be said of certain other rights (see Albert and Le Compte, cited above, p. 19, § 35).

More often, the Court emphasises that a particular right is of such a character that it cannot be waived. The statements in De Wilde, Ooms and Versyp concerning personal liberty are symptomatic:

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.

The statement in Bulut, where the principle of an impartial tribunal (art 6 (1)) was at stake, also underlines the importance of the right involved:

Regardless of whether a waiver was made or not, the Court still has to decide, from the standpoint of the Convention whether the participation of [a judge] in the trial after taking part in the question of witnesses at the pre-trial stage could cast doubt on the impartiality of the trial court.

201 See The Commission’s report in the Pfunders Case (Austria v Italy) (App no 778/60), Yearbook 4 (1961) page 117, at 138 and ECtHR’s judgment in Loizidou (n 15) [93].
202 See in this direction De Schutter (n 14) 487, which warns against attaching too much weight to statements by the bodies, which suggest that the rights may be hierarchical.
203 See Galstyan v Armenia (App no 26986/03) ECHR 15 November 2007.
204 Ibid [91].
206 Ibid [35].
207 See Bulut v Austria (App no 17358/90) ECHR 1996-II 346.
208 Ibid [30].
(b) Some rights are obligatory in the sense that they are obligations for the state irrespective of whether the individual actively claims the right or not. The obligation to abstain from torture (art 3) is the most obvious example. But a closer look reveals that this obligatory character only attaches to one of the freedoms in the said article: freedom from torture. The reason for this is the purposes of the treatment as listed in the definition in the UN Convention against torture, article 1; it can never be justified.209

(c) This observation gives cause to assume that if the relevant right, or aspect of the right, has elements that reach beyond the right-holder’s sphere, there can be no waiver. Generally it can be assumed that the core of the right is indispensable, while elements in the periphery may be waived: while the torture-element is in the core of article 3, and hence never can be waived, the picture is quite different when it comes to inhuman or degrading treatment. The consent of the right-holder to a given treatment (typically for medical purposes)210 is capable of depriving it of any inhuman character. The keyword here is the right to self-determination, covering the right to decide over one’s own body. Yet, this ‘sovereignty’ for the individual will be limited if there are other more important public interests that argue against it. Similarly, while the right to a ‘fair hearing’ as such can never be waived, it may be in conformity with fairness to allow proceedings without a lawyer, if the right-holder so requests.

In line with this logic, it is to be expected that a waiver in relation to personal freedom will be subject to strict scrutiny (compare the text of art 5(1): ‘no one shall be deprived of his liberty save in the following cases’). But, again, consent to treatment is capable of depriving the matter of its character of deprivation of liberty. Nevertheless, control of all aspects of the validity of the consent will be thorough.

4.3.2.3 The Comprehensiveness of the ‘Interference’
However, the right involved is not the only issue when it comes to considering the interference. The character and intensity of the interference with (or devia-

209 This finds a reflection in the fact that there is no exception from the prohibition, even in war time, see ECHR art 15(2) and CCPR art 4(2). See also ECtHR in Gäfgen v Germany (App no 22978/05) ECHR 30 June 2008. Nevertheless, the question is debated, see M Ignatieff, ‘If Torture Works’ (2006) 121 Prospect Magazine <http://www.prospectmagazine.co.uk/2006/04/iftortureworks/> and in response S Crawshaw, ‘Torture Doesn’t Work’ (2006) 122 Prospect Magazine < http://www.prospectmagazine.co.uk/2006/05 /torturedoesntwork/ >, both accessed 06 February 2011.
210 See 4.3.3 below.
tion from) one and the same right is also of importance. Waiving the right to wear casual clothes or have long hair at work is one thing, accepting continuous surveillance is something else (and more intrusive), even though both interferences concern private life (ECHR art 8). And there are stronger reasons to be sceptical about a waiver of the right to have a criminal charge determined by a court (ECHR art 6) if deprivation of liberty is involved compared to in the case of acceptance of a fine. The same logic applies, of course, in the field of property rights, where the scrutiny will, in principle, be more lenient. Voluntarily giving up (waiving the right to) property in the public interest (art 1 of the 1st protocol to ECHR) is unproblematic if full compensation is paid; otherwise it is more worrying.

