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Editorial Note

Land rights for the indigenous Sami people living in Finnmark – the northernmost county of Norway – forms the backdrop for the first article in this issue. Øyvind Ravna examines the procedures established by the Finnmark Act 2005 for surveying and recognising land rights of areas previously considered to be state-owned. In so doing, Ravna assesses whether the legal clarification process conducted by the Finnmark Commission is subject to the rules of trial within a reasonable time, and if so, to examine how best to prevent these processes from coming into conflict with the European Convention on Human Rights (ECHR), article 6(1).

Does the European human rights system, with the ECHR and the Court, promote the human rights of lesbians, gays, bisexuals and transsexuals? In this issue of the Nordic Journal of Human Rights Eirik Bjorge critically analyses the relationship between changing sexual discourse and relevant human rights law. Bjorge intriguingly suggests that the liberalizing human rights project of which sexual rights is a part, which at first blush looks like a liberal development, may be ripe with unintended consequences.

The editors are also pleased to present in this issue the third part and conclusions of Jørgen Aall’s extensive study on waiver of human rights. This last part focuses on procedural rights laid down in article 6 of the ECHR. Aall concludes that the Court, by way of dynamic interpretations of the Convention, has lent ear to the right-holder’s preference not to have enforced a right upon him in a number of cases. He notes that, with respect to certain rights, a state party may be entitled and even obliged to respect the waiver of a right under the ECHR. The editorial team is convinced that Aall’s findings will provoke reactions in the human rights community.

We are proud to announce the Nordic Journal of Human Rights’ inaugural seminar series, to be held in Oslo in October, in its continuing effort to contribute to and lead the public debate by addressing pertinent issues of contemporary human rights theory and practice. In the first seminar of the series, Professor of Law Maleiha Malik of Kings College London, along with Social Anthropologist Dr. Sindre Bangstad of the University of Oslo, will present the topic ‘Anti-Islam Ideology – How Should A Liberal Political Order Respond?’ on 19 October at the Norwegian Centre for Human Rights in Oslo.

In the second installment in its inaugural seminar series, Jørgen Aall will present the key arguments of his articles on waiver of human rights, followed by a
panel discussion on 21 October 2011 at Universitetsforlaget in Oslo. Both seminars are open to all with an interest in human rights.

Finally, the editors invite readers to submit articles in the aftermath of the terrorist events in Oslo and at Utøya on 22 July. These events bring to the fore conflicts and tensions within human rights. We are immediately reminded of the state’s duty to protect us against terrorist attacks and to bring the perpetrators to justice. But we are also reminded, less intuitively perhaps, of our right to verbally express contentious opinions and, for those who resort to violence, the right to fair proceedings. As we seek to strengthen our security and hold terrorists accountable, we must not resort to means that unduly infringe on other core rights, such as freedom of expression, respect of privacy and the right to fair proceedings. It is in moments such as these that our commitment to the whole specter of human rights is tested. With the intention to making a special issue of the Journal, we invite our readers to submit articles addressing these tensions within human rights and the challenge of finding the right balance between conflicting interests.

The Editors
Sexuality Rights under the European Convention on Human Rights

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Abstract: The present article asks: what bearing does the relationship between changing sexual discourse and human rights law have on the furtherance of lesbian, gay, bi-, and transsexual rights? This question the article answers by way of recourse to the Foucaultian concepts ‘genealogy’ and ‘discourse’; it traces in this vein how the law of the European Convention on Human Rights on sexuality rights has changed in relation to societal views of sexuality over the last twenty years. By bringing to bear a Foucaultian perspective the article shows the instabilities and costs incurred in the liberalising human rights project of which sexual rights is a part, bringing out how that which at first blush looks like a liberal development may in point of fact be ripe with unintended consequences.

Keywords: Discrimination; Sexuality Rights; European Convention on Human Rights (ECHR); Foucaultian Analysis.

I. Introduction

ECHR Law and LGBT Issues

What bearing does the relationship between changing sexual discourse and human rights law, exemplified here by the European Convention on Human Rights (ECHR), have on the furtherance of lesbian, gay, bi-, and transsexual (LGBT) rights? This is the question to be examined in the present article. The focal point of this study are changes in sex discourses regarding LGBT issues in Europe through the latter part of the twentieth-century up until today, and how these discursive changes have been used in the interpretation of the ECHR by the European Court of Human Rights. The questions which arise, revolve around

1 I would like to thank Mads Andenas, Marius Emberland, Kristin Bergtora Sandvik, Heidi Mork Lomell as well as the referees for comments to drafts to this article. All errors remain emphatically my own.

the role of human rights law with respect to resistance to overweening power in the field of sexuality: how have human rights furthered that resistance? How, in turn, has this resistance reshaped human rights? And, what are the inherent limitations of a human rights strategy in this context?3

Front and centre here is the concept of sexuality, and its relation to gender. Important markers of difference in society flow from a sex–gender system. Some forms of relationship, activity, and identity are privileged; others are disfavoured and disciplined. Shoring up this system is a gamut of practices and institutions, more or less singling out disfavoured relations, activities, and identities as abnormal, lacking, or deficient.4 As one of those domains, law has been deemed an important avenue by those seeking to redress injustices of prevailing sex–gender arrangements. Groups such as the LGBT movement have in recent decades have prioritised the effort, both nationally and internationally, to secure legal change and put in place legal recognition and protection. This is reflective of a wider trend: there generally can be little doubt that rights talk and the framing of social problems in terms of ‘rights’ – particularly ‘human rights’ – have exerted and continue to exert an almost irresistible appeal, ‘with its compelling rhetoric and normative clout’.5

One important and telling expression of such legal change is to be found in the jurisprudence of the European Court of Human Rights, the regional arbiter of the European Convention on Human Rights.6 By way of a Foucaultian approach to the subject matter, this study analyses the Court’s judgments as the sedimentation of discursive changes; the aim is to foreground how constellations of power–knowledge constituting, for example, our perception of the ‘homosexual’ or the ‘transsexual’ have been deposited in the Court’s rulings.

Part I is devoted to presenting my method and the materials on which I bring the method to bear. Part II fleshes out how discursive changes on sexuality have been deposited in a representative selection of the Court’s rulings on three LGBT issues – the right to live out sexually one’s homosexuality, the right to recognition

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of sex change, and discrimination with respect to gay adoption. In Part III I shed light on the costs incurred – the ‘dark sides’ of the project of the LGBT rights movement. All is then brought together to a conclusive whole in the study’s last part, Part IV.

Method

David Kennedy has said that international lawyers, in their attempts to come to grips with how power flows in international law, have focused too much on the authority of agents they can see to act within structures they understand. They have paid too little attention to the myriad ways in which power flows through the capillaries of social life.7 If we take such exhortations seriously, in the context of the ECHR and LGBT rights, we must look not at the development of LGBT persons’ rights as a development from repression to liberation, from illiberal regulation of sexuality to liberal regulation. Rather the point is to conceive of the process as one in which LGBT persons are both ‘winners and losers’.8 A reading which is alive to such perspectives may throw light on rights-related issues in novel ways. This type of reading points out the pitfalls of articulating desires of better rights protection within the logics of ‘identity politics’, when the same protection could perhaps also have been reached by ‘framing the question in more universal terms’.9

Underlying such a perspective is a Foucaultian strain. According to Michel Foucault, the study of power ought not to be restricted to analyses of class dynamics or how A exerts power over B by making B do what A wants; he draws instead our attention to mechanisms of power in what could be termed their ‘capillary’ forms.10

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Power must be investigated in its relation with knowledge; this is where power forms its most basic relations. Power according to Foucault produces truth. Through analysing amassed ‘archives’ of knowledge – in what has later become known as ‘discourse analysis’ – power’s most basic effects may be discerned. On Foucault’s account, ‘[t]he essential political problem for the intellectual … is [to change] the political, economic, institutional regime of the production of truth’, the critical task to detach ‘the power of truth from the forms of hegemony, social, economic and cultural, within which it operates’ and elucidate ‘the possibility of constituting a new politics of truth’. Critique, Foucault says, consists not of saying that things are not good as they are; it consists of seeing on what sort of evidence, familiarities, acquired and not-reflected-upon modes of thinking the practices we accept actually rest. Foucault provides the answer to what this really entails both through leading by example – in applying his method in his path-breaking studies on criminality, madness, and sexuality – and in his own theoretical discussions of the strategies involved. Here we shall look particularly at two of Foucault’s conceptual tools – ‘genealogy’ and ‘discourse’.

The first central concept is that of ‘genealogy’. In an essay called ‘Nietzsche, Genealogy, History’, Foucault explicates this Nietzschean-inspired notion by contrasting it with history in the more traditional sense. Conventional history in Foucault’s view is directed to discovering origins; it is about explaining how they set a course that can be traced in coherent, linear fashion. Eschewing this search for origins, genealogy, on the other hand, relates a story of accidents, surprises, miscalculations, and deviations; its ambition is to grasp the piecemeal and slowly construction of things.

To further clarify the distinctiveness of what this genealogical strategy entails, Foucault underscores a slate of specific differences between a traditional way of looking at unfolding events and the genealogical one. While history is prone to present reality as the rational effect – a necessary outcome of sorts – of a set of causes, genealogy depicts current conditions as dramatically dependent or contingent. Writing in the genealogical vein purports not to announce the culmination of a historical process; unlike history, shoring up present arrange-
ments by showing them to rest on firm foundations, genealogy works to demonstrate the fragility of inherited institutions and practices. A genealogical approach ‘disturbs what was previously considered immobile; it fragments what was thought unified; it shows the heterogeneity of what was imagined consistent with itself’. Wielding indiscretion in the face of prevailing regimes of truth and systems of power, genealogy homes in on exclusions, tensions, and disparities.

Alongside ‘genealogy’, Foucault develops a score of other concepts for use as tools in the analysis of power–knowledge. The second Foucaultian notion of special pertinence for this study is ‘discourse’. To understand Foucault’s view of the nexus of power–knowledge ‘discourse’ is key: ‘it is in discourse that power and knowledge are joined together’.

Discourses, imposing themselves on master and servant, are that through which, in every epoch, people see and understand ‘reality’, think and act. In short, discourses are not lies invented by some to deceive others, justifying the domination of the latter by the former; far from being mendacious ideologies, discourses structure and make intelligible the world around us, without our thinking about it. A discourse is what makes us believe that the borders of a phenomenon – not wholly unlike the borders of a state – are ‘given’ and ‘natural’. Foucault, therefore, wants us to see that these borders are functions of specific ways of thinking – not natural or universal in the least. In this way ‘madness’ is a function of discourses, as is ‘homosexuality’ or ‘criminality’; they are not given or universal entities.

As it is the aim of this study to look at how changes in what was taken for granted with regard to LGBT issues – the nature of homosexuality and important aspects of binarism of gender – has been subject to change, the tracing of such changes in discourse along genealogical lines sheds light on why the jurisprudence of the Court in this field has evolved the way it has done. It also, however, shows the liberatory potential that may lie in unveiling the fragility of received practices and ways of thinking on how to redress LGBT difficulties. Tapping into the emancipatory capacity of knowledge in this way is potentially linked to transformative action.

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15 Ibid 134–35.
16 See Foucault (n 13) 82.
17 See Marks (n 14) 135.
18 Michel Foucault, *The History of Sexuality I* (Vintage 1990) 100.
II. Discursive Changes Deposited in the Court’s Jurisprudence

This part presents and analyses two kinds of sexuality rights cases brought before the Court: the rights of homosexuals and transsexuals. As this chapter sheds light on the relationship between changing discourses on sexuality and the Court’s interpretation of the ECHR, genealogically examining the conditions of possibility of the Court’s decisions will be the focal point. The first, *Dudgeon v United Kingdom*,21 deals with whether a state within the system of the ECHR can rightfully impose a blanket ban on homosexual activity. Second the focus moves to transsexual litigation – as illustrated by *Rees v United Kingdom*,22 *Cossey v United Kingdom*,23 *B v France*,24 *Sheffield & Horsham v United Kingdom*,25 and *Goodwin v United Kingdom*26 – and how changes in European societies’ view of sex change and gender binarism have been reflected in the Court’s jurisprudence.

Gay Rights in the United Kingdom: *Dudgeon v UK*

*Dudgeon* effectively forbade the member states to interdict male–male sexual intercourse. The 1981 decision should be analysed in the light of the discursive changes that had been on the offing in Europe for quite some time in societies’ view both of sexuality and what private individuals should be allowed to do within the confines of their private lives, without the interference of laws defending public morals.27 As a function of different traditions with regard both to legislation and the nexus of politics on the one hand and religion on the other, regulation of sexuality – particularly homosexual relations – has varied in Europe.

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20 See Marks (n 14) 135.
In France, for example, lawmakers had from the Napoleonic era been recalcitrant to overturn the libertarian dimensions of the 'code pénal', permitting any sexual activity between any consenting adults, unlike nineteenth-century legislation elsewhere in Western Europe which went to great lengths to ban 'deviant' sexual relations carried out both in public and private. Provided that their lovemaking was carried out privately, homosexuals in France did not have to dread arrest and incarceration until the Vichy regime.²⁸ It has been argued that exactly this apparent French liberty for homosexuals to live their lives free from oppression and opprobrium was what spurred Foucault's efforts to grasp and explain the power that resides in 'normalizing' processes in society. The myriad extralegal imperatives in French inter- and post-war society of marriage, procreation, and measuring up to the modern image of masculinity that was obligatory for all men qua males were what Foucault wanted to bring to the fore in his analyses.²⁹

Where the United Kingdom is concerned, two occurrences special attention. The first one is the Wolfenden Report of 1957,³⁰ which had a considerable impact on public debate on homosexuality and legislation throughout the latter half of the twentieth century in the United Kingdom. The second one is Thatcherism, which with its 'traditional' and very hands-on approach to morals and values, was to be seen as the defining ideology of the United Kingdom in the tail end of the twentieth century.³¹

Before the Strasbourg Court, the applicant in Dudgeon argued that the existence of the law in Northern Ireland criminalising private consensual sexual intercourse between men fell foul of article 8 of the Convention. The Court found that the legislation in question constituted a continuing interference with the applicant's right to respect for private life – which, the Court added, included his sexual life – within the meaning of article 8.

As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of

²⁸ Robert A Nye, 'Michel Foucault’s Sexuality and the History of Homosexuality in France' in Jeffrey Merrick & Bryant T Ragan (eds) Homosexuality in Modern France (OUP 1996) 231.
²⁹ Ibid 231. This is also borne out in Didier Eribon, Retour à Reims (Fayard 2009).
³¹ See, for a recent example, Brian Harrison, Finding a Role? The United Kingdom 1970–1990 (OUP 2010).
the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind in question as in themselves a matter to which the sanctions of the criminal law should be applied.\(^{32}\)

Notwithstanding the margin of appreciation, the Court had to make the final evaluation as to whether the reasons it had found to be relevant sufficed in the circumstances, in particular whether the interference was proportionate to the social need the Government claimed. Finding that it could not be maintained that there was ‘a pressing social need’ to criminalise the acts in question, as there was no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public, the Court found the measures not to be proportionate. After Dudgeon European states could operate with anti-sodomy laws no longer; the kind of prohibition which was at issue in Dudgeon was no longer at the disposal of state authorities.\(^{33}\)

This in an interesting way ties in with an important Foucaultian point, which also introduces the next theme of this study: laws and practices regulating the situation of transgendered persons. In The History of Sexuality Foucault writes that modernity is wedded to a shift in the way in which sexuality is governed. In place of bright-line interdictions, whose legal expression were prohibitive laws founded on age-old taboos, there came a complex and multifarious system of regulation and normalisation. Foucault thus jettisons the so-called repression thesis; he does not accept that society has gone from pre-modern sexual illiberalism to modern liberalism, as Freud’s repression thesis advocates.\(^{34}\) Implicit in Foucault’s model is that the replacement of clearly illiberal practices may give way to other techniques of regulation, which may be less visible and at first blush also less unpalatable. Such a system operates more through control and normalisation than through punishment; though it may be locally dependent on interdiction and punishment, it ultimately supersedes such logic.\(^{35}\)

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32 Dudgeon (n 21) 60.
33 Though at the time of the Court rendering Dudgeon, most European states had moved away from anti-sodomy laws, some had not. In Modinos v Cyprus 16 EHRR 485 and Norris v Ireland 13 EHRR 186 Cyprus and Ireland respectively had their anti-sodomy legislation struck down in accordance with Dudgeon.
34 Slavoj Žižek, First as Tragedy, Then as Farce (Verso 2009) 101–02.
35 Marks & Clapham (n 3) 331.
The Rights of Transgender Persons

For years the Court held back from recognising the right of British citizens to receive a birth certificate which was in accordance with their new sex after sex change.\(^{36}\) Five thousand transgendered individuals in the United Kingdom complained of discrimination: others, such as colleagues at work, could readily infer from public records that they had undergone sex change, to which great stigma was attached. Restricted to individuals of – officially – opposite gender, marriage, too, was denied transsexuals. In a string of cases, the Court was asked to recognise the right of transsexuals to change their official gender identity.

As indicated above, Foucault in his account of the history of sexuality asserts that modernity is wedded to a shift in the way sexual life is governed. With the Dudgeon case a milestone had been reached: the kind of overt prohibition that the Northern Irish interdiction of male–male sexual intercourse represented was no longer at the disposal of the state. The following section analyses judgments from the Court concerning the right of post-operative transsexuals to legal recognition of gender change. Though this may sound like a statement of the obvious, it is nonetheless worth clearing the ground by making the following point clear: in Europe at the time this was not and is not a question of whether changing sex is legal or illegal; legislation outright prohibiting different types of sexuality is a thing of the past, ushered to the pyre as we have seen by Dudgeon. Instead, focus is on administrative legal measures which control and normalise in less visible ways. The analysis in this chapter illustrates the evolution of the right to recognition of different aspects of gender change – aspects which seem commonplace but still hold great importance, such as marriage, pension rights, and employment issues – under the ECHR. Foucault was particularly keen to call attention to the role within this field of institutions and practices which do not form part of the apparatus of government; especially salient in this regard he found medicine, psychiatry, psychology, biology, demography, and pedagogy, the upshot of which comes to expression in a term which Foucault used with a double entendre, ‘discipline’.