4.3.2.4 The Importance of the Interest Arguing Against Waiver
Related to the intensity of the interference, is its purpose. Individual interests (eg the right-holder’s health) or public interests (such as ‘morals’), may count heavily against respecting waiver. In *Laskey, Jaggard and Brown* the ECtHR found no reasons to respect the right-holder’s waiver of protection of integrity in the case concerning punishment for wilfull participation in sado-masochistic activities. The moral considerations outweighed waiver. Similarly, even if a right-holder wishes to terminate life to be relieved from pain, the state will be entitled to set aside such waiver because the protection of life corresponds to a supreme public interest.

4.3.3 The Interest Supporting Waiver
The other side of the coin, then, is the importance of the *interests that support a waiver*. To the extent that waiver is supported by substantial public interests, such as the improvement of health by medical treatment, its weight is equally enhanced. The consent to the amputation of a leg may be in conformity with ‘public interests’ provided medical necessity.

Further, if a right-holder’s waiver is supported by ‘rights of others’, it will hold a stronger position. In *Rommelfanger*, the Commission devoted considerable attention to the fact that not only the applicant’s, but also his counterparty’s interests were supported by convention rights. Rommelfanger had accepted abstai-

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211 See *Laskey, Jaggard and Brown v UK* (App no 21627/93, 21826/93, 21974/93) ECHR 1997-I 120. See also *Frumer* (n 3) [896].
212 See ECtHR’s reasoning in *Pretty v UK* (App no 2346/02) ECHR 2002-III.
213 See *Rommelfanger* (n 18)
ning from making certain utterances relating to his employer. While the fact that the ECtHR has underlined the fundamental importance of freedom of expression calls for strict scrutiny, the employer, a Catholic hospital, was also protected by an important right – freedom of religion. The Commission thus had to balance the rights, and it expressed the view that, in a situation involving two private parties, a waiver in such cases will only be set aside if it strikes at the very substance of the right in question.

In other words, it will only be turned down where it has qualified unreasonable effects. But even in such situations it is far from decisive. The Commission employed a proportionality test, underlining that German law ensured that a reasonable relationship between the interference and the interests supporting the waiver was not exceeded. In the particular context in Rommelfanger, it was not considered unreasonable to accept the interference with, or more correctly, the waiver-based deviation from the applicant’s freedom of expression. Presumably, the result would have been different if the limitation was less obvious for the right-holder, for example if the disputed utterance did not involve the counterparty’s human rights or similar important protected interest, such as industrial secrets, but censurable working conditions (whistleblowing).

In line with the same logic as in Rommelfanger, where rights of others enhanced the importance of the given waiver, it should be expected that if the right-holder himself has more than one important interest supporting departure from a certain right, this interest may amount to a right to have waiver respected. Before I embark on an investigation of selected human rights in the follow up articles, it is time to introduce this extension of the topic: the question whether the state may not only have the liberty, but also an obligation to respect a waiver.

5 Extension: A Right to the Opposite of an Express Right?

5.1 Introduction

In principle distinct, but at the same time closely related to waiver of rights, is the question whether there, under certain circumstances, is a right for the right-holder

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214 Ibid.
215 Ibid.
not to have imposed a particular right upon him. Any such right to have respected a waiver clearly presupposes that there is a valid waiver of the express right (A). But the problem to be discussed is more extensive: the question is whether the right-holder not only can waive the protection right A affords him, a right that is expressly laid down in Article X, but also whether he can claim the opposite of right A, let us call it right A’.

If one claims a right to die, one implicitly waives the right to live (ECHR art 2). But is there a right to die in the sense that the state violates art 2 (or another article) if it refuses to contribute (or is too passive in relation) to fulfilling the right-holder’s wish to end his life? Similarly, ECHR art 6(1) grants the right to a ‘public hearing’. The right-holder can supposedly, on certain conditions, waive the right. But can he claim a right to have the case tried in camera? A further example: ECHR art 11 grants a right to join a trade union, but is there a negative right not to organise, namely a right not to join an organisation (typically a trade union) without risking (too) negative consequences? Pursuant to case law from ECtHR, the answer is affirmative in the last, but not in the first two instances. The reason for this is explained and evaluated in the second and third articles.

5.2 The Legal Basis for a Right to the Opposite of an Express Right

5.2.1 ‘Negative’ and ‘Preferred’ Rights

As part of the question of whether a right-holder can claim the opposite of what a particular article expressly grants him, one has to determine the legal basis for the claim. A narrow approach suggests that insofar as the right-holder can claim the opposite of what a particular article grants him, he has to invoke the same article (X) that expressly grants a particular right, negatively – in the following called a negative right. Instead of right A (eg the right to life (art 2) or the right to join a trade union (art 11)), he invokes Article X as the basis for claiming right A’ (in the examples a right to die or to stay unorganised).216

However, the ‘negative right’-approach is not the only way for a right-holder who claims the opposite of an express right. It is not necessarily illogical to reject a negative interpretation (A) of an Article (X) granting a particular right (A), while

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216 The terminology ‘negative right’ is collected from the landmark judgment in Young, James and Webster (n 20) where a ‘negative right’ to organise was read into the right to join trade unions in ECHR art 11, see especially [51-54] of the judgment. Subsequent case law uses this terminology, see inter alia Sorensen and Rasmussen v Denmark (App no 52562/99; 52620/99) ECHR 11 January 2006, where the Court emphasises that ‘… protection of the freedom of association can only be effectively secured through the guarantee of both a positive and a negative right ….’
at the same time allowing another Article (Y) as the basis for right A’, a right that conflicts with and, due to the right-holder’s preference, potentially supersedes right A – in the following called a preferred right.

5.2.2 Self-Determination as a General Preferred Right?
The right to ‘private life’ (ECHR art 8) includes a right to self-determination (see among other authorities the Pretty-judgment\(^\text{217}\)). The right to ‘self-determination’ is of rather general importance for the question of admissibility of waiver.\(^\text{218}\) In a sense it is in the core of the main question we are discussing: as well the question of the consequences of a waiver, as the question of a possible claim from the right-holder that his preference not to have enforced another right upon him should be respected, can be seen from the angle self-determination.\(^\text{219}\)

The comprehension that a right-holder on the basis of article 8 can determine to waive any right, and even claim respect for that determination, may at first sight seem plausible. To admit the right-holder a wide opportunity to determine own matters, even if it has serious and intrusive consequences, is taking the right to self-determination seriously. It is apparent, though, that this right does not solve our main question: hardly anyone would hold that the right to self-determination should or can be without limits.\(^\text{220}\)

A first limitation is obvious: if self-determination is exercised in a way that affects ‘rights of others’, the state is entitled (see art 8(2)) and may even be obliged to interfere to secure the rights of others (see for example art 2)). This situation

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\(^{217}\) Pretty (n 212) was a hopelessly ill woman. Although in its judgment ECtHR confirmed that a right to self-determination is enshrined in the concept ‘private life’ in art 8, it rejected her claim that it extended to a right to die. The right to self-determination (to end life) had to be balanced against the state’s obligation to protect life.

\(^{218}\) De Schutter (n 14) 508 too, points at this possible effect of art 8.

\(^{219}\) It is worth noting that the Court in Sørensen and Rasmussen (n 216 ) [55], explained that ‘... 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 art 11 and confirmation of the importance of the negative aspect of that provision’. Identical formulations are found in Vordur Olafsson v Iceland (App no 20161/06) ECtHR 27 April 2010 [46].

\(^{220}\) Compare the more far reaching ‘principle of liberty’ established by case law from the US Supreme Court during the so-called Lochner era, which, under the guise of giving a substantive content to the Due Process Clause of the Fourteenth Amendment ... translated into constitutional law the doctrine of limiting the police powers of the State to the enforcement of the maxim of sic utere tuo ut alienum non leades, according to which one must not use one’s property for the purpose of violating the rights of others: any public intervention which goes beyond imposing respect for this basic rule of social life would constitute an intolerable, and ‘paternalistic’ interference with individual liberty. See also De Schutter (n 14) 495-496.
is strictly outside our theme, because the right-holder has not the rights of others at his disposal. However, ‘rights of others’ may draw in the same direction as the right-holder’s (original) determination to waive a specific right: in a private party context, typically in employment, the ‘rights of others’ (typically the rights of the employer) may be so involved: if the right-holder by signing an employment contract accepts risky work (but in return gets well paid), the combination of the right-holder’s self-determination and the employer’s rights according to the contract may tip the scales in this direction.