The following analyses lay bare the importance of the evolution of for example the scientific discipline psychology on whether sex is a function of bodily or mental factors. The analyses focus in other words on how changes in scientific – and other – discourses on sex are deposited in the evolution of the

\(^{36}\) See Rees (n 22); Casey (n 23); Sheffield & Horsham (n 25).
Court’s jurisprudence on the rights of transsexuals. The Court’s evolving case law on LGBT rights is an apt example of the idea that consensus among the contracting states has been a fundamental interpretative principle.37 The question in these cases was not whether the applicant’s right to private life had been proportionately restricted; rather, in the case of transsexuals, it was whether the state had a positive duty under article 8 of the ECHR officially to recognise the new gender of post-operative transsexuals. In Rees, Cossey, and Sheffield & Horsham, the Court in effect found that despite extant legislative trends, it was still, to quote the Court in the latest of these three judgments, ‘the case that transsexualism raises complex scientific, legal, moral, and social issues, in respect of which there is no generally shared approach among the Contracting States’.38

In the 2002 Grand Chamber judgment Goodwin v United Kingdom,39 the applicant was a post-operative male-to-female transsexual. She had been ‘diagnosed’ in the mid-1960s as a transsexual; although at the time championing that she was a woman, she was of the conviction that her ‘brain sex’ did not fit her body.40 And though working as a man, she dressed as a woman in her free time. In 1985 she began treatment in earnest, including consultations with a psychiatrist and a psychologist. Hormone therapy, grooming classes, and voice training were also part of the treatment. After this, she lived fully as a woman, in 1990 undergoing gender re-assignment surgery, provided for by the National Health Service.41 In the period 1990–92 Goodwin was sexually harassed by colleagues in her workplace; subsequently she was dismissed for ‘reasons connected with her health’ but she claimed the real reason was her transsexuality. Starting to work with a new employer, she was asked to produce her National Insurance number; eventually, her employer was able to trace back her identity. After this, colleagues stopped speaking to her, save to tell her that ‘everyone was talking about her behind her back’.42 The Department of Social Security (‘DSS’) Contributions Agency informed her that she would not be eligible for a State pension at the age of 60, the age of entitlement for women; her pension contributions would have

38 Sheffield & Horsham (n 25) [58].
39 Goodwin (n 26). Goodwin was handed down the same day as the largely identical I v United Kingdom (2003) 40 EHRR 967.
40 Ibid [12–13].
41 Ibid [13].
42 Ibid [15–16].
to be continued until the date at which she reached the age of 65, the age of entitlement for men. Her dossier at the DSS moreover was marked ‘sensitive’, which effectively meant that she had to make special appointments even for the most trivial of matters. Despite strenuous efforts on her part to the contrary, her record continued to state her sex as male; letters to her from the DSS were ‘addressed to the male name which she was given at birth’.43

The Court noted at the outset of the judgment that the case raised the issue whether or not the United Kingdom had failed to comply with a positive obligation to ensure the right of the applicant to respect for her private life as set out in article 8 of the ECHR, in particular through the lack of legal recognition given to her gender re-assignment. As the idea of ‘respect’ in article 8 is not clear cut – with different situations obtaining in the contracting states – the requirements of this concept are likely to vary considerably; the margin of appreciation may thus be wider than that applied in other areas of the ECHR. Citing Rees, Cossey, X, Y & Z,44 and Sheffield & Horsham, the Court reiterated that it had found no breaches of the Convention in cases similar to the one currently at hand; the view had traditionally been that there was no positive obligation on the government to alter the extant regimen for registration of births. Highlighting that the Convention first and foremost is a system for the protection of human rights, the Court said that it:

must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved. … It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform and improvement.45

Echoing the concerns to which it had repeatedly given expression in its case law on transsexuals’ rights, the Court proposed ‘to look at the situation within and

43 Ibid [18].
44 X, Y & Z v United Kingdom (App no 21830/93) (1997) 24 EHRR 143. In this case, the applicants complained that the inability of post-operative transsexuals to be registered as the father of a child was in breach of, eg art 12 ECHR. The Court in the event found that there had been no interference.
45 Goodwin (n 26) [74].
outside the Contracting State to assess “in light of present-day conditions” what is now the appropriate interpretation and application of the Convention’. 46 Harking back to Dudgeon, the Court went on to set the tone in paragraph 77 by recognising the serious interference with private life that can arise where the state of domestic law conflicts with an important aspect of personal identity. More than merely minor inconveniences arising from formality, the stress and alienation endured by post-operative transsexuals had to be taken seriously, the Court said.

A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.47

The Court then pointed out that where a state has authorised the treatment and surgery alleviating the condition of a transsexual, financed or contributed in financing the operations, and permits artificial insemination of a woman living with a female-to-male transsexual, refusing to recognise the legal implications of the result to which the treatment leads seems illogical. It furthermore noted an interdepartmental working group surveying the lay of the land against these con-

46 Ibid [75]. On dynamic or evolutive interpretation of the ECHR, see George Letsas, ‘Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer’ 21 (2010) European Journal of International Law 509. Though sometimes (wrongly) portrayed as something which is exclusive to human rights law (see for example Malgosia Fitzmaurice ‘Richard K Gardiner, Treaty Interpretation’ (2009) 20 European Journal of International Law 919, 955), dynamic or evolutive interpretation is a very widespread phenomenon – and has been for a very long time – in the general law of treaties. See, most recently, Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua) ICJ Reports 2009 in which the International Court of Justice built on Aegean Sea Continental Shelf (Greece v Turkey) ICJ Reports 1978, 3. The same is true of the decision of the Permanent Court of International Justice in Nationality Decrees Issued in Tunis and Morocco (French Zone) PCIJ Series B No 4; the ICJ’s judgment in Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276, ICJ Reports 1971, 31 [53] and Gabčíkovo–Nagymaros Project (Hungary/Slovakia) ICJ Reports 1997, 7 [112]; the Permanent Court of Arbitration took the same perspective in Arbitration regarding the Iron Rhine (‘IJzeren Rijn’) Railway (Belgium/The Netherlands) Award of 24 May 2005, 36 [80], and the same is true of Grishadarna (Sweden v Norway) (1909) 2 RIAA (see Sir Humphrey Waldock, ‘Commentary on draft articles’ in Yearbook of the International Law Commission (1964) vol II, 9–10 and Richard K Gardiner, Treaty Interpretation (OUP 2008) 257). Other important examples are Dispute concerning Filleting within the Gulf of St Lawrence (‘La Bretagne’) (Canada/France) (1986) 82 ILR 591 and United States–Import Prohibition of Certain Shrimp and Shrimp Products, WTIDS58/AB/R, 12 October 1998.

47 Ibid [77].
siderations had acknowledged both in English courts and the current plight of transsexuals in the United Kingdom. The Court accordingly had to look at medical and scientific considerations, the state of any European and international consensus, and the detrimental impact of any changes to the current birth register system.

On the matter of medical and scientific considerations the Court concluded that no persuasive material had been presented that provided any determining argument as regards legal recognition of transsexuals; it was, for example, not apparent to the Court that the chromosomal element inevitably had to take on decisive significance for the purposes of legal attribution of gender identity. Here, then, the Court abandoned static for dynamic criteria in the sense that it abandoned sex for gender, biology for sociology.\(^{48}\) In doing so, it went a long way to recognise the socially constructed natures of sex categories and that there is a possibility of movement between them.\(^{49}\)

Regarding the state of any European or international consensus, the Court pointed out that the fledgling common ground to which it had referred in *Sheffield & Horsham* only had grown. Looking outside the area of the Contracting States, the Court showed that in Australia and New Zealand, courts appeared to be moving away from the biological birth view of sex. In English courts, however, the biological birth view of sex was still the prevailing tenet. The Court therefore noted that the lack of a common European approach that was emphasised in *Sheffield & Horsham* still pervaded. While, however, this appeared ‘to remain the case, the lack of such a common approach among forty-three Contracting States with widely diverse legal systems and traditions is hardly surprising’.\(^{50}\) It followed from the principle of subsidiarity that it was primarily for the Contracting States to decide on the measures necessary to secure the rights enumerated in the ECHR within their jurisdiction. In resolving, within their domestic legal system, the practical problems created by legal recognition of post-operative gender status, the states enjoyed a wide margin of appreciation. Nonetheless, the Court did not find this to be decisive:

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\(^{48}\) ‘Gender’ refers to social or cultural categories; ‘sex’ is reserved for reference to biological categories. Although principally a useful distinction, this is not widely observed, and – as this study shows – the boundaries between what is physical and immutable, on the one hand, and what is social and mutable, on the other, are amenable to contention.


\(^{50}\) *Goodwin* (n 26) [85].
The Court accordingly attaches less importance to the lack of evidence of a
common European approach to the resolution of the legal and practical prob-
lems posed, than to the clear and uncontested evidence of a continuing inter-
national trend in favour not only of increased social acceptance of transsexuals
but of legal recognition of the new sexual identity of post-operative transsexuals.51

As regarded the impact on the birth register system, the Court recalled that in
Rees it allowed premium to be placed on the historical nature of the birth record
system; in the assessment considerable argumentative clout was given to the argu-
ment that allowing exceptions to this system would undermine its functioning.
This time around, however, the Court noted that exceptions were already made
to the historic basis of the birth register system; to make further exceptions in the
case of the United Kingdom’s approximate 2000–5000 transsexuals would not be
to court the subversion of the whole system. Adding to this, the Court noted that
the English government recently had issued proposals for reform allowing on
going amendment to civil status data; the need to sustain with rigour the integ-
rety of the historic basis of the birth registration therefore did not take on the
same importance in the current climate as did it at the time of the Court handing

down Rees.

Foregrounding that the very essence of the Convention is respect for human
dignity and human freedom,52 and all the more so in the case of art 8, the Court
went on to say that in the twenty-first century the right of transsexuals to per-
sonal development and to physical and moral security could not be regarded as
the stuff of controversy, requiring the passage of time in order to shed clearer
light on the issues at hand. The unsatisfactory situation under which post-oper-
ative transsexuals suffered – ‘an intermediate zone as not quite one gender or
another’53 – was deemed no longer to be sustainable. Claiming not to overlook
the hardships that could inevitably follow in the wake of major changes in the
system, and asserting that such changes would cause no detriment to third par-
ties, the Court considered that society should reasonably be expected to tolerate
a certain inconvenience in order to enable individuals to lead their lives ‘in dig-
nity and worth in accordance with the sexual identity chosen by them at great

51 Ibid.
52 See generally Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of
53 Goodwin (n 26) para 90.
personal cost’. On account of these and other considerations, the Court found that the United Kingdom could no longer claim that the matter lay within its margin of appreciation, except with respect to the appropriate means of achieving recognition for the right protected under the ECHR. Absent any significant factors of public interest that could weigh against the interest of the applicant in obtaining legal recognition of the gender re-assignment, the Court found that the fair balance inherent in the Convention decisively tilted in favour of the applicant; there was, accordingly, an interference with the applicant’s right to private life, in violation of article 8 of the ECHR.

Turning to the issue of alleged violation of article 12, the Court recalled that in its previous case law, it had found the inability of transsexuals to marry a person opposite of the sex of their re-assigned gender did not fall foul of article 12. Surveying the situation in 2002, however, the Court observed that article 12 guaranteed the rights of a man and woman to marry and to found a family. Of course, the latter aspect is no condition of the first; the inability of any couple to conceive or rear a child in itself does not bar their enjoyment of the first limb of the provision. The Court noted the major social changes in the institution of marriage and in the field of transsexuality since the adoption of the Convention. The question was whether the allocation of sex in national law to that registered at birth is a limitation impairing the very essence of the right to marry. In this regard, said the Court, it would be deceptive – ‘artificial’ – to venture the assertion that post-operative transsexuals have not been deprived of the right to marry a person of their opposite sex. Although living as a woman in relationship with a man and wishing to marry him, under English law the applicant was barred from doing so; accordingly, the Court held, the applicant could claim that the very essence of her right to marry had been infringed. In its judgment the Court conceded that despite widespread acceptance of the marriage of transsexuals, fewer countries permitted the marriage of transsexuals in their assigned gender than recognise the change of gender itself. The Court was, however, not persuaded that this supported an argument for leaving the matter entirely to the states as being within their margin of appreciation.

Such a solution would be tantamount to ruling that the range of options open to a state included an effective bar on any exercise of the right to marry. The Court found that the margin of appreciation did not extend that far; although it was for the state to determine certain aspects regulating post-operatives and mar-

54 Ibid [91].
riage, the Court found ‘no justification for barring the transsexual from enjoying
the right to marry under any circumstances’.\footnote{Goodwin (n 26) [103].} Because of this, the Court con-
cluded that there had been a breach of article 12 of the ECHR.

In the view of the Court, the ‘lack of evidence of a common European
approach’ carried less clout than did ‘the clear and uncontested evidence of a con-
tinuing international trend in favour not only of increased social acceptance of
transsexuals but of legal recognition’. In recognising that gender identity to some
extent is a matter of choice and self-ascription, \textit{Goodwin} opened the door to the
development and transformation of the self by the self, to some extent transgress-
ing the pigeonholes and classifications of society. The Court effectively came
close to saying that the biological criteria are themselves social constructs or that
scientific knowledge is a function of discourse.\footnote{Sandland (n 49) 196–97.}

III. Costs Incurred: The Dark Side of Human Rights
Litigation in LGBT Issues

Synthesising the most salient treads of the discussion above, this part looks at
how the demands of the LGBT movement for redress with respect to sexuality
rights have shaped ECHR law: what, in other words, are the limitations of a legal
human rights strategy in this field?

Honing in on darker sides, tensions, and heterogeneities in this way is, as we
have seen, consistent with Foucault’s concept of genealogy, as opposed to trying
to announce the culmination of the historical process of LGBT rights, with a lib-
eratory moment as the conclusive apex. Instead of shoring up present arrange-
ments by purporting to show them to rest on sound foundations, the aim is to
shed light on crevices and interstices.\footnote{Foucault (n 13) 82.} As the analysis in this part shows, couch-
ing the plights of LGBT persons as legal human rights issues has buttressed the
effort to redress injustice in notable ways. Primarily, such victories have been
reached by way of dynamic interpretation of article 8 based on the idea that sexu-
ality and gender identity belong to the sphere of private life, and are by that token
protected by the right to respect for privacy.\footnote{See Johnson (n 27).} The right to non-discriminatory

\footnote{55 Goodwin (n 26) [103].}
\footnote{56 Sandland (n 49) 196–97.}
\footnote{57 Foucault (n 13) 82.}
\footnote{58 See Johnson (n 27).}
treatment has also been interpreted to take account of discrimination on grounds of sexual proclivities and gender identity. And, at least with respect to transsexuality, the right to marry has likewise been recognised as a right that should belong to everyone.59

In addressing the question of the limitations of human rights strategies in this field, much may be gleaned from Foucault’s work, and in particular three of the themes on which he elaborated. The first theme is Foucault’s famous claim that ‘homosexuality’ is a modern phenomenon, that it was only in modern times that homosexuality was defined with a particular form of life or category of people. The second is the medicalisation of the sexually peculiar, how sexuality – and homosexuality with it – became a medical and medicalisable object whose detection was wedded to prurient pleasure on the part of those tasked with detecting sexuality. Thirdly this part focuses on the relationship between the two issues of sexual orientation and gender identity, looking at how the heteronormativity that the expanding field of LGBT rights takes on may in fact be perpetuated through international LGBT human rights litigation.

Homosexuality: ‘A Socially Constructed Category’

As adumbrated above, the first Foucaultian insight I shall bring to bear here is that homosexuality is a modern phenomenon, the product of discourse. Foucault insisted that the category of the homosexual be seen as something taking shape in a particular context in the 1870s; it should be viewed as a constructed category of knowledge rather than as a discovered identity.60 It was not, however, Foucault’s assertion that same-sex relationships did not exist before the nineteenth century. The distinction between for example Renaissance-period condemnation of sodomy and the regulatory practices of the nineteenth century lies in the latter’s claim to identify what Foucault called a ‘species’, a deviant type of human being defined by perverse sexuality. Whilst sixteenth-century men and women might have been urged to confess that they had indulged in shameful sexual practices against the laws both of God and man if they partook of same-sex indulgencies, the late nineteenth-century man engaging in a sexual relationship with another man would be viewed – and be encouraged to view himself – as ‘homosexual’.61 Whereas in other words the

59 Marks & Clapham (n 3) 339.
60 Foucault (n 18).
61 Tamsin Spargo, Foucault and Queer Theory (Icon Books 1999) 17–18.
sodomite had been a temporary aberration, the homosexual was now a species.62

A personage, a case history, a life form, the ‘homosexual’ now became the focal point of a burgeoning plethora of studies. Cast to meet the needs of a developing capitalist society, these technologies were designed to preserve and foster a productive and procreative populace; the key nucleus of this social order was the bourgeois family within which the future workforce was to be begat. In the logic of such a framework, same-sex desires were a problem to be dealt with, affronts to the procreative norm to be nipped in the bud. Moreover, the homosexual was a species understood as entirely defined by his sexuality. Nothing going into his composition was unaffected by his sexuality. His sexuality was everywhere present in him: ‘[i]t was consubstantial with him’.63

At the same time, however, Foucault sens itises us to the ambiguities of identity politics. This he does because the challenges themselves may ultimately have the effect of reinforcing the phenomenon by which gay men and lesbians are taken to constitute a ‘species’, a minority, or a particular social group that is marginal and subaltern vis-à-vis the heterosexual genus, majority, those conforming to heteronormativity.64

Prurience: Medicalisation of the Sexually Peculiar

A second theme concerns what Foucault referred to as the ‘medicalization of the sexually peculiar’.65 On Foucault’s account, once sexuality was no longer the subject of proscriptions but also amenable to widely dispersed forms of regulation, detailed procedures were established of examination, observation, as well as scrutiny, and by that token elaborate conceptions of health and of pathology. Sexuality became something to be detected. In the process it also became a source of prurient interest for those in the business of detecting. A twofold effect was the result: an impetus was given to power through its very exercise; an emotion rewarded the overseeing control and carried it further. The intensity of the confession renewed the curiosity of the questioner; the pleasure discovered fed back to the power encircling it. As power anchored the pleasure it uncovered, pleasure spread to the power which harried it.66

62 Foucault (n 18) 42–43.
63 Ibid 43.
64 Marks & Clapham (n 3) 341.
65 Foucault (n 18) 44.
66 Ibid 44–45.
This seems to dovetail neatly with this study’s review of challenges to laws and practices concerning not least transsexuals. Where the reassigned gender is not recognised post-operationally, the body of the transsexual is put under the voyeuristic scrutiny of effectively all and sundry. In order to prove a violation of the right to private life, the applicants in Rees, Cossey, Sheffield & Horsham, and Goodwin had to produce a wide range of documentation to substantiate the violations they purported to having suffered. Close and perhaps prurient attention is paid to the minutiae of psychiatric examinations, counselling sessions, and surgical procedures, as well as to the various physical changes – like the intriguing construction of vagina-like cavities – and attendant psycho-social effects. The Court in Goodwin opened its narrative with the information that the applicant was ‘diagnosed’ as a transsexual. The Court tells of all the hospitals she visited and the treatments in which she partook; prior to being accepted for gender reassignment surgery, Goodwin had attended ‘regular consultations with a psychiatrist as well as on occasion a psychologist’, we are told. This seems to be exemplary of how society fixes its gaze on the otherness of the transsexual body, looking for signs to explain its deviance or the scars of attempts to bring it to conformity. The process of vindicating the right to a private life clearly is not without ambiguities and costs. In a way conceptually akin to Karl Kraus’s famous quip that ‘psychoanalysis is the disease of which it purports to be the cure’, we are once more sensitised to the danger of entrenching the marginality which one is trying to combat.

Sexual Orientation and Gender Identity

Finally, the analysis of this study points to an important nexus between the two issues of sexual orientation and gender identity: Foucault – and the tradition of ‘queer theory’, as evinced in the seminal work of Judith Butler and Didier Eribon – have brought to the fore how the same heteronormativity which structures the discursive processes associated with sexuality also structure those associated with gender. For example, control of sexuality is dependent upon, and invests in, a strict binarism of gender categories: a person is pigeonholed either as

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67 Goodwin (n 26) [13].
68 Sandland (n 49) 206.
69 See Judith Butler Gender Trouble: Feminism and the Subversion of Identity (Routledge 1990).
70 See Didier Eribon, Réflexions sur la question gay (Fayard 1999).
71 As intimated above, ‘gender’ refers to social or cultural categories, whereas ‘sex’ is reserved for reference to biological categories.
Sexuality Rights under the European Convention on Human Rights

a man or a woman. One of the merits of queer theory is its exploration of avenues of deconstructing this strict binarism. We have seen that the bearing of heteronormativity on gender-crossing asserted itself in this study’s analysis of the relationship between sex discourse and the Court’s jurisprudence. When the Court decided finally to reverse its position adopted in Rees on legal recognition in the United Kingdom of reassigned gender identity, the ambiguities of transsexualism were front and centre in the Court’s argument: ‘In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable’. As Ralph Sandland has astutely observed, it seems that the Court could not stand for the horror which such an ‘other’ ambiguity represented. Ms Goodwin had to lend herself to be categorised as belonging to one sex or the other; she was no longer a man and had to be recognised as a woman. Indeed, following this theoretical vein, a reading of Goodwin which pays attention to how the Court navigates the shoals of ambiguity and the safer waters of more comfortable gender categories suggests that in fact she must be recognised as a straight woman.

The Court in Goodwin did not construct the right of post-operative transsexuals to full legal recognition in any fundamental sense. This study follows Sandland in arguing that Goodwin trades in normative images: the ‘proper man’, the ‘proper woman’. It is along these lines which one must understand the, at first blush surprising, traditionalist paternal view, sometimes met with in quotidian life, according to which it is unacceptable for the son to be a homosexual (who prefers the same sex) but acceptable to be a transsexual (who prefers the opposite sex). A proper woman wants only to espouse a man, or as the Court says about Ms Goodwin, she ‘lives as a woman, is in a relationship with a man and would only wish to marry a man’. In this sense there is in Goodwin only an expansion of the boundaries of the proper; the heteronormative chalk circle is made big enough so as to include transsexuals, to the extent that they are heterosexual. In the context of the Court’s examination of post-operative gender identity, it seems

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72 Marks & Clapham (n 3) 342.
73 Goodwin (n 26) para 90.
74 Sandland (n 49) 202.
75 I was told during my time at Oxford University of a Cambridge student whose father had not been able to condone what the father thought to be the son’s homosexuality. When it turned out, however, that what the father saw as the son’s ‘ponce-like’ demeanour was due not to homosexuality but to transsexuality (I am oversimplifying here), the father had no problem accepting the lifestyle of his heterosexual son-turned-daughter.
76 Goodwin (n 26) [101].
that this was proof of successful gender-crossing. The right to recognition of new
gender is thus strong-armed into going hand in hand with heteronormativity. As
uncanny and seemingly facetious as a lesbian man, the Court may be interpreted
to be saying, is a homosexual transsexual.77 To be sure, the applicant in Goodwin
identified as a full-fledged straight woman and the horrors of in-betweenness had
certainly been hers. This victory for post-operative transsexuals may, however, in
fact be to the detriment of sexual minorities, insofar as victories for post-operative
transsexuals may be at the expense of further shoring up the construction of
homosexuality as the fundamental sexual deviation.78 Although deemed an
important victory and fêted as a milestone for sexuality rights, Goodwin contrib-
utes ‘to the very problems we hoped to solve’, to appropriate a phrase from David
Kennedy.79

The Logical Continuation of Dudgeon and Goodwin

As we have seen, the Court in Dudgeon explicitly chose not to engage article 14.
The Court chose instead to conceive of the prohibition of sodomy in terms of the
right to privacy. As we also saw the Court in Goodwin in no way opened up for
full recognition of transsexuals; Ms Goodwin only had the right to marry insofar
as she wanted to marry a person of the opposite gender. The Court in its 2010
ruling Schalk & Kopf v Austria took Dudgeon and Goodwin to their logical conclu-
sion.80 Schalk & Kopf is the first ECHR case where the questions bearing on
same-sex marriage have really come to a head. The Court in its ruling initially
brought out that article 12, according to the established case law of the Court,
guarantees the right of every man and woman to marry and establish a family.
The Court said the right to marry had been explicated in the Court’s jurispru-
dence on the rights of transsexuals.81 The Court said about its own ruling in
Goodwin that

[i]n Christine Goodwin the Court departed from that case-law: It considered
that the terms used by Article 12 which referred to the right of a man and
woman to marry no longer had to be understood as determining gender by

77 Marks & Clapham (n 3) 342–43.
78 Sandland (n 49) 204.
79 David Kennedy, The Dark Sides of Virtue: Reassessing International Humanitarianism (Prince-
80 Schalk & Kopf v United Kingdom (App no 30141/04) (2010).
81 Schalk & Kopf (n 80) [51–52].
purely biological criteria. In that context, the Court noted that there had been major social changes in the institution of marriage since the adoption of the Convention. Furthermore, it referred to Article 9 of the Charter of Fundamental Rights of the European Union, which departed from the wording of Article 12. Finally, the Court noted that there was widespread acceptance of the marriage of transsexuals in their assigned gender. In conclusion the Court found that the impossibility for a post-operative transsexual to marry in her assigned gender violated Article 12 of the Convention.\footnote{Schalk & Kopf (n 80) [52].}

The Court then brought out that article 12 in the English version gives ‘men and women’ the right to marry; the French version, on the other hand, gives ‘l’homme et la femme le droit de se marier’. The wording of article 12, said the Court, may be interpreted as including the marriage of two men or two women. The choice, however, of ‘men and women’ instead of ‘everyone’, the preferred wording of the other rights of the Convention, must be regarded as deliberate.\footnote{Schalk & Kopf (n 80) [55].}

The case of the applicants was, however, not based primarily on the text of article 12; they argued that in light of ‘present-day conditions’ article 12 now gave the right to same-sex marriage.

This argument did not sway the Court. As only six out of forty-seven states were found to guarantee same-sex marriage the Court found that there was no European consensus on which an evolutive interpretation could be based. In Goodwin, however, the Grand Chamber of the Court had not based itself on the number of states which had changed their law but on what at the time it called a ‘clear and uncontested evidence of a continuing international trend’.\footnote{Goodwin (n 26) [85].} The Court in Schalk & Kopf held that:

the present case has to be distinguished from Christine Goodwin. In that case the Court perceived a convergence of standards regarding marriage of transsexuals in their assigned gender. Moreover, Christine Goodwin is concerned with marriage of partners who are of different gender, if gender is defined not by purely biological criteria but by taking other factors including gender reassignment of one of the partners into account.\footnote{Schalk & Kopf (n 80) [59].}
What the Court here did was to say that the type of continuing international trend on which it based its interpretation in *Goodwin* could not be given the same importance in *Schalk & Kopf*. The Court went on to say that marriage has ‘deep-rooted social and cultural connotations which may differ largely from one society to another’. It reiterated ‘that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society’.  

The question regarding discrimination was a difficult one for the Court. It underscored that in many cases on homosexuality it had relied not on article 14 but on article 8. The Court said that in common with differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification. On the other hand, however, a broad margin of appreciation must be accorded to the states ‘when it comes to general measures of economic or social strategy’. The majority of the Court did *not* find that if there was no right to same-sex marriage under article 12 then this right had to follow from article 14 read in conjunction with article 8. It reiterated that the Convention must be read as a whole; its articles should therefore be construed in harmony with one another.

Though the majority of the Court did not find that the case raised issues of discrimination, the majority held that they must:

- note that there is an emerging European consensus towards legal recognition of same-sex couples. Moreover, this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes.

The Court’s majority concluded that there was no breach of article 14 read in conjunction with article 8. Judges Rozakis, Spielmann, and Jebes did not agree with the conclusion of the majority on this issue. The conclusion of the minority was founded on an analysis which takes seriously the prohibition of discrimina-

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86 *Schalk & Kopf* (n 80) [62].  
87 *Schalk & Kopf* (n 80) [97].  
88 *Schalk & Kopf* (n 80) [101].  
89 *Schalk & Kopf* (n 80) [105].
tion in this type of case, thus breaking with *Dudgeon*. Though the argumentation of the majority may seem weak even within the logics of the Court’s jurisprudence in LGBT questions, *Schalk & Kopf* is nothing if not the logical extension of the Court’s prior conceptualisation of LGBT issues. The choice in *Dudgeon* not to view differential treatment of heterosexuals and homosexuals as ‘discrimination’ and the choice in *Goodwin* of viewing marriage within a strict heteronormative framework reached their logical apex in the denial in *Schalk & Kopf* of the right to same-sex marriage.

**IV. Conclusion**

This article has demonstrated that the evolutive interpretation of the ECHR by the Court in questions concerning sexuality rights, rather unsurprisingly, has been tightly interwoven with changes in sexual discourse. We have seen the importance far into the twentieth and also twenty-first century of how the appearance in nineteenth-century medical disciplines ‘of a whole series of discourses on the species and subspecies of homosexuality … made possible a strong advance of social controls into this area’.90 In a way, however, which echoes German Romantic poet Hölderlin’s words that ‘the danger itself fosters the rescuing power’, we have also seen how the appearance of these discourses, by the same token, ‘made possible the formation of a “reverse” discourse: homosexuality began to speak in its own behalf, to demand that its legitimacy or “naturality” be acknowledged’.91

The Strasbourg Court in *Dudgeon* said that in comparison with the distant era in which the prohibitive legislation was enacted, there was in 1981 a better understanding – and an increased tolerance – of homosexual conduct; ‘the Court [could] not overlook the marked changes which [had] occurred in this regard in the domestic law of the member States’.92 What moved the Court in *Dudgeon* in its interpretation of the ECHR was change in sexual discourse.

In cases concerning post-operative transsexuals, we have also seen how the Court has trailed the forefront of medical knowledge on the ‘criteria of sex’; we have seen how psychological sex went from being the handmaid to chromosomal sex, in the Court’s first cases on transsexualism, to the Court in *Goodwin* finding that it was no longer apparent that the chromosomal element take on decisive sig-

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90  Foucault (n 18) 101.
91  Ibid.
92  *Dudgeon* (n 21) [60].
nificance for the purposes of legal attribution of gender identity. Abandoning the static criteria of chromosomal sex for the dynamic criteria of sociological gender, the Court allowed for discursive change in its evolutive interpretation of articles 8 and 12. In what it termed the 'conflict between social reality and law', the Court seemed to side with the former, placing discursive changes at the fulcrum of its jurisprudence. What the Court said is worth quoting at some length:

The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.

The article has, however, also evinced the shoals of human rights litigation as an avenue for redress of injustice with regard to sexuality rights. Along genealogical lines we have seen how the challenges by the LGBT movement of discriminatory practices in themselves may have the effect of reinforcing the phenomenon by which gay men and lesbians are taken to constitute a ‘species’. We have seen the danger posed by prurient medicalisation particularly of transsexuality, which may in fact further entrench the marginality which one is trying to combat. The article has, lastly, attested how momentous victories for post-operative transsexuals may in fact turn out to be to the detriment of homosexuals, shoring up the construction of homosexuality as the fundamental deviation.

When Richard Kennedy, one of the founding fathers of the Committee for Homosexual Law Reform in Northern Ireland, in the wake of his announcement as a heterosexual, lost his life presidency of the Northern Ireland Gay Rights Association, he quipped, ‘Before I die, I have to be a dyke’. What is perhaps most ironic here is that for all the milestones reached, something as ‘preposterous and uncanny’ as a man turned into a lesbian woman – ‘a lesbian man’, as it were – falls outside of the limits of what is acceptable within the register in which the fight for LGBT redress has been carried out.

93 Goodwin (n 26) [77].
94 Ibid [85].
95 Michael Goldhaber, A People’s History of the European Convention of Human Rights (Rutgers University Presss 2007) 41.
Duncan Kennedy has argued that since the bourgeois revolutions, one group after another has defined its struggle for inclusion in the social, economic, and political order as a rational demand for enjoyment of the same rights of freedom and equality which belong to a postulated ‘normal’ citizen in bourgeois democracy. An important struggle has thus been over how far to go in incorporating those not included in the initial liberal formulation of human rights – ‘the Rights of Man’ – into the order which the revolutions established only for a select few. As this study has borne out with respect to the rights of LGBT persons in Europe, the principle of evolutive interpretation has been instrumental in this regard. It was through evolutive interpretation of the ECHR by the Strasbourg Court that Northern Irish homosexuals – and no longer only heterosexuals – were allowed to contract sexual relationships to their heart’s content. It was, likewise, through evolutive interpretation of the ECHR that transsexuals in a laggard United Kingdom – not only ‘normal’ people – were able to secure respect for their own perception of their identity, under the shelter of respect for private life. As we have seen, the attainment of these rights through an evolutive expansion of who should be eligible to wield them has meant significant victories for LGBT persons. But the process of acquisition of the rights of this ‘normal’ citizen can also partake of what Foucault referred to as ‘normalisation’; the freedom which is shared by an increasingly large class of person is very much the freedom to conform oneself to the discursive mould of the ‘normal’.

The Finnmark Act 2005 Clarification Process and Trial ‘Within a Reasonable Time’

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Abstract: The Norwegian Finnmark Act 2005 aims to initiate a process for surveying and recognising land rights of areas previously considered to be state-owned. This clarification of land rights involves two separate bodies: the Finnmark Commission to investigate and conclude fields, and a land tribunal to settle disputes arising from hearings by the Finnmark Commission. Together they constitute a unified system to effectuate the trial process.

In connection with the Finnmark Commission’s regulations, it is stated that it is an aim to investigate the legal situation in the whole county within a reasonable time. Fair trial within a reasonable time is a human right enshrined in the European Convention on Human Rights 1950 (ECHR) article 6(1). The issue to be addressed in this paper is whether the legal clarification process conducted by the Finnmark Commission is subject to the rules of trial within a reasonable time, and if so, to examine how best to prevent these processes from coming into conflict with ECHR 1950 article 6(1).

Keywords: Finnmark Act; Reasonable Time; ECHR; Finnmark Commission; Indigenous People.

I. Introduction

The Finnmark Act of 17 June 2005 No. 85 relating to legal relations and management of land and natural resources in the county of Finnmark (Fm Act 2005) is a land code for Finnmark. Section 1 of the Act outlines that ‘the purpose of the Act is to facilitate the management of land and natural resources in the county of Finnmark in a balanced and ecologically sustainable manner for the benefit of the residents of the county and particularly as a basis for Sami culture, reindeer husbandry use of non-cultivated areas, commercial activity and social life.’

I am grateful to Supreme Court Judge Karl Arne Utgård for inspiration and for pointing out relevant case law on ‘land consolidation’ through his article Karl Arne Utgård, ‘Jordskifte domstolane og Den europeiske menneskerettskonvensjonen’ in Øyvind Ravna (ed), Perspektiver på jordskifte (Gyldendal 2009) 163–183.

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Finnmark is the northernmost county of Norway and central part of the traditional area of the indigenous Sámi people. The land code initiates an ongoing process of surveying and recognising existing rights of use and ownership of areas previously considered to be state-owned land, which it transfers to an entity called the Finnmark Estate. The identification process is to be performed by a body called the Finnmark Commission (cf Fm Act 2005 s 29 para 1), while a special court, the Land Tribunal for Finnmark, is to settle disputes arising once the Commission has investigated a field or specified area (cf Fm Act 2005 s 36 para 1). These two bodies constitute a unified system to effectuate the process of mapping and clarifying existing rights.