Even if the right-holder’s activity has no direct effect on ‘rights of others’, the state has a responsibility for balancing his individual freedom against a variety of interests and considerations: his determination must not run counter to important public interests listed in article 8(2).

So, even if one proceeds from the assumption that the right to self-determination constitutes a general basis which allows the right-holder to give less priority to other rights, this right, as other article 8-rights, is subject to limitations ‘necessary in a democratic society’ for a variety of purposes. Hence, the comprehension that the right to self-determination (art 8(1)) is capable of deciding every aspect of waiver, both as a privilege and as a right, must be rejected: once a right-holder determines to waive a right, the state will have to take her determination into consideration, while weighing this interest against its potential responsibility for giving priority to other important interests. Presumably ‘health’, which includes the right-holder’s health, and ‘morals’ are the interests that most frequently are referred to by the state as a justification for trumping the right-holder’s self-determination. And these objectives most often give the state party a considerable margin of appreciation.221

A claim to have the exercise of self-determination respected in a particular context is strengthened if the right-holder can additionally anchor her preference in a more specific preferred right.

5.2.3 Specific Preferred Rights

The fact that the admittance of negative or preferred rights with some justification may be said to imply an extension (even duplication) of the states’ obligations, calls for a certain restraint on the part of ECtHR. The competence of the Court is limited by the (positive) rights listed in the Convention. It cannot create

221 See generally ECtHR in Müller and others v Switzerland (App no 10737/84) (1988) Series A no 133, concerning interference with the freedom of expression in the interest of ‘morals’ and Laskey, Jaggard and Brown (n 211) concerning interference with private life in the interest of ‘morals’.
new rights by duplicating positive rights into corresponding negative ones (see ECtHR’s express statements in Johnston). Nevertheless, there is a tenuous distinction between (unacceptable) creation of new rights and (acceptable) ‘creative’ interpretation of existing ones. This is especially true in relation to imprecise rules, such as a majority of the convention rights. It may be observed that the Court by way of dynamic interpretations of the Convention at times lends ear to the right-holder’s preference not to have enforced a right upon him. Still, this dynamic approach towards open-ended rights may easily leave the application of the law uncertain. The applicant will easily find himself in a borderland between lex lata and lex ferenda.

To the extent that a negative or preferred right arguably exists, there has to be a balancing of alternative and potentially conflicting human rights. Only in this case they are held by the same right-holder. (She prioritises to be spared from an inhuman being before life.) As a point of departure this situation is distinguishable from where the state’s task is to balance the conflicting rights of two (or more) individuals (such as the private life of a politician versus media’s reporting). It is plausible to assume that the preference of this, one right-holder directly, involved carries more weight when it comes to the evaluation and prioritisation of his alternative rights.

Without forestalling the position de lege lata, it may well be argued that, even if article 2 does not grant a right to die, the right-holder will, under certain circumstances, be subject to ‘inhuman treatment’ in contravention of article 3 if she is denied, or even if she is not helped, to obtain this option. Article 3 may play a role as a preferred right also in quite different situations, for example as a basis for a claim, under certain circumstances, to get out of marriage. The right-holder’s preferences are relevant also in the field of procedural rights (ECHR art 6). By way of an example: is there a right for the accused to prioritise the appointment of a new lawyer even if the consequence is a less speedy determination of the charge, or are the authorities entitled or even under an obligation to secure speediness despite the right-holder’s preference? Similarly, it may be asked whether the accused is entitled to a right to personal defence without the assistance of a lawyer.

Such and similar issues concerning states’ freedom and obligation to respect waiver of human rights deserve further elaborations.

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6 Preliminary Conclusions and Perspectives

This discussion gives cause to assume that the core of the convention rights are ‘inalienable’ in the sense that they cannot be deviated from on the basis of waiver, while the content of aspects more in the periphery of the rights to a considerable degree may be influenced by the right-holder’s determination to waive, so that the state party is entitled and may even be obliged to respect it. In order to test and concretize this hypothesis I will investigate the role of waiver and negative and preferred rights within the fields of a broad selection of substantive and procedural rights expressed in ECHR, in two forthcoming articles.