The Finnmark Act and the clarification process can be seen as a response to many years of struggle by the Sámi and due in part to the conflict surrounding the development of the Alta-Kautokeino watercourse in the 1970s. But the question of the right to land in Finnmark had become controversial long before the Alta conflict. Already in 1956 the Sámi Council for Finnmark stated that ‘…the Sámi live in the sure knowledge that both the mountains, the main lands and the islands along the coast, which they have had the right to use since time immemorial, had not been ownerless land, but belonged to the Sámi.’

And we can go even further back in time. As far back as 1902 when the Norwegianisation policy prevailed, the State of Norway passed a land code prohibiting those who did not use Norwegian in everyday speech from acquiring land...

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3 The Finnmark Estate (Finnmarkseiendommen, in Fm Act 2005 s 6) is defined as ‘a separate legal entity with its seat in Finnmark, which shall manage the land and natural resources, etc… as the owner in accordance with the purpose and provisions of the Act in general’. It has a board of six persons: three elected by the Sámi Parliament and three by Finnmark County Council, cf Fm Act 2005 s 7.

4 The term ‘Uncultivated Land Tribunal for Finnmark’ is often used in English translations. It does not reflect the Finnmark or Sámi context, since livelihood and cultural activities historically have not depended on actual land cultivation. The outlying land and mountainous areas are consequently Sámi cultural land. Therefore the more neutral form, the Land Tribunal for Finnmark, is used.

5 Ot ppr nr 53 (2002–2003) Om lov om rettsforhold og forvaltning av grunn og naturressurser i Finnmark fylke (Finnmarkloven) 7. The Act and the processes are also a response to the implementation of ILO Convention No. 169 (1989) concerning indigenous and tribal peoples in independent countries, which we will come back to.

6 Innstilling fra komiteen til å utrede samepersomal (The Sámi Committee, Oslo 1959) 1. The Sámi Council for Finnmark was established in 1953 by Finnmark County Council, with the Sámi politician and educator Per Fokstad as the leader. In 1964 the Sámi Council for Finnmark was replaced by the Norwegian Sámi Council.
from the state.7 This action prompted direct opposition, as expressed in 1906 through the voice of the Sámi politician and teacher Isak Saba in his rhetorical question: ‘Will not the grass grow just as well on the meadow, whether you speak Norwegian or Sámi? Is it not enough that the Sámi have to buy the land that from ancient times has been their own?’8

About 15 years later yet another struggle arose over a draft of a new reindeer husbandry act, which contributed to the first Sámi congress held in Trondheim on 6 February 1917.9 Today 6 February is celebrated as the Sámi National Day. The land code adopted in 2005 is thus a result of a long struggle for recognition of Sámi land rights.

If we again move forward to the 1970s, Sámi cultural awareness was galvanised by a proposal to build a hydroelectric power plant with a dam which would flood the Sámi village of Maze. Another vital contribution was the doctoral thesis of Sverre Tønnesen, ‘The Rights to the Land of Finnmark’,10 wherein state ownership of unsold land was questioned. These events culminated in the Alta case at the end of the decade, which prompted the government of Prime Minister Nordli to found the Sámi Rights Committee in 1980.

The investigatory work that took place under the auspices of the Sámi Rights Committee led to acknowledgement that state ownership of unsold land in Finnmark was based upon a legal opinion which the Norwegian government could no longer support. Although Rettsgruppa (The Law Group) under the Sámi Rights Committee in 1993 concluded that the Norwegian state owned the unsold land both by the coast and in the interior of Finnmark County, it raised a fundamental question regarding the legitimacy of this ownership, stating that it might be based on a misunderstanding that was difficult to excuse.11 Ten years later, in April 2003, when the Bondevik government presented a bill for the Finnmark Act, it concluded that state ownership could no longer be maintained

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7 Regulation 7 July 1902 s 1(c), issued under the Act of 22 May 1902 No 7, om afhændelse af statens jord og grund i Finmarkens amts landdistrikt, s 2, quoted in Ot Prp No 20 (1901–1902) 12.
8 Sagai Muittalægje (Sigerfjord, 1 March 1906) quoted in Steinar Pedersen, ‘Statens eiendomsrett til grunnen i Finnmark – en del av den interne kolonihistorie’ in Harald Eidheim (ed), Samer og nordmenn (Cappelen 1999) 15–38 [37]. Isak Saba (1875–1921) was the first Sámi elected to the Norwegian Parliament (1907–1912). He is also known for having authored the text of the Sámi national anthem Sámi soga lávlla.
10 Sverre Tønnesen, Retten til jorden i Finnmark: Rettsgrevene om den såkalte 'Statens umatrikulerte grunn' – en undersøkelse med særlig sikte på sammens rettigheter (Universitetsforlaget 1972).
11 NOU 1993: 34 Rett til og forvaltning av land og vann i Finnmark 263.
in full.\textsuperscript{12} It found that land in Finnmark could be subject to 'private or collective rights based on prescription or immemorial usage'.\textsuperscript{13}

By 1990 Norway had ratified ILO Convention No. 169 (1989) concerning indigenous and tribal peoples in independent countries. This meant the state undertook the obligation, among others, to identify and recognise indigenous peoples’ traditional lands. Even though the Bondevik government recognised that there might be rights based on prescription and immemorial usage in Finnmark, in their bill they did not propose any survey or specific process to clarify such rights.

The Bondevik bill was met with considerable criticism, in particular from the Sámi Parliament,\textsuperscript{14} who argued that it did not fully address obligations under international law. As a result, the Parliamentary Standing Committee of Justice asked for an independent assessment of the bill, which Professors Geir Ulfstein and Hans Petter Graver were engaged to undertake. They concluded that government proposals on key points were insufficient to meet the requirements of ILO Convention No. 169, stating that in order for the Finnmark Act to meet ILO Convention requirements for recognition of land rights, the decision rules must be changed so that the Sámi could be secured control according to an ownership position.\textsuperscript{15}

The criticism, in particular the requirement for the bill to comply with international human rights law, initiated consultations between the Sámi Parliament, Finnmark County Council, and the Standing Committee of Justice. The consultations led to rather extensive changes in the bill\textsuperscript{16} which included a new first paragraph of section 5 stating 'the Sámi have collectively and individually through prolonged use of land and water acquired rights to land in Finnmark.'

As a result of these consultations, the majority of the Standing Committee of Justice, with the exception of the members from the Progress Party and the Socialist Party, acknowledged that the identification of existing rights must be included as a key element in the Finnmark Act 2005.\textsuperscript{17} Subsequently the majority

\begin{itemize}
\item \textsuperscript{12} Ot prp nr 53 (2002–2003) 43.
\item \textsuperscript{13} Proposal for a Finnmark Act s 5(1), see Ot prp nr 53 (2002-2003) 122.
\item \textsuperscript{14} Innst O Nr 80 (2004-2005) Innsitting fra justiskomiteen om lov om rettforhold og forvaltning av grunn og naturressurser i Finnmark fylke (finnmarksloven) 14.
\item \textsuperscript{16} Innst O Nr 80 (2004-2005) 14 ff.
\item \textsuperscript{17} Innst O Nr 80 (2004-2005) 27.
\end{itemize}
proposed establishment of 'a surveying commission and a judging tribunal to identify existing rights to land and water in Finnmark.' This resulted in a new chapter 5 of the Finnmark Act 2005, which outlined a trial process to clarify and determine right holders to the former state land in Finnmark. The rationale for requiring legal clarification was mainly the obligation Norway undertook in ratifying ILO Convention No. 169, particularly article 14. One should note that the majority of the Standing Committee concluded the scheme selected was much preferable to the ordinary courts, pointing out:

Article 14(3) further states that adequate procedures should be secured in the national legal system to settle legal claims related to land from the concerned people. In other words, it is clearly not acceptable under international law to hand over to the ordinary courts the question of which and the extent of rights acquired in Finnmark.19

As an additional argument in favour of the proposed procedure, the majority found reason to mention similar arrangements had been made elsewhere in the country, regardless of indigenous peoples’ rights and obligations under international law.20 The reasoning of the Standing Committee of Justice for proposing the identification process was thus in part due to Norway’s international legal obligations to the Sámi, and in part so that the people of Finnmark should not be put in a worse position than people elsewhere in the country when it came to legal clarification of the outlying fields and mountainous areas.

Fair and public hearing within a reasonable time is a human right enshrined in the European Convention on Human Rights 1950 (ECHR) article 6(1). 21 It is also stated that 'one of the aims of the Finnmark Act is that the legal situation in the whole of Finnmark shall be investigated within a reasonable time'.22 The issue

18 Ibid 17. Both entities contain elements of previous commissions, however, there are clear differences between the scheme chosen for Finnmark and former regimes, both in their rationale and how the clarification is arranged procedurally.
19 Ibid 28. This was later refuted by the Sámi Rights Committee II, in NOU 2007: 13 Den nye sameretten 453, where it is stated that there is ‘no basis whatever in ILO practice for the point of view of the majority on the Standing Committee’.
20 See ‘Is the Finnmark Commission covered by the commitments in ECHR 1950 Article 6(1)?’ below for similar arrangements.
of ‘reasonable time’ addressed in this paper can be divided into two parts: (1) examination of whether the legal clarification process in Finnmark, which does not fall directly under the Land Tribunal for Finnmark, is subject to the rules of trial within a reasonable time outlined in ECHR 1950 article 6(1); and (2) if that element of the clarification process is in fact required to comply, determine whether the process initiated for clarification and legal recognition of land rights through the Finnmark Act 2005 may possibly come into conflict with ECHR 1950 article 6(1), and what measures may be taken to avoid such a conflict.

Alleged violations of the ECHR can be heard by national courts, see ECHR article 13, and finally by the European Court of Human Rights (ECtHR). Sources for the analysis presented here consist mainly of case law of the ECtHR, including legal literature and textbooks that discuss and analyse this case law. Comparison of the legal process initiated in Finnmark with other human rights provisions is beyond the scope of this paper. In any case, since the Finnmark clarification uses the reasoning contained in ILO Convention No. 169, the Convention provides a framework for the discussion.

The question of ‘reasonable time’ has become particularly relevant because it is more than three years since the Finnmark Commission was established on 14 March 2008, and it has yet to report any conclusions. This article can thus be seen as a contribution to the discussion of frameworks which may prevent the Finnmark clarification process from conflicting with ECHR 1950 article 6(1).

II. Is the Finnmark Commission subject to ECHR 1950 Article 6(1)?

ECHR 1950 Article 6(1) Requirement for Trial within a Reasonable Time

Before discussing the issues to be addressed, we first examine the provision. Regardless of juridical outcome, an unreasonably lengthy time to clarify and decide upon a legal dispute, in and of itself, can be considered unlawful. Through the Norwegian Human Rights Act of 1999, the European Convention on

23 The European Court of Human Rights is the monitoring body for the ECHR, which can overrule and bind national courts in countries that are party to the Convention; see Jørgen Aall, Rettstat og menneskerettigheter, (2nd edn. Fagbokforlaget 2007) 83–94. Alleged violations of the ECHR can also be heard by national courts, see ECHR art 13.
Human Rights was incorporated into Norwegian law with precedence over other legislation without constitutional rank. Article 6(1) of the ECHR 1950 contains provisions concerning the right to a fair trial. The first sentence reads as follows:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [italics added]

Case law and interpretations by the European Court of Human Rights (ECtHR) indicate that the concept of a hearing within a reasonable time depends upon a complex assessment. David Harris and others write that there is no absolute time limit, but that reviews for both civil and criminal cases show that the assessment of reasonable time depends upon three criteria: (1) the complexity of the case; (2) the conduct of the applicant; and (3) the conduct of the case by the competent administrative or judiciary authorities. The first of these three criteria, the legal and actual complexity, is considered the most important evaluation criterion. An additional fourth criterion of significance is considered together with the three others in a Grand Chamber hearing by the ECtHR. This last criterion (4) concerns what is at stake for the applicant in the hearing; in a civil case what ‘good’ is at dispute.

At which particular point the calculation of reasonable time should commence is naturally of concern. In civil cases the beginning of the period is generally taken to be the initiation of court proceedings, namely the time the subpoena is served. Case law from the ECtHR demonstrates exceptions to this practice, which we will discuss further.

24 Lov 21. mai 1999 nr. 30 om styrking av menneskerettighetens stilling i norsk rett, ss 2 and 3.
26 Frydlender v France (App no 30979/96) ECHR 27 June 2000. See also van Dijk and others (n 25) for further reference to other ECtHR case law.
27 See van Dijk and others (n 25) 605; Harris and others (n 25) 278, who write: ‘In non-criminal cases, it normally begins to apply from the initiation of court proceedings ....’
Is the Finnmark Commission Covered by the Commitments in ECHR 1950 Article 6(1)?

Before commencing the discussion of whether the clarification process in Finnmark may be in conflict with ECHR 1950 article 6(1) concerning trial within a reasonable time, the obvious initial starting point would be to discuss whether the Finnmark Commission is indeed covered through Norway’s commitment to uphold this legislation. Following the wording, article 6 refers to ‘an independent and impartial tribunal established by law’. The term ‘tribunal’ reaches beyond the scope of what is considered a court of law under Norwegian legislation, where its competence rather than designation is of most significance. Independence and the authority to pronounce a binding legal decision based on a procedure prescribed by applicable law are important criteria.

The Finnmark Commission differs significantly from a classical court of law. Of note it is empowered to examine legal questions and relations on its own initiative, independently of whether questions are under dispute or whether a claim has been raised. It also has the responsibility to shed light on a case. Furthermore, it should be emphasised the Finnmark Commission cannot pronounce judgments or make enforceable decisions. The last point, that it cannot pronounce enforceable decisions, makes the most convincing argument that the Finnmark Commission is not covered by article 6(1).

It would seem then that the Finnmark Commission process, evaluated independently according to its limited legal capacity, would probably not be covered by ECHR 1950 article 6(1). However, in combination with the Land Tribunal for Finnmark, the Finnmark Commission forms half of a joint trial scheme and this makes a difference. Just as the Finnmark Commission cannot settle legal disputes on its own, a dispute cannot be brought directly to the Land Tribunal for Finnmark. This means that any dispute to be heard by the Land Tribunal for Finnmark has to include processing time by the Finnmark Commission beforehand.

Case law of the ECtHR shows that when an administrative scheme is required to reach a conclusion on a legal dispute, the time spent on such treatment is factored into the calculation of trial within a reasonable time. Van Dijk and others

28 That the Land Tribunal for Finnmark is covered by ECHR art 6(1) is obvious, and need not be further discussed here.
29 See Harris and others (n 25) 285–286; and Aall, (n 22) 349–352, who state that the competence of the body, and not its name/designation, is most important for the assessment.
point out that ‘if prior to the juridical proceedings another action, such as an
administrative objection or a request for a formal confirmation must have been
brought, the beginning is shifted to that moment’. 30 Harris and others are of the
same opinion, writing that the period may begin to run before the writ is issued:

This has been held to be so in cases in which the applicant must exhaust a pre-
liminary administrative remedy under national law before having recourse to a
court tribunal or cases in which the applicant objects to a draft plan for land
consolidation prior to a tribunal hearing.31

The requirement is that where national law requires an administrative procedure
to be exhausted, then that period of time should be counted in the assessment.32
Accordingly calculation of reasonable time should include total time for hearings
by both bodies.

An additional argument is that the Finnmark Commission could well have been
assigned judiciary authority to determine disputes. Both its predecessors, the Norwe-
gian Mountain Commission (1908–1953), and the Uncultivated Land Commission
for Nordland and Trøms (1985–2004), held this authority.33 But for Finnmark the
legislators chose a scheme where the first instance holds no such authority. However,
it can be argued that parties to the process, either with or against their will, should
receive no less protection against unreasonably long proceedings than if the investi-
gation body had in fact been given such judiciary authority.

Finally the legislative statement referred above (in the Royal Decree 16 March
2007) stating that ‘the whole of Finnmark shall be investigated within a reasonable
time’ is of importance. Even if it is not aimed directly at the provisions in ECHR
1950 article 6, it emphasises a commitment to investigate and hear the cases in
Finnmark within reasonable time, not only as a whole, but also in each case.

30 Van Dijk and others (n 25) 603, with further reference to König v [West] Germany (App no
6232/73) ECHR 28 June 1978 [28] and [101].
31 Harris and others (n 25) 232, with further references to König v [West] Germany (n 30);
Schouten and Meldrum v Netherlands (App no 19005/91; 19006/91) ECHR 9 December 1994
[62]; Erkner and Hofauer v Austria (App no 9616/81) ECHR 23 April 1987 [64]; and Wiesinger v
Austria (App no 11796/85) ECHR 30 October 1991.
32 See also Møse (n 25) 360; with reference to Golder v The United Kingdom (App no 4451/70)
ECHR 21 February 1975 where it is stated in para 32: ‘It is conceivable also that in civil matters the
reasonable time may begin to run, in certain circumstances, even before the issue of the writ com-
encing proceedings before the court to which the plaintiff submits the dispute’.
33 See respectively lov 8 August 1908 om ordning av retsfeltholdende vedkommende statens buetjeld-
grund m.v.; and lov 7 juni 1985 nr. 51 om utmarkskommisjonen for Nordland og Trøms, s 2 of each.
When Should Calculation of Reasonable Time Commence?

Given the hearing of a case by the Finnmark Commission is covered by the commitment to trial within a reasonable time, this means a position must be taken as to when calculation of ‘reasonable time’ should commence. As already mentioned, the starting point for such calculation is usually the date of the subpoena or when the writ is issued. This is impractical in regard to the Finnmark Commission, since its legal investigations are initiated through public notice and not a writ (cf Fm Act 2005 s 31 para 1). We have shown that the time taken for hearing by the Finnmark Commission should also be included, so the date the writ is issued before the Land Tribunal for Finnmark would not reflect the original starting point for the purpose of calculating reasonable time.

Perhaps the period could run from the time the Finnmark Commission announces the investigation of a field (cf Fm Act 2005 s 31 para 1), or from the time the Finnmark Commission has finished the investigation and delivers its report (cf Fm Act 2005 s 33 para 1). In support of the latter alternative, one could argue that a dispute undoubtedly would become visible from the release of the report, while it also would be *lis pendens* for alternative hearings. But there is no support for this position in ECtHR case law. At the same time it is important to note here that the clarification process in Finnmark is unique, with both an investigation body and a land tribunal joined together into a public trial system. This situation precludes comparison with similar schemes.

However, it is possible to find ECtHR case law from procedural arrangements that do not begin with a writ, and where it is not necessary for a dispute to exist at the actual time when the case begins. In *Ortner v Austria*, where one of the questions to be heard was whether ECHR 1950 article 6(1) had been violated in a land consolidation case due to unreasonably long proceedings, the Court stated that the land consolidation process should be considered as a whole. It was nevertheless assumed that the time ‘when a dispute arises to be taken as a starting point for the calculation of the length of proceedings’.

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34 See Innst O Nr 80 (2004–2005) 23, which states: ‘If the deadline is exceeded, a party may bring the case before the ordinary courts’.
35 See NOU 2007: 13, 247–272 where comparable systems in other states are reviewed.
36 See Utgård (n 1) 166–172, who examines several Austrian land consolidation cases been found violating ECHR art 6(1); *Erkner and Hofauer v Austria* (n 31); *Poiss v Austria*  (App no 9816/82) ECHR 23 April 1987; *Wiesinger v Austria*  (App no 11796/85) ECHR 30 October 1991; *Kolb and Others v Austria* (App nos 35021/97 and 45774/99) ECHR 17 April 2003; *Ortner v Austria*  (App no 2884/04) ECHR 31 May 2007.
37 *Ortner v Austria* (App no 2884/04) ECHR 31 May 2007 [23].
In the same way as in land consolidation cases, there may not necessarily be a ‘dispute’ at the time the Finnmark Commission takes the matter under investigation. A natural starting point for determining reasonable time may therefore be the moment ‘when a dispute arises’, which means when a legal conflict actually appears.

What qualifies as litigation or a legal dispute is also a matter for debate. An objection to a draft plan for land consolidation prior to a tribunal hearing is recognised as such a dispute.38 In the Grand Chamber Judgment Frydlender v France which concerned a case of employment, the Court required that there must be a dispute over a ‘right’ that could be said to be recognised under domestic law: ‘The dispute must be genuine and serious. It may relate not only to the actual existence of a right but also its scope and the manner of its existence. Moreover, the outcome of the proceedings must be directly decisive for the civil right question.’39

For hearings by the Finnmark Commission it should be relatively easy to determine when a dispute arises which meets the above-mentioned qualification. If two parties or collective groups submit a claim for ownership of the same specific area, for example by placing a tick on the form entitled ‘Notification of possible rights’,40 such an action may already constitute a ‘dispute’. This might apply even though the form uses the phrase ‘possible rights’, but of course this would need to be explored in more detailed hearings. Similarly a dispute could arise if two parties submitted mutually exclusive claims for land or other usufruct rights in the same area.

At the same time, this means that although controversy concerning the right to land and waters in Finnmark has endured for decades, and clarification and law bill preparation have taken a great deal of time, these efforts will not affect the assessment of whether the requirement for trial within a reasonable time has been violated in a specific case.

Not entirely irrelevant is the fact that the preparation of the land rights clarification process has already taken such a long time that many of the older generation of rights holders with substantial knowledge of Sámi customs and other

38 Erkner and Hofauer v Austria (n 31) [13] and [64], where the period was counted from the time the applicant objected to a draft plan for land consolidation prior to a tribunal hearing.
legalities in Finnmark have passed away. This leaves at least a moral commitment for the Norwegian authorities to ensure an effective and timely process in the future.

It is possible too that taking an unreasonably long time before a specific case is heard may conflict with other provisions for the protection of Sámi culture, for example as in the Norwegian Constitution article 110a, the International Covenant on Civil and Political Rights article 27 and ILO Convention No. 169.\(^\text{41}\) Here we remind legislators of the pressing need for legal clarification of Sámi reindeer herders’ winter pastures,\(^\text{42}\) and the ensuing negative consequences on Sámi culture and livelihood of having to live with legal uncertainty, lack of recognition in law, community tension, and ongoing legal disputes. This situation may be impacted by ECHR 1950 article 6(1) since the member states are obliged to organise the judicial process in such a way that prevents unreasonable delay. The issue is further discussed in the next section.

III. What Factors Could Cause the Clarification Process in Finnmark to Violate ECHR 1950 Article 6(1)?

Factors Considered by the ECtHR

Having established that the Finnmark Commission process is covered by ECHR 1950 Article 6(1) and that the time for trial within a reasonable time runs from when the dispute occurs during the Commission process, we next examine under what circumstances the hearing may violate article 6(1). Since there is no case law available from the Finnmark Commission as yet, we cannot assess an actual case. However, it is possible to examine reasonable time assessment factors set up by the European Court of Human Rights, and compare their case law and other requirements with the Finnmark clarification process. As we have seen, case law

\(^\text{41}\) See also Susann Skogvang, Samerett (2nd edn, Universitetsforlaget 2009) 245, with reference to ILO Convention No. 169 requirement for identification and recognition of indigenous rights, where she points out that ‘there must be some requirements for progress in the mapping work for the convention to provide an effective shield. Finnmark Commission should therefore give priority to the traditional Sámi areas, reindeer industry’s rights and other fields where there are Sámi right holders’.

of the Court in relation to reasonable time emphasises (1) case complexity; (2) the behaviour of the applicants; (3) the conduct of the case by the competent administrative or judiciary authority; and (4) what is at stake for the parties. The behaviour of the applicants in relation to the Finnmark process is not yet possible to assess, but we can to some extent examine the three other factors generally.

The Complexity of the Case

Although there is no case law from the Finnmark Commission/Land Tribunal for Finnmark as yet or from the European Court of Human Rights on procedural arrangements directly comparable, some guidance can be found in ECtHR case law from certain land consolidation cases heard by the Court. As mentioned in note 36 above, Karl Arne Utgård has analysed the concept of reasonable time under ECHR 1950 article 6(1) in relation to such cases. The cases he discusses, which mainly are from Austria, are considered to be complex and with many parties, as may be the situation in Finnmark. The land consolidation cases, like the Finnmark Commission cases, do not begin with a dispute. In that regard comparison with Finnmark is also relevant, since calculation of reasonable time for both runs from the time when the dispute arises.

The standard assessment itself of whether reasonable time has been exceeded, in addition to actual case time spent, is reflected in the complexity of the case and its handling by the authorities. This is also the situation in land consolidation cases heard by the European Court of Human Rights, where these factors must be assessed in light of the circumstances of the actual case.

Of particular interest, the European Court of Human Rights specifically goes into the time spent in previous land consolidation cases where the Court has found that ECHR 1950 article 6(1) has been violated. In *Ortner v Austria*, the European Court of Human Rights refers to *Kolb and Others v Austria*, which concerned land consolidation proceedings lasting between seven years and eight months, and ten years and four months, respectively.

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43 See for example *Ortner v Austria* (n 37) para 3, where the Court clearly emphasised ‘the complexity of the case, the conduct of the applicant and the relevant authorities’ as factors for evaluating the reasonableness of the length of proceedings, referring to the principle Grand Chamber case *Frydlande v France* (n 39).

44 *Ortner v Austria* (n 37) para 32, with reference to *Kolb and Others v Austria* (n 36) para 50, where the proceedings lasted seven years and eight months as regards the first applicant, ten years and four months as regards the second applicant and nine and a half years as regards the third and fourth applicants.
Although clearly progress will vary from case to case, case law indicates that unnecessary delay could easily be categorised as a factor under the control of the competent authority, which can lead to violation of ECHR 1950 article 6(1).\(^\text{45}\) Utgård concludes by pointing out that in land consolidation cases heard by the European Court, they are consistently recognised to be complex, involving many parties and public authorities. In spite of the complexity of the cases, and the period of time running from when the dispute first arises, many cases heard before the ECtHR have been found not to have been heard within a reasonable time, and so in violation of ECHR 1950 article 6(1). According to Utgård, cases found in violation had in general lasted eight to nine years.\(^\text{46}\)

The complexity of land consolidation cases means one can anticipate a protracted timeline for such cases. In relation to the Finnmark Commission, comparative analysis on levels of complexity of the cases is of interest. As stated by Utgård, there is a general opinion by the Court that the land consolidation cases heard by the ECtHR are highly complex. In *Wiesinger v Austria*, the Court recognises:

…that land consolidation is by its nature a complex process, affecting the interests of both individuals and the community as a whole. Here, the consolidation scheme concerned a large number of landowners and covered an area of approximately 172 hectares (...). An additional factor of complexity was the recent construction in the area of a network of link roads to a main road, which caused the position of a number of landowners to be revised.\(^\text{47}\)

In *Erker and Hofauer v Austria*, the court stated that ‘any land consolidation is by its nature a complex process’, even before addressing particularly complicated issues such as ‘proper valuation of parcels of land to be surrendered and to be received in exchange’, stating that:

\(^\text{45}\) Ortner v Austria (n 37) para 33, where the Court emphasises an inactive period of three years and eight months. See also *Handölsdalen Sami Village and Others v Sweden* (App no 39013/04) ECHR 30 March 2010, which among others concerns trial within a reasonable time in relation to pasture rights of Sámi reindeer herders. In the case, EMD not surprisingly found that the trial period of 13 years and 7 months, violated the ECHR 1950 art 6 (1). One of the reasons was unnecessary delay, see [65–66]. For more about the case, see T Koivurova, ‘Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospect’ (2011) 18 International Journal on Minority and Group Rights 1–37 [17–20].

\(^\text{46}\) Utgård (n 1) 171, cf n 36 above.

\(^\text{47}\) Wiesinger v Austria (App no 11796/85) ECHR 30 October 1991 [55].
The difficulties inherent in such an assessment are often exacerbated by farmers’ traditional attachment to their fields and meadows. Furthermore, the operation is designed to increase the profitability of holdings and develop the infrastructure of the area concerned; it therefore affects the interests not only of individuals but also of the community as a whole.\(^4\)

Even if the legal clarification process in Finnmark in some areas can be compared with a land consolidation process, it clearly differs on the issue of substantive fields. While the land consolidation process aims to create more appropriate properties, the clarification process in Finnmark primarily aims to identify rights of use and ownership of the land. The land consolidation process also includes non-legal, substantive assessments, such as property valuation, property design and exchange of parcels.

Although the processes are different, both can be assumed to have a relatively high degree of complexity. Further comparison of the different kinds of complexity would not be helpful before the Commission has completed some cases, but one may conclude that it would probably take a lot before the complexity of the Finnmark Commission cases exceed the complexity of the land consolidation cases in Austria.

The Conduct of the Case by the Competent Authority, Including Proper Organisation of the Proceedings

The third factor emphasised by the ECtHR is the conduct of the case by the competent authority, in our analysis first and foremost by the Finnmark Commission. In large part, the proceedings of the Finnmark Commission will be determined by provisions in the Finnmark Act 2005, designed to allow a rather wide variety of alternatives to handle procedural requirements. For example Fm Act 2005 s 32 para 1 states that the Commission ‘may in the manner it finds appropriate’ obtain information and examine the parties to study the fields under investigation, which could significantly impact the time involved.

A tradition of relatively heavy use of external investigators and researchers by the Commission is already established.\(^4\) They obtain information on land usage, customs and the general opinion of law before the Finnmark Commission con-

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\(^4\) Erkner and Hofauer v Austria (n 31) [67].
\(^4\) See [http://www.domstol.no/no/Enkelt-domstol/Finnmarkskommisjonen/Sakkyndige](http://www.domstol.no/no/Enkelt-domstol/Finnmarkskommisjonen/Sakkyndige) accessed 4 April 2011, where it is given an overview of such investigations.
siders the question of law and rights. On the one hand this may contribute to the matter being more thoroughly investigated, but on the other hand it may prolong the term of proceedings in a case. Such investigations may take more time than if the Finnmark Commission itself participates to a greater extent in the hearing at an earlier stage in the process.

In close connection with the conduct of the case by the competent authority, is the way the judicial process is organised, both legally and actually. Proper organisation of the process is a state responsibility, including ensuring that the proceedings do not take unreasonable time. This is discussed in many cases by the ECtHR, including the Grand Chamber case Frydlender v France, where it is stated:

The Court reiterates that it is for the Contracting States to organise their legal system in such a way that their courts can guarantee to everyone the right to a final decision within a reasonable time in the determination of his civil rights and obligations.

In relation to the indigenous Sámi people, this responsibility is strengthened by ILO Convention No. 169 article 14(3), stating that ‘Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned’.

It is also necessary to mention the United Nations Declaration on the Rights of Indigenous Peoples of 2007. Although this is a declaration and not a binding treaty, Norway’s vote to adopt it does carry obligations to comply with the contents of the declaration, especially since the cabinet minister responsible has stated the ‘UN Declaration on the Rights of Indigenous Peoples is in line with government policy towards the Sami people’. Its article 40 requires ‘prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights’. This is a commitment to organise legal proceedings in such way that they not be unduly lengthy where indigenous peoples are concerned.

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50 Utgård (n 1) 172.
51 Frydlender v France (App no 30979/96) ECHR 27 June 2000 [45].
Considering the various steps involved and time required, one may question whether the legal clarification process in Finnmark is properly organised by law. As discussed above, certain provisions allow the authorities freedom to determine themselves how they will proceed, including how much time and resources they will spend on investigation, which may prolong cases. But even if the Finnmark Commission ‘puts on spikes and sprints off’, the Finnmark Act 2005 contains time-consuming provisions. This may be explained in part by the fact that the Finnmark Act 2005 Chapter 5, which regulates the legal clarification process in Finnmark, was not considered by any law committee or legal professional body beforehand, but was developed in the final days of negotiations between the Parliamentary Standing Committee of Justice, the Finnmark County Council and the Sámi Parliament. The process of the surveying and recognition of land rights, designed with two different bodies rather than one judiciary body, by that fact alone clearly consumes additional time. The Finnmark Commission and the Land Tribunal for Finnmark have a far more comprehensive and less precise mandate than previous comparable commissions, and that may also contribute to increased processing time.53

After the Finnmark Commission has issued its report with legal recommendations concerning the fields investigated (cf Fm Act 2005 s 33 para 1), the Finnmark Estate has to assess the Commission’s conclusions. That can be time-consuming too, since the Fm Act 2005 s 34 para 1 says that a decision to accept a conclusion stating that others hold rights to the areas investigated must be put before the Sámi Parliament and the Finnmark County Council for consideration according to Fm Act 2005 s 10 para 6.

The Finnmark Act 2005 s 35 also allows for mediation after the Commission has concluded a field. If the mediation does not result in an agreement between the litigants, the Act permits a period of one year and six months to bring the case further to the Land Tribunal for Finnmark (cf ibid s 38 para 1), counted from the submission of the report of the Commission. And where appropriate, the Land Tribunal can reconcile cases, which means that it takes even more time to finish the first submitted cases. Finally, decisions by the Land Tribunal for Finnmark can be brought before the Norwegian Supreme Court of Justice (cf ibid s 42).

53 The Mountain Commission and Uncultivated Land Commission for Nordland and Troms had a mandate to decide whether the land was state-owned land, the boundaries between state and privates, and which usufruct rights rested on the state land. The clarification process in Finnmark has no such limitation.
Overall a prudent time estimate for assessment of a single field could easily take between five and ten years. Questions can legitimately be raised as to how this timeline might affect those who are entitled to usufructs and ownership rights on the Finnmark Estate, and how well it complies with the requirement for trial within a reasonable time in relation to ECHR 1950 article 6(1).

What is at Stake for the Applicant, including the Significance of Legal Protections of Indigenous People’s Culture

As mentioned above, what is at stake for the parties involved is another factor taken into consideration by the ECtHR. Cases that impact the culture, industry and livelihood of the parties, or where the parties’ way of life is challenged, have more at stake than leisure-related rights cases. This means that in cases related to clarification of the right to reindeer husbandry, agriculture, livelihood and commercial fishing, the period for hearings and proceeding within a reasonable time is shorter than for cases related to game hunting and angling. However, because industry and livelihood cases are more complex than leisure pursuit cases, the actual difference in the period of reasonable time may not be as significant as might be supposed.

As well as recognising Sámi cultural issues that may be at stake, the competent authority must consider the fact that the Sámi, by virtue of being indigenous people and a minority, enjoy legal protection according to international obligations as well as Norwegian domestic law. The international human rights law protecting indigenous peoples’ culture and land rights, ILO Convention No. 169 article 14 and the International Covenant on Civil and Political Rights article 27, clearly indicate that states have a particular responsibility to clarify land rights of indigenous people such as the Sámi in Finnmark. The Norwegian Constitution article 110(a) also addresses this responsibility.

The legal clarification process of Finnmark is reinforced by the commitment of the State of Norway to international treaties protecting indigenous peoples’ land rights and culture. This means that such rights in relation to ECHR 1950 article 6(1) and the concept of reasonable time, should afford them priority – in selection of investigation fields and timely processing – by both the Finnmark Commission and Land Tribunal for Finnmark.55

54 See ‘ECHR 1950 Article 6(1) Requirement for Trial within a Reasonable Time’, including n 26 above.
55 See also Susann Skogvang at n 41 above.
IV. Summing up

Case law from the European Court of Human Rights shows that clarification processes like the one conducted by the Finnmark Commission are covered by the European Convention on Human Rights 1950 article 6(1). This obligation demands that legal proceedings or hearings in a particular case should be processed within a reasonable time. What constitutes reasonable time will vary from case to case, based on an assessment of its complexity, the conduct of the applicants, the handling of the case by the competent authorities, and what is at stake for the applicants. Reasonable time in such cases is calculated from the time a genuine dispute arises.

Whether a particular case in the Finnmark clarification process will extend beyond the understanding of reasonable time according to ECHR 1950 article 6(1) it is too early to say. Reasonable time must be determined for each case individually, and no cases have yet been concluded or alleged to violate the provision. Although no cases from the Commission to date have been completed, it may be reasonable to examine under what circumstances the trial process chosen for clarification of land rights in Finnmark may come into conflict with ECHR 1950 article 6(1) for several general reasons: (1) both the Finnmark Commission and the Land Tribunal for Finnmark have a wider mandate than comparable commissions, and yet at the same time have far less guidance from preparatory works, case law and customary law; (2) the procedural legislation selected for the clarification process is complicated and time-consuming in itself; (3) trial will be challenging because it deviates from general civil procedure requirements in several areas, such as principle of party disposes, including rules on subpoena and collection of necessary information to investigate the case (which in ordinary civil procedure falls to the parties); and (4) the fact that two distinct legal bodies (the Finnmark Commission and the Land Tribunal for Finnmark) must remain strictly independent of one another and yet still constitute a unified system is challenging, and will undoubtedly prolong case processing time.

In their reasoning for the establishment of this two-pronged legal procedure, the Standing Committee of Justice among others, stated that hearings by ordinary courts would be more time-consuming than this process, and it is ‘clearly not acceptable under international law to hand over to the ordinary courts the question of which and the extent of rights acquired in Finnmark’. In retrospect
the validity of these statements is open to debate; however, such a discussion is outside the limits of this paper.56

Indications are that the Finnmark Commission, appointed 14 March 2008, will spend more time investigating its first field than any previous comparable commission arrangement,57 something that is worrying. In particular, in Field 1, Stierdná/Stjernøya and Sievju/Seiland, the Commission took over litigation originally brought before the Alta District Court. That the parties chose to move the hearing of the case from the District Court to the Commission will of course not imply that the time before the Commission announced the case is to be factored into the processing time. However, there is no doubt that the dispute existed when taken over for hearing by the Finnmark Commission, and that is now (in 2011) more than two years ago. And the Finnmark Commission report, only the first link in a complex chain leading to a final decision, is still some way off.

The European Court of Human Rights has ruled that eight to nine years of processing time violates the provision of trial within a reasonable time for land consolidation cases in Austria. Whether by extension this would apply to the clarification process in Finnmark, it may be speculative to conclude at this time, since there is no relevant practice yet. But since the comparable land consolidation cases are highly complex with a large number of parties, and where land planning and valuation are key elements in the process, we certainly cannot rule out that this will be the case in Finnmark; especially since trial in a reasonable time should be sought particularly where rights to exercise culture, livelihood and traditional way of life is at stake.

56 The Sámi Rights Committee had proposed a very different clarification process (see NOU 1997: 4 Naturgrunnlaget for samisk kultur 246 ff). It is worth noting that the legislators did not evaluate or discuss any other arrangement before reaching their conclusion, including the appropriateness of establishing both an investigation commission as well as a tribunal.

57 The Finnmark Commission can be compared with the Mountain Commission and the Uncultivated Land Commission of Nordland and Troms. From when the Mountain Commission Act was adopted (8 August 1908 No 6), it took two years and four months for its first sentence on 1 December 1910. The Uncultivated Land Commission, established through the Act 7 June 1985 No 51, took nearly five years before its first sentence on 26 April 1990. It must be noted though that the process was based on subpoena, which in this case was filed 12 January 1987, thus taking three years and three months before the sentence. We can also compare the advisory committee Utvalget for Statseiendom for Nordland og Troms, appointed 11 June 1971, which submitted its first report, NOU 1974: 8 Tromsdalstindområdet on 18 December 1973.
V. Some Proposals *de lege ferenda*

The Finnmark Commission is most likely covered by the ECHR. It is difficult to give any direct advice how to prevent violation of the Convention, beyond that the Commission must be aware of the assessments ECtHR has made in relation to the land consolidation cases from Austria, and that long proceeding time can lead to that the Finnmark clarification process being similar to the Austrian land consolidation cases.

In considering what the law ought to be (*de lege ferenda*), the legislators might address the lengthiness of the procedural legislation, as referred to in this paper, including establishing a shorter deadline for bringing cases before the Land Tribunal for Finnmark. Another option would be to give the Finnmark Commission judiciary authority so that the process could conclude with an enforceable decision using only one body.58 There may be conflict between achieving resolution within a reasonable time, and the necessity for proper investigation and an effective appeal system. Even though interests may conflict, the legislators here as in other legal processes must balance the goal of trial within a reasonable time with achieving a fair and effective remedy.

In cases of alleged violations, we must assume that also the Norwegian courts, to the extent they have to hear the case (see note 23 above) are well prepared both to examine the claim, but also to evaluate if the procedural legislation can be justified within the framework of trial within a reasonable time by current law.59

Finally, the concerns raised above do not mean that Norway does not recognise Sámi rights to land and natural resources under the human right provisions. These initial difficulties primarily result from uncoordinated and inadequate preparatory work rather than failure to uphold the aim of ILO Convention No. 169. The Finnmark Act 2005 is internationally recognised by the UN Special Rapporteur on the rights of indigenous people, James Anaya, ‘as an important protection for the advancement of Sami rights to self-determination and control over natural resources at the local level, setting an important example for the other Nordic countries’.60 But

59 See Jens Edvin Skogshøy, ‘Nasjonal skjønnsmargin etter EMK’ (2011) 50 Lov og Rett 189–190, who states: ‘Whether an … infringement [of the right to a fair trial] can be defended in a democratic society, have the courts a good qualification to re-examine’ [190]. Opposite for ECHR legislation based more on political issues.
Anaya also expresses some reservations, stating that since 'the process for identifying rights to land under the Finnmark Act is currently underway, the adequacy of the established procedure is not yet known'.

In sum, this means that there is certainly room for legislative improvement, in which both Norwegian legislators and Sámi representatives should participate, to ensure that the Finnmark clarification process embodies ILO Convention No. 169 article 14(3), with 'Adequate procedures … within the national legal system'. In light of the length of time it has taken to prepare for the clarification process, our legislative authorities have a special responsibility to ensure that the coming trials will be heard within a reasonable time.

61 Ibid [49].
Waiver of Human Rights
Waiver of Procedural Rights According to ECHR Article 6
(Part III/III)

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Abstract: The general principles governing waiver of rights according to ECHR were analysed in the first article, published in Joint issue 3&4 2010 of this Journal: if there is sufficient proof for a valid and societal acceptable waiver, there is a freedom and may even be an obligation for the state to respect it. The application of these principles to substantive convention rights were investigated in issue 1 2011. In the present article I will focus on procedural rights laid down in article 6 of the Convention. Both waiver of the right to a court in toto and of particular rights in an ordinary court hearing will be addressed (in part 1 and 2 et seq. respectively).

Keywords: Waiver of Rights.

1. Waiver of the Right to an Ordinary Main Hearing before a Court

1.1 Introduction

Article 6(1) is applicable in the determination of civil rights and obligations as well as in the determination of any criminal charge. Case law clearly shows that the right to a determination by a court can be waived, both in civil and in criminal cases, see 1.2 and 1.3 respectively. The wording of article 6(1) ‘is entitled to’ could be taken as an indication that it is entirely up to the right-holder whether or not to utilise this entitlement. This, however, cannot be assumed (see part 1.2.4 of the first article). It depends on broader considerations if and when access to court may be barred with reference to a waiver from the applicant. Two varia-
bles, presumably the most important, will be examined in the following: the interest involved, not only for the parties to the dispute, but for the society as well, and the degree of discrepancy between the alternative procedure and the ordinary court procedure.

The main focus in the following will be on criminal cases, after a briefer presentation of waiver of the right to determination by a court in civil cases.

1.2 Civil Cases

1.2.1 General

Article 6(1) is an accessory to national law. The provision guarantees no substantive rights, only a procedural right to have rights or obligations determined by an independent tribunal. As a point of departure the right-holder is free to waive her right to a court in civil cases. This exercise of self-determination is both in the right-holder's interest and in the interest of the society. In *Axelson* the Commission noted:

> that insofar as arbitration is based on agreements between the parties to the dispute, it is a natural consequence of their right to regulate their mutual relations as they see fit. From a more general perspective, arbitration procedures can also be said to pursue the legitimate aim of encouraging non-judicial settlements and of relieving the courts of an excessive burden of cases.3

Nevertheless, waiver of the right to a court may give rise to concern in at least five different situations (see 1.2.2 et seq).

1.2.2 The Character of the Substantial Right Involved

There is a gradual transition from situations where the right-holder accepts conditions presented by his counterpart, so that there is no dispute, to situations where there is a dispute that he accepts is being unilaterally settled by his opponent. It may be rational to choose this option if there is after all, little at stake for the right-holder. From the point of view of the Convention the qualms are modest if that is the case and waiver is given in a current situation, as opposed to being for any future disputes (cf below on ticket in criminal cases).

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3 See *Axelson* (n 2). See also the Commission decision in *Nordström-Janson and Nordström-Lehtinen v The Netherlands* (App no 28101/95) (1996) Series A no 87.
Another situation arises where the right to a court is waived by agreement in cases concerning mandatory substantial rights. A broad range of civil rights and obligations are of such a character that according to national law they cannot be disposed of by the parties. This clearly indicates that there may be, phrased in ECtHR-terms, ‘important public interests’ involved in the matter rendering it unsuitable for determination outside ordinary courts. It is assumed that there is a hard core of cases that corresponds to a European consensus, cases which will be examined correspondingly thoroughly by the ECtHR. Core cases are disputes concerning family law in a wide sense: conditions for marriage and its dissolution, paternity, custody; and a wide range of cases with the common denominator: a ‘public interest’ in the outcome.

There are few illustrative cases from ECtHR on this topic. Nevertheless, it must be assumed that a thorough examination of whether the character of the substantial right involved bars waiver of the right to have it determined by ordinary courts will be conducted.

In the following we shall focus on two common waiver-based alternatives to ordinary court hearings in civil cases: arbitration and court settlement. We will have the two variables – the character of the case and the quality of the alternative procedure – in mind when assessing the question of the compatibility of waiver with article 6.

1.2.3 Court Settlement

Court settlement is not a waiver of the right to a court, but rather a waiver of a full court hearing. In such cases the dispute is already brought before the ordinary courts and is determined by a judicial confirmation of the agreement between the parties having the same legal effect as a judgment. The system has a parallel in summary procedures in criminal cases: in both cases the dispute (charge) is brought before a court and the agreement (confession) shall form the basis for the determination. A precondition for this is, however, that this agreement is in conformity with ‘important public interests’.

The fact that a court settlement (like a criminal summary procedure) is pending before the ordinary courts, makes it, as a point of departure, less worrying to

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4 See for example The Norwegian Civil Procedure Act (2005) s 11-4.
5 Typical national law requirements are in civil cases ‘conformity with public interests’ (cf Norwegian Civil Procedure Act (2005) s 19-11) and in criminal cases that a summary procedure is excluded if more grave sanctions are involved and it appears risky, see the Norwegian Criminal Procedure Act (1981) s 248.
open a wide opportunity for the parties to agree without a full hearing. This is especially so if the court is empowered to verify the validity of the agreement.

1.2.4 Arbitration: Points of Departure

Arbitration is an inter-partes-agreed dispute settling procedure before an organ outside the ordinary judicial hierarchy. In most cases arbitration will not entail any substantial deviation from an ordinary court procedure. The arbitrators are normally highly qualified lawyers, often judges in their professional life. Normally, the arbitration court delivers a reasoned decision based on an adversarial procedure. Most often judgment will be delivered more speedily compared to judgments by ordinary courts; this may be a major motivation for choosing arbitration.6

The judicial character of the body and its procedure removes, as a point of departure, any qualms with accepting such waiver of an ordinary court procedure. However, several circumstances may change this point of departure.

1.2.5 Arbitration: Deficiency in Agreed Procedure

Normally, national law allows the parties to agree on the procedure.7 It may be that the tribunal fails to meet the agreed procedural requirements. If such a discrepancy is substantiated the tribunal acts in contravention of its mandate. However, one can hardly conclude that any divergence from the agreed procedure will render the process null and void. Often the consequences of procedural errors in arbitration are regulated in national law.8 Otherwise it may be adequate to draw an analogy to what can fairly be characterised as common procedural principles in national law on the consequences of procedural errors: either a possible impact of the error on the outcome of the case (the principle of relativity) or the fundamental character of the breach (especially the importance of the disrespected right) will have to be considered.9 Substantial divergence from the agreed

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6 However, in certain fields arbitration is so ‘popular’ that the ‘customers’ are left to wait for turn so long that the speediness-expectation fails. Still the expectation of particularly qualified judges and maintenance of a good relationship to the counterparty may constitute sufficient motivation.

7 See for example the point of departure in The Norwegian Arbitration Act 2004 s 21 (‘in conformity with the agreement of the parties …’ [innenfor rammen av partenes avtale …]).


procedure may at any rate be considered a faulty assumption, rendering the waiver of access to ordinary courts invalid.

1.2.6 Arbitration: No Agreement on Procedure
The situation may be that there is no specific or detailed agreement on the procedural requirements to be followed by the tribunal. Considerations connected to fairness in this context must take account of the fact that arbitration implies a waiver of the right to an ordinary court procedure. 10 Already for that reason the parties can have no expectation that the tribunal will adhere to the requirements of article 6 in minute detail. To a certain degree the arbitration tribunal’s opportunity to fulfil the expectations with regards to speediness, which may have motivated the parties to opt for arbitration, even presupposes a more expedient procedure as compared to the ordinary court procedure.

However, even in an arbitration context there is a presumption that the parties have agreed on no less than a fair procedure (see generally on the indispensable fairness, 2 below). This means that, even in an arbitration context, basic requirements of a fair judicial procedure will have to be complied with. So, what is procedural fairness in an arbitration context? To my knowledge there is no conclusive case law on this point. But inferences may be drawn both from common solutions in national law and from ECtHR’s case law in ordinary article 6-cases. Both sets of rules suggest that there can be no presumption of waiver of the basic requirements of article 6: the independency and impartiality of the tribunal, and its adversarial procedure. 11

1.2.7 Arbitration: The basic Requirements of Article 6 are Mandatory
Finally the question may be raised if these basic requirements of article 6 will have to be complied with even if expressly waived by the parties.

Again there is no decisive case law. We are left to inferences from neighbouring fields. In Pfeifer and Plankl 12 ECtHR stated, rather unreservedly, that the right to an independent and impartial tribunal (arguably extendable to arbitrators) ‘is of fundamental importance and its existence cannot depend on the parties alone’.

True enough, Pfeifer and Plankl does not exclude waiver (see 3 below). Furthermore the case is distinguishable from arbitration in that it was a criminal case

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10 See the Commission’s decision in Nordström-Janzon and Nordström-Lethinen (n 2).
before an *ordinary* court. It is, however, doubtful that these differences are material in relation for the question we discuss: article 6(1) is applicable in civil cases as well as in criminal cases. And the ‘core rights’ of that article ought to be respected wherever such cases are tried by a body intended and appearing to be a court,\(^\text{13}\) because such a system arouses expectations of fairness.\(^\text{14}\)

Arbitration belongs to the private sphere, and is most often conducted in camera. Hence the issue of unfair procedure may never come to the knowledge of the relevant state organs. The state’s responsibility is not to make conditions favourable to it, more specifically to combat it by legislation and in practice, by defining minimum requirements in law and by allowing subsequent access to an ordinary court procedure for any party to an unfair arbitration process, for example.

Obviously, in most civil cases,\(^\text{15}\) there is a right to avoid a court hearing by settling the dispute *inter partes*. And naturally a party to such a dispute can influence the basis for a court hearing by meeting the counterpart’s claim.\(^\text{16}\) But as long as a dispute remains, it is hard to see that there is any basis in the Convention for a *negative right* to have it determined by ordinary tribunals. There is no right to have disputes determined any other way (such as by arbitration).

### 1.3 Criminal cases

#### 1.3.1 Pros and Cons for Mandatory Court Hearings in Criminal Cases

(a) We concluded in part 6 of the second article (NJHR 1 2011) that the *nulla poena sine lege* principle is mandatory. It is uncontroversial to take as a starting point that also the closely related *nulla poena sine judicare* principle, demanding the mediation of the judicial branch when it comes to criminal sanctions, holds a prominent place in a democratic state governed by the rule of law.\(^\text{17}\) The latter principle is, however, not equally unreserved. There may, as we shall see, be reasons to submit to the right-holder’s waiver without undermining the central objective of criminal law.

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13 The classical triangle conflict-solution mechanism is inspired *inter alia* by Charles Montesquieu, *De l'esprit des lois* (Londres 1748).

14 See also 2 below.

15 But see 1.2.2 above.

16 A seemingly parallel situation in criminal cases where the accused confesses, is only comparable to a certain extent, see below.

17 An underlining of the importance of separation of powers goes all the way back to Montesquieu (n 13).
Even if we anticipate that the right to have a criminal charge determined by a court can be waived, to a certain extent, we can proceed from the assumption that there can be in no cases such a negative right. The ‘public interest’ dimension inherent in criminal law (general deterrence) is so vital that there is a presumption that the state will retain the option, where considered necessary, to enforce it the ordinary way: in a criminal trial before a tribunal.18

(b) The nulla poena sine judicare principle is supported both by public interests and by the interests of the defendant. Society needs a machinery to carry out criminal responsibility vis-à-vis a perpetrator, and the perpetrator (now accused) is in need of safeguards against unjustified convictions. These two interests meet in the need for ‘a … fair and public hearing by an independent and impartial tribunal …’ when the harm punishment is meant to imply is deliberately imposed by the state.

Fairness entails several requirements in addition to the basic presumption of innocence, all aimed at ensuring that society’s deliberately imposed pain does not harm innocents. This is not only to the benefit of the accused, but the community at large: with a more arbitrary procedure its members would have run a higher risk of unjustified convictions.

Society’s most obvious interest in support of a court hearing is the deterrent (and pedagogical) effect thereby obtained: general prevention is the fundamental rationale supporting criminal liability and punishment,19 and this objective is most efficiently obtained through an open and thorough process, enhanced by the publicity requirement, where the consequences of criminal acts are brought to the knowledge of the general public. At the same time publicity is a safeguard for the accused: ‘justice must not only be done, it must also be seen to be done’ (see 5 below).

(c) However, there are considerations that count in favour of the admissibility of waiver of a trial as well. Both the individual and society have legitimate needs for flexible solutions relieving the judiciary of numerous and more trivial cases. It is in the individual’s interest to have a minor offence decided by a summary trial or a ticket without any publicity, rather than by a – to his reputation burdensome – full public hearing. And, the judiciary’s capacity in any society will easily be

18 But as we shall see (inter alia in 4 and 9 below) certain preferred rights for the accused may be invoked as a basis for the limitation of specific art 6 rights.
19 See among other authorities X and Y v Netherlands (App no 8978/80) (1985) Series A no 91 where the fundamental importance of criminal law and its enforcement is underlined. See also on general prevention, for example Antonio Cassese, International Criminal Law (OUP 2008) ch 2.2.
overstrained if, for instance, any minor traffic offence, irrespective of the wishes of the accused, were to be decided in a full trial. The mentioned considerations to deterrence and pedagogy generally supporting a public trial, is of (relatively) lesser importance here. At the same time the effect of relieving the judiciary counts heavily in favour of flexible solutions because of the high number of such (relatively) less grave cases.

Different legal systems meet this need for flexibility, and the challenges it necessitates in different ways.

1.3.2 Waiver is a Necessary but not Necessarily Sufficient Condition for the Exception of Trial

A Common solution when it comes to exempting trial is to authorise the prosecution or the police to offer the accused the option to have the charge determined by a ticket. The accused’s valid consent is a conditio sine qua non for the assessment of the system’s conformity with the convention (art 6).20

As to the question of proof for waiver of the right to a court, the general rule ought to be, and in national law it generally is, a requirement that it is express and in writing. It is assumed that different kinds of constraint, lack of knowledge, incompetence or similar invalidating causes play a certain role in this field.21 Consider the Deweer-case22 where the prosecution’s offer was thought so advantageous that it put the right-holder under constraint invalidating his waiver. In the following we shall focus on the requirement that the waiver is in conformity with ‘important public interests’.

1.3.3 Important Public Interests: Character and Severity of Sanction

(a) In Engel23 ECtHR makes it clear that the national classification of a sanction is no more than a starting point for the consideration of whether it is of a criminal character (so that art 6 applies under the criminal charge-head). If the law in question is classified as criminal under national law, this is decisive without further ado in relation to the applicability of article 6 as well. However, as often is

20 See among other authorities, Deweer v Belgium (App no 6903/75) (1980) Series A no 35.
21 A rather peculiar example from Norwegian case law is Amy Winehouse who was arrested and offered a ticket for use of drugs in connection with a concert she held in Norway 2007. Later she claimed that she had not understood what she had signed and appealed to court. However, ultimately the appeal was revoked.
22 Deweer (n 20). See also part 3.2 of the first article, NJHR issue 3&4 2010.
the case, the Convention may be more extensive: norms with a punitive purpose may be considered criminal under the convention, even though they are classified otherwise, typically as disciplinary norms under national law. The nature of the alleged offence and the character and severity of the sanction are decisive factors for the consideration.24

The latter factor is of importance for the waiver-consideration as well: it is suggested that the more severe sanction the right-holder (the accused) risks, the easier a waiver-based exception from trial will run counter to important public interests (b) – (e) below.

(b) The development worldwide has moved in the direction of the abolition of the death penalty.25 Within the European context this development has culminated in the ratification of Protocol No 13 completely abolishing the death penalty, both in peace and war time.26 This development reflects serious and almost universal public interest-concerns on the subject matter. With this in mind it goes (almost) without saying that the death penalty without a trial will run counter to important public interests to say the least; it will strike at the very roots of a civilised society.

(c) In Europe time has run out for corporal punishment as well.27 In some other cultures the element of corporal punishment is substantial: the Taliban’s practice of the talion-principle and Iraqi leaders’ recent warning that the use of amputations will be practised more frequently for punitive purposes, are only examples. In a European context corporal punishment will most likely still occur as a disci-

24 See ibid where the Court states that when considering whether there is a deprivation of liberty, ‘account should be taken of a whole range of factors such as the nature, duration, effects and manner of execution of the penalty or measure in question’[59].
26 The Protocol is ratified by all member states in conformity with the policy of the Council of Europe.
27 See Tyrer v The United Kingdom (App no 5856/72) (1978) Series A no 26 where ECtHR already in 1978 expressed ‘[t]he very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State (…) Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment – whereby he was treated as an object in the power of the authorities – constituted an assault on precisely that which it is one of the main purposes of Article 3 (art. 3) to protect, namely a person’s dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects’ [33].
plinary sanction in private schools where parents have accepted the sanction. In British private schools corporal punishment has a long tradition. Parents who send their children to such schools, regularly accept the regime. In \textit{Y v Great Britain} a 15 year old boy was punished by four strokes with a cane, a method that initially was accepted by the parents. The fact that a friendly settlement was reached before ECtHR indicates that there had been a violation of article 3.\textsuperscript{28} This confirms ECtHR's firm stance on corporal punishment. Both in relation to the substantial provision (art 3) and the enforcement mechanism (art 6), any waiver (typically by parents) seems to be irrelevant.

(d) Consent to \textit{imprisonment} without conviction based on a fair trial raises serious concerns as to its conformity with important public interests. True enough, there are situations where consent deprives the matter of its character of deprivation of liberty, most typically where the right-holder has called for treatment (compare art 5(1)(e), presented in part 5.2 of the second article, NJHR issue 1 2011). However, confinement as a punishment, regulated by article 5(1)(a), is different in character. It has more in common with detention on remand (art 5(1)(c), cf 5(3)), where a court decision is mandatory. It could probably be argued that imprisonment on that basis of waiver, even in this field, is less worrying as long as the right-holder retains the entitlement to a court review of the continued legality of the deprivation of liberty, in case he revokes his consent to confinement.

However, this line of reasoning cannot succeed. Where the case is of such a gravity that imprisonment is the adequate reaction both public interests and the interests of the right-holder advocate strongly for a 'conviction by a competent court' (art 5(1)(a)) as the only acceptable basis for confinement.

The question is whether there are exceptions to this point of departure or not. We will not go into derogations in times of emergency (art 15), beyond pointing to the fact that both articles 5 and 6 may be derogated from, and that a typical derogation is to open for a penalty notice on deprivation of liberty.\textsuperscript{29}

In peacetime, too, special efficiency-considerations may apply, typically within the armed forces. In this area national law often allows en extended use of

\textsuperscript{28} See also David J Harris and others, \textit{Law of the European Convention on Human Rights} (OUP 2009), 105-106.

\textsuperscript{29} According to Norwegian legislation (22 February 1946) amending the Criminal Procedure Act (1 July 1887) sanctions up to one year imprisonment could be accepted by ticket. Given the fact that Norway at the relevant time was no longer in a state of emergency, the arrangement was hardly in conformity with the Constitution, let alone the Convention (if it had been applicable).
the ticket system or other simplified procedures.\textsuperscript{30} To a certain extent such concession may be in conformity with the Convention: In \textit{Engel}\textsuperscript{31} the Court accepted that the point of departure for the consideration of whether there was a deprivation of liberty was to be taken in light of the particular situation of the right-holder; ordinary military service entails, from the outset, restrictions on personal liberty (eg compulsory work or stay in the camp). Such restrictions are regulated by and in conformity with article 4(3)(b)), and by implication do not constitute deprivation of liberty activating article 5. By comparison, in relation to civilians article 4(3)(b) is not applicable, and similar restrictions will activate article 5. Clearly, even in a military context there are limits. In \textit{Engel} being locked up in a cell (‘strict arrest’) was not considered a natural part of military service, and accordingly a deprivation of liberty.

\textit{Engel}\textsuperscript{32} illustrates a flexible interpretation of article 6 in a military context, too. Only restrictions amounting to deprivation of liberty were considered sufficiently grave to imply a criminal charge in such disciplinary contexts.\textsuperscript{33} The flexible approach probably applies beyond the question of the field of application of article 6: even where personal liberty is at stake, so that article 6 is applicable, waiver can most probably justify a deviation from the \textit{nulla poena sine judicature} principle. The limits beyond which the matter will ‘run counter to important public interests’ are, however, uncertain.

In the absence of explicit case law one has to approach the matter on the basis of the general interpretations of the fairness-standard of article 6(1). Case law has confirmed that the provision allows flexible application of the rights.\textsuperscript{34} Hence, it is fair to assume that the implied right to a court is subject to such flexibility.\textsuperscript{35} More specifically, ECtHR has confirmed that the authority may limit this provided that ‘the very essence of the right to a court’ is not impaired. The meaning

\textsuperscript{30} The Norwegian Criminal Procedure Act (1981) allows the acceptance of arrest by penalty order (s 479).
\textsuperscript{31} See \textit{Engel} (n 23).
\textsuperscript{32} Ibid.
\textsuperscript{33} See [83] of the judgment and generally \textit{Harris, O’Boyle and others} (n 28) 205-206 and Francis G Jacobs, Robin CA White and Clare Ovey, \textit{The European Convention on Human Rights} (OUP 2010) 244.
\textsuperscript{34} See \textit{Barberà, Messegué and Jabardo v Spain} (App nos 10588/83, 10589/83, 10590/83) (1989) Series A no 146, especially [89], and \textit{T v The United Kingdom} (App no 24724/94) ECHR 16 December 1999.
\textsuperscript{35} First confirmed in \textit{Golder v UK} (App no 4451/70) (1975) Series A no 18 where a prisoner was precluded from bringing proceedings for defamation against a prison officer. His effective right to a fair hearing was thereby barred.
of this cryptic formulation is basically that the limitation must be reasonable, notably purpose-rational and proportionate.\textsuperscript{36}

In view of the fact that special efficiency considerations apply in relation to the armed forces, an exception to access to court based on consent to custodial sentence appears well founded (the purpose-requirement). However, the proportionality-requirement sets limits in respect of the gravity of the sanction, including its duration. Probably, no more than two weeks will be considered fair and in conformity with important public interests.\textsuperscript{37}

In one more ordinary situation an extension of the admissibility to imprison without a trial is known, at least in some Convention states. That is where the accused has accepted primarily to pay a fine, alternatively to go to prison if the fine is not paid.\textsuperscript{38} It may be argued that the efficiency sought to be achieved by the ticket system would be unduly hampered without this threat. For the consideration in relation to the Convention, such auxiliary deprivation of liberty is clearly not imprisonment ‘after conviction’ in accordance with article 5(1)(a). But the deprivation of liberty may still be acceptable according to litra (b) ‘to secure the fulfilment of any obligation prescribed by law’. According to case law the term ‘any obligation’ should be narrowly construed, so that only deprivation of liberty aimed at constituting a pressure \textit{to secure the fulfilment of specific obligations according to law that have so far not been respected} is covered.\textsuperscript{39}

Hence, a precondition for the acceptability of the system seems to be that (1) the accused is released as soon as the fine is paid (the pressure has fulfilled its mission) and (2) that he cannot be deprived of his liberty if it is the ability, not the willingness to pay that is lacking (the purpose (the payment) cannot be obtained). These limitations have relevance for the article 6 consideration as well. Even if the accused has had a perception of the consequences of a waiver of the right to a court in relation to the fine, the situation may be different in relation to a future imprisonment, see part 3.3 of the first article (NJHR issue 3&4 2010) on the qualms connected to waivers with reference to future situations). Hence it

\textsuperscript{36} See ECtHR’s formulation in \textit{Ashingdane v The United Kingdom} (App no 8225/78) (1985) Series A no 93 which concerned statutory limitations on civil claims under the British Mental Health Act (1959).

\textsuperscript{37} I presume that this represents a European average.

\textsuperscript{38} See the Norwegian Criminal Procedure Act s 256. Other systems seek to meet the same efficiency considerations by highly simplified court procedure, such as the Magistrates Court in UK.

\textsuperscript{39} Interpreted narrowly in \textit{Lawless v Ireland} (App no 332/57) (1961) Series A no 3.
may be unreasonable at this point to force the accused to accept imprisonment without the intervention of a court.  

(c) It follows from the discussion under (d) that waiver of the right to a court is least problematic where the sanction is purely economic. The qualms are hardly more severe when it comes to confiscation and the like. Loss of rights, however, may attain a level of severity, such as where license to perform a profession is at stake. Such sanctions may require determination by an independent organ. Nevertheless, the need to relieve the courts may be managed by alternative, more court-like procedures.

1.3.4 The Importance of the Quality of the Alternative Procedure

Different kinds of quasi-judicial authorities, systemically outside the ordinary judicial hierarchy, empowered to decide quasi criminal sanctions in the first instance are common in most of the Convention states. For the same reasons as for the ticket-system, the rationale lies both in the individual’s interest (to have business done smoothly and without too much publicity) and in the interest of the society (relieving the ordinary courts). The conformity of such systems with ECHR article 6 is accepted by ECtHR, provided that the procedure itself satisfies the conditions in article 6 (independence, impartiality, equality of arms and so on) or the right-holder subsequently has access to a court procedure that so complies.

Normally, such systems are not based on the party’s prior consent, but rather on a subsequent acceptance of the administrative sanction manifested by the right-holder’s passivity – the fact that he refrains from taking the decision to the ordinary courts for a full review.

40 Hence the Swedish system is to be preferred to the Norwegian, see ‘Bötesverkställighetslag’ (1979:189) s 15 et seq.
41 The concept ‘criminal charge’ extends, according to firm case law beyond ordinary criminal sanctions. That is so if either the nature of the offence or the possible punishment, eventually applied cumulative indicates a criminal character, see first Engel (n 23). On the basis of these criteria inter alia grave disciplinary sanctions (as in Engel), tax surcharges (Bendenoun v France (App no 12547/86) (1994) Series A no 284) and regulatory offences (Öztürk v Germany (App no 8544/79) (1984) Series A no 73 activates art 6 under the ‘criminal charge’ head. In addition, a range of administrative interferences, amounting to criminal sanctions, fall under the ‘civil rights’ concept, inter alia revocation of licences as in Albert and Le Compte v Belgium (App nos 7299/75, 7496/76) (1983) Series A no 58. See further about the concepts eg Harris and others (n 28) 205-208 and 211-26 respectively.
42 See among other authorities Albert and Le Compte (n 41).
Waiver on the basis of passivity calls for vigilance (see part 2.3 of the first article, NJHR issue 3&4 2010). In order to assure that waiver is informed, it is recommended that the right-holder is informed about his option to bring the administrative sanction before a court, either expressly in the administrative decision, through his lawyer or the like.

If the right-holder thus opts for waiving determination by ordinary courts, the evaluation of the conformity of the administrative procedure with ‘important public interests’ may draw on a comparison with related fields. In case the procedure is devoid of any judicial character, such as is the case for the ticket-system, it should basically be confined to economic sanctions. An administratively imposed tax surcharge offers an example. If, on the other hand, the administrative procedure gets close to an ordinary court procedure, it is logical to allow this quasi criminal tribunal to determine more severe sanctions as well. Typical examples will be organs empowered to decide on disciplinary sanctions, hereunder withdrawal of licenses to hold a profession. Such organs most often have a judicial character, although not necessarily sufficient to be recognised as a ‘tribunal’. Typically the procedure will be adversarial, the leader a professional judge and the remaining members balance the interests of the parties. The qualms connected to the organ’s sanction-competence are reduced proportionate to its resemblance with ordinary courts.

1.3.5 Summary Trials by Ordinary Courts
Finally the right-holder’s waiver of rights may play a role in ordinary court-proceedings. Technically, there is no waiver of the right to a court, only a partial waiver of one or more particular right(s). One variant is summary procedures where a range of rights related to publicity and evidence, most typically articles 6(1) and 6(3)(b) and (d), are considered superfluous and therefore waived, primarily justified by the existence in the case of the ‘queen of evidence’: the confession. In Hermi the Court addressed the question of waiver of article 6-rights at first instance. The applicant had opted for a summary procedure. The procedure entailed advantages for him: first and foremost the prospects of a more lenient sentence. However, it also meant a curtailment of certain rights. The Court found, under the circumstances, this to be unproblematic:

43 Hence, a certain caution with the use of ‘connecting concepts’ ought to be exercised, see for example A Ross, ‘Tù-Tù’ in Festschrift for H Ussing (Copenhagen 1951) 468-484.
44See Hermi v Italy (App no 18114/02) ECHR 18 October 2006 [79].
The Court considers that the applicant, who was assisted by two lawyers of his own choosing, was undoubtedly capable of realising the consequences of his request for adoption of the summary procedure. Furthermore, it does not appear that the dispute raised any questions of public interest preventing the aforementioned procedural guarantees from being waived (see Kwiatkowska, cited above).45

As this procedure is applicable not only to charges that will be sanctioned with a fine, but imprisonment as well, guarantees accompanying waiver presumably will be of importance. The more severe the sanction the accused risks incurring, the more natural to demand that the determining procedure attains the character and quality of an ordinary court trial: it would hardly be consistent with ‘important public interest’ to allow determination of life term imprisonment by a ticket or a waiver-based summary trial.46

Thus, there are gradual transitions: not only from a plain administrative procedure to a trial before an administrative organ with a certain judicial character, and from the latter to a summary procedure before ordinary courts, but also from such summary procedures to an ordinary hearing where a specific right, the right to a public hearing for example, is waived.

2. Waiver of Specific Article 6 Rights in Ordinary Trials: Importance of the Fairness Standard

As for the right to a court itself (1.3 above), there obviously can be no negative right to an independent and impartial court. Whether specific article 6 rights can be subject to waiver during an ordinary trial depends on several factors.

When a court-hearing is activated in order to determine a case, either because the right to a court cannot or have not been waived in toto, public expectations to a fair procedure is activated as well. Hence, a more-less-consideration a-la: ‘if the right to a court according to article 6 as such can be renounced, the lesser, to

45 See ibid [79].
46 See The Norwegian Criminal Procedure Act (1981) s 248 that limits the admissibility of summary court-procedures to cases where maximum sentence is ten years of imprisonment. This option is dependent on a request from the prosecution and an acceptance form the court, and the latter is under an obligation, in case it decides to proceed with a summary procedure, to assure that such a procedure is not risky and that the confession is confirmed by independent evidences.
allow waiver of one of the rights normally attached to the court-hearing, should be considered trivial’, is not helpful. Even if a less grave charge can be determined by a fine-ticket, it cannot, irrespective of the right-holder’s consent, be determined in court with the Attorney General sitting as the presiding judge. That would be detrimental to the confidence that the judiciary is dependent on – being perceived as independent. Otherwise it cannot fulfil its task in a democratic ‘Rechtsstaat’. In other words, the composition would manifestly run counter to important public interests – the fairness standard in article 6.

A natural starting-point for the assessment of the question of which of the article 6 rights, if any, may be subject to waiver, is to assume that the right-holder can never waive the right to a ‘fair hearing’, the Para-norm of article 6. The ‘fair hearing’ norm encompasses more specific rights listed in article 6. At the same time these specific rights have to be interpreted in light of the fairness-standard.47 The challenge, then, is to approach when a waiver of a particular right has the potential to disturb the fairness of the proceedings.

One example has already been mentioned (the Attorney General sitting as judge). Another is this: even if the accused consents to the use as evidence a statement obtained by torture, the trial court must refuse it because of the overriding public interest in maintaining the confidence in the court’s integrity (cf also rt 15 of The UN Convention against Torture, which states that ‘any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings …’. In other words: a hearing allowing such evidence can never be fair (or will always ‘run counter to a public interest’), even if agreed to.

The situation is less obvious where evidence is obtained through inhuman or degrading treatment. We are then outside the absolute prohibition in article 15 of the Convention against Torture. In Jalloh48 the question of applicability in general (there was no consent) was addressed, but left unresolved by ECtHR. It can be argued that a confession (or other evidence) obtained by such less grave methods (as compared to torture) to an equally lesser degree is likely to have an influence on the reliability of the evidence. However, the reliability of evidence is not the

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47 This general perspective is reflected in Ashingdane (n 36) where the right to determination by a court (implied in art 6) can be limited provided that ‘the very essence of the right to a court’ is not impaired (see 1.3.3 above). It is suggested that a similar line of reasoning is applicable to other arts, then phrased as a question of whether a deviation from a right infringes ‘the very substance of the right’ (eg the freedom of expression as interpreted in Rommelfanger v Federal Republic of Germany (App no 12242/86) (1989) 62 DR 151.

48 See Jalloh v Germany (App no 54810/00) ECHR 11 July 2006.
only relevant factor. The importance of preventing uncivilised police-methods counts as well. And this factor argues against an acceptance (that can be interpreted as a tacit blessing) by the court of a police method that goes beyond the graveness threshold in article 3. The force of this factor is not reduced significantly by the right-holder’s subsequent acceptance concerning the admittance of the evidence. Hence evidence obtained in contravention with article 3 ought to be refused by the court irrespective of the right-holder’s stance to that question.

3. Waiver of Specific Article 6 Rights: Independent and Impartial Tribunal

The independence and impartiality of the judiciary clearly is of fundamental importance in a society governed by the rule of law. Hence it is plausible to assume that it cannot be dispensed with by the parties to the civil or criminal proceedings in question. The Court has made statements to this effect. But case law is not crystal clear on whether waiver of these rights under all circumstances runs counter to ‘important public interests’. The cases have been decided on the basis that an informed waiver has not been sufficiently proven.

_Pfeifer and Plankl_

_51_

dealt with the participation of two trial judges who previously had acted as investigating judges in the case. ECtHR put decisive weight on the fact that, although the applicant had been asked by one of the participating judges whether he had any objections as to the composition of the court, he was not at this point assisted by his lawyer. Since the question essentially was one of law, the applicant was not considered to be in a position to appreciate it satisfactorily. The Court held: ‘That in the case of procedural rights a waiver, in order to be effective for Convention purposes, requires minimum guarantees commensurate to its importance’.

There are even statements _obiter dictum_ in _Pfeifer and Plankl_ that may be interpreted so that the right to an independent and impartial tribunal is absolute

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49 See generally 1.3.1 above.
50 ECtHR does not always distinguish clearly between independence and impartiality. Although analytically difficult and practically unimportant, it may be suggested that the first has its pivot on the organisational level (typically judges’ relationship to or ‘dependence on’ other organs of the state), while the latter more concerns their connections with parties to the case.
51 _Pfeifer and Plankl_ (n 12)
52 See ibid [37].
Waiver of Human Rights

in the sense that a deviation from it on the basis of waiver will run counter to important public interests: ‘Such a right is of essential importance and its exercise cannot depend on the parties alone’.

53 However, already in the next paragraph the possibility of a waiver-based exception seems to be suggested: ‘even supposing that the right in question can be waived ….’ True enough, the statement does not expressly allow the admissibility of a waiver, but nor does it exclude it.

In the *McGonnell*54 case the Court did not have to take a clear stance to the conformity of waiver with ‘important public interests’ either. The cases were solved on the basis of the lack of proof for a tacit waiver. However, the Court’s rather extensive deliberations as to whether it was reasonable to infer waiver in the cases, may suggest that if sufficient proof was provided, the conformity with important public interest is not excluded.55 (Otherwise the Court could have jumped the fence at this lower point, eg by stating that waiver of this particular right runs counter to important public interests.)

True, there are arguments in favour of allowing waiver of the right to an independent and impartial court, first and foremost efficiency considerations. This is especially apparent if the right-holder fails to object once he has gained knowledge of bias. He may refrain from objecting because this will provide him with a second chance: if a successful outcome is not obtained in the first place, he may activate the objection.

I fail to see, however, that this is a substantial argument in favour of allowing a waiver. The qualms connected to this double chance may be cleared away by an obligation to bear the extra costs by such additional trial for a right-holder who does not object at earliest opportunity.56 This hidden threat may be most natural in civil cases, but it is applicable in criminal cases as well. And even though it may be futile because the accused is without money, this objection is not weighty enough to justify a waiver of a guarantee of such fundamental public importance; arguably, it is one of the clearest examples of a rule whose objective primarily is of

53 See ibid [38]
54 See *McGonnell v The United Kingdom* (App no 28488/95) ECHR 8 February 2000.
55 In the *Bulat v Austria* (App no 17358/90) ECHR 1996-II 346 the majority of the Court found that the judge involved at any rate was impartial. In his minority opinion judge Morinilla stated: ‘Certainly, there are procedural rights which can be waived where the waiver has been established in an unequivocal manner … , but where the right at issue is a fundamental one, like the right to an impartial tribunal, such a waiver is not permissible.’
56 See also James Goudkamp, ‘The Rule Against Bias and the Doctrine of Waiver’ (2007) 26 CJQ 310, 323.
a public character: to preserve public confidence in the law by ensuring that justice is both done and is seen to be done.\textsuperscript{57}

This mandatory character of the rule does not exclude the relevance of the right-holder’s view on whether there is bias. It is worth noting that ECtHR in its definition of the objectivity-test focuses on the way the tribunal appears to (or reasonably is perceived by) the parties and the general public.\textsuperscript{58} The question of when there is an infringement with the impartiality-principle is a complex one, ranging from situations where one or more judges has a clear connection to the case or to the parties (eg has previously decided on the matter or is the prosecutor’s sister) to remarks that may give rise to doubt. If the parties perceive a remark as harmless, and hence see no reason to object, this may (and under certain circumstances should) influence the consideration of a fair-minded and informed observer in the same direction. Hence, the right-holder’s own informed and unequivocal view on the impartiality of the tribunal is relevant for the assessment of the overriding public question.

4. Determination within Reasonable Time

4.1 Introduction

Because ‘justice delayed is justice denied’ the accused (as well as any party to a civil dispute) has the right to a ‘determination within reasonable time’. However, a multitude of factors may influence the lapse of time from charge to final determination, eventually on appeal. As far as the time consumed is considered unreasonable, hereunder where the appellate system in itself is too inefficient, the state will be held responsible, even if these deficiencies were foreseeable for the right-holder. It is hardly in conformity with ‘important public interests’ to consider such unreasonable delays justified by a waiver.

The question of what is considered an (un)reasonable time depends on the traditional factors attributable to the state: the complexity of the case, the right-holder’s situation (such as where she is deprived of her liberty, suffering from life-

\textsuperscript{57} See generally ECtHR in \textit{Hauschildt v Denmark} (App no 10486/83) (1989) Series A no 154 according to which impartiality is to be analysed on the basis of both a subjective test and ‘an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt’ in respect of impartiality [46]. See also, and especially in relation to waiver \textit{Goudkamp} (n 56) 325.

\textsuperscript{58} See \textit{inter alia} \textit{Hauschildt} (n 57) [46].
threatening illness or similar causes demanding speediness) and more generally the efficiency of the authorities in handling the case (eg slow periods). Further, what particularly interests us here, are factors for which the right-holder is answerable.59

The point of departure is that the state has a responsibility to pursue the process with vigour, irrespective of the conduct of the accused.60 Hence, it is not a prerequisite that the right-holder asserts the right to speediness actively. However, his conduct may in different ways lead to a prolongation.

Extreme and opposite views have been introduced when it comes to consider the impact of any such contributions to the delay from the right-holder. Some will hold that an uncooperative right-holder should be stopped from complaining about an unreasonable time according to article 6(1). The opposite view will hold that the state’s obligation is unaffected by the right-holder’s attitude. Not surprisingly, these extreme views were rejected in early case law.61 The applicant’s contribution, and what it consists of, is clearly to be taken into consideration in the assessment of whether there is an unreasonable delay attributable to the state.

A wide waiver-concept will include multiple situations where the right-holder (implicitly) accepts a prolongation of the process: he absconds, tampers with evidence, threatens or kills witnesses, the prosecutor or judges. Clearly, the right-holder must realise that a likely consequence of such conduct is a delay, and therefore that the time consumed by the state’s efforts to cope with the hurdles cannot be labelled unreasonable. Even if the time consumed by such conduct is attributable to the right-holder without further ado, I find it artificial to call it waiver of the right to trial within a reasonable time.

The term is more pertinent when it comes to situations where the right-holder prioritises other rights: she asks for more time to prepare the defence,62 wants a new defence lawyer and so on. Obviously, a negative right to a speedy

59 The point is underlined by Philippe Frumer, La renunciation aux droits et libertés (Brucelles 2001) [329].
60 See eg Corigliano v Italy (App no 8304/78) (1982) Series A no 57 where ECtHR underlined that the accused was under no obligation to remind the trial court of lack of progress. This point of departure even applies in civil proceedings, although with modifications; see among other authorities Sürmeli v Germany (App no 75529/01) ECHR 8 June 2006 [131].
62 This appears to have been a technique applied by the accused Milosevic and Karadzic to postpone the trials before ICTY.
trial is both impractical and in principle unacceptable. However, such preferences as mentioned may attain the character of a right for the accused, rights that, if exercised, may influence the lapse of time. The trial court's task is to balance such preferred rights against its obligation to deliver its decision within a reasonable time.

In the following we shall focus on situations where the right-holder, by invoking other rights by implication, waives the right to a more speedy trial.

4.2 Implicit Waiver of Speediness by Asserting other Rights

4.2.1 The Right-Holder’s Lack of Cooperation

One of the obvious advantages for the right-holder when opting for a summary trial based on her confession is the speediness made possible by this simplified procedure (part 1.3.5 above). It goes without saying that more time is needed to conduct a full trial. Hence, already the fact that the accused prioritises a full trial may (with some goodwill) be seen as a de facto waiver of the benefit of speediness immanent in a summary trial.

The contrast to a confession is the assertion of the right to remain silent. As we shall see, relying on the privilege against self-incrimination, the accused is entitled to remain silent. Obviously, however, if she chooses to do so that may influence the time necessary to determine the case. Her passivity will regularly necessitate time consuming efforts on the part of the prosecution and investigating authorities to establish alternative evidence necessary to determine the case.

In most countries the accused is even immune from criminal liability for making false statements concerning the accusation against him. However, if such statements are made this will influence the proceedings in different ways, amongst others the need for detention) and – what interests us here – the time needed to investigate and determine the case. In Eckle the applicant’s lack of cooperation caused a considerable part of the delay, hence not attributable to the state. The same consideration applies a fortiori where the accused actively misleads the authorities by false statements.

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63 See Norwegian Criminal Law s 167.
64 See Eckle v Germany (App no 8130/78) (1982) Series A no 51 [82]. Nevertheless, The Court agreed with the applicants that the length of the proceedings primarily stemmed from the way in which the judicial authorities handled the case.
4.2.2 Appeal

Similarly, the accused is free to utilise any opportunities to appeal granted in national law.\(^65\) However, in doing so he cannot complain about the time necessarily consumed by the appellate process. This must be irrespective of the outcome of the process. The time spent is attributable to the right-holder even if the appeal is unsuccessful.\(^66\) Case law reveals that ECtHR conducts an independent and thorough examination of the facts.\(^67\) The task is to single-out elements of time consumed not imputable to the right-holder and estimate their contribution to the time spent in total. In *Foti*\(^68\) it concluded in favour of the applicant:

Of the four applicants, Mr. Foti alone exercised, in the second proceedings brought against him, his right to enter an ordinary appeal and then to apply to the Court of Cassation. Mr. Cenerini’s objection that the decision committing him for trial was void was allowed by the Potenza Regional Court and its contribution to the duration of the proceedings was no more than five months and twelve days. Accordingly, such delays as there were in the conduct of the proceedings were not imputable to the applicants.\(^69\)

4.2.3 Choice of Lawyer

The exercise of other rights, for example the right to have appointed a lawyer of his own choosing, hereunder the right to have an appointed lawyer replaced if the right-holder is dissatisfied, is likely to prolong the lapse of time. Hence, it is the trial court’s responsibility to balance the preferred right against speediness.

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\(^65\) Art 6 does not guarantee any right to appeal, see *Delcourt* v *Belgium* (App no 2689/65) (1970) Series A no 11. A limited right to have a conviction or sentence reviewed follows from art 2 of Protocol No 7 to the Convention. If, however, appeal procedures are available, the right-holder is free to utilise them: ‘he [the applicant] cannot be blamed for having consistently pursued all remedies available to him to preserve the Labour Courts’ jurisdiction concerning this matter. He was entitled to the determination of his civil rights and obligations in this matter within a reasonable time by a final decision as to the merits (…)’; *Obermeier* v *Austria* (App no 11761/85) (1990) Series A no 179, Commissions report [214].

\(^66\) Cf the considerations applied by ECtHR in *Soering* v *The United Kingdom* (App no 14038/88) (1989) Series A no 161, in relation to art 3: even appeals from the accused were likely to contribute to the period of time likely to be spend on ‘death row’, these contributions did not reduce the inhuman character of the case. See also *Harris and others* (n 28) 81.

\(^67\) See in the same direction *Harris and others* (n 28) 279 who state that ‘[n]o margin of appreciation is applied, at least not expressly ….’


\(^69\) See ibid [59].
A series of factors come into play: are the defendant’s objections against the originally-appointed lawyer well founded? The defendant may have expressed that it is important for him to have a particular lawyer, so that he, if needed, accepts a delay. Is the request for a new defence lawyer forwarded shortly before trial or in due time for the preparation of the case? How quickly can the preferred lawyer take on the assignment, prepare the defence and perform it properly (art 6(3)(b))? It is the trial court’s task to harmonise the preferred rights as far as possible, and ultimately, if needed, overrule the defendant’s waiver of a speedy trial by appointing another qualified lawyer than the one chosen by the defendant.

4.2.4 Continuation: Identification between Lawyer and Defendant?
In the extension of time questions connected to identification between the applicant and his lawyer may arise. In civil cases ECtHR has gone far in exempting the state from any responsibility for delays caused by the right-holder’s lawyer, even where the latter is publicly appointed.70 The obligation is only slightly sharpened in criminal cases where the state’s responsibility for supervising the effectiveness of the defence (art 6(3)(c)) is underlined.71 In this respect there is probably no Chinese wall between civil and criminal cases: civil cases which involve elements of ‘public interest’ ought to be considered according to the sharpened rule.

5. Waiver of Specific Article 6 Rights: Public Hearing
5.1 Waiver
5.1.1 General Considerations
(a) In line with the maxim ‘Justice must not only be done, it must also be seen to be done’ article 6(1) requires, as the main rule, that the hearing shall be public. As the maxim indicates the rationale is primarily a protection for the accused (and any party to a civil proceeding): The general audience present in court is presumed to have a disciplining effect on the trial court, so that it conducts fairly. Normally publicity is in the interest of the parties.

(b) However, it has always been accepted that important interests may argue against publicity. As the only of the article 6 rights the right to public hearing is subject to limitations in the interest of:

morals, public order or national security in a democratic society, where the interest of juveniles or the protection of the private life of parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice.

A general (and admittedly vague) characterisation is that exception to publicity is tenable where the character of the case so requires. Indeed, to a large extent the same objects and purposes as for the publicity-rule, can justify its limitation, where the exception from publicity is justified with reference to 'the authority and impartiality of the judiciary' for example (art 10(2)). Furthermore, an important cause for closed doors is the protection of the private life of (one or more of) the parties.

And when private life can justify exception from publicity, it is not a far step to assume that a request for closed doors from the holder of the right to private life (eg a party or a witness) is relevant for the trial court when it decides whether 'publicity would prejudice the interest of justice.'

Certain cases, both criminal and civil, may deal with sensitive issues, so that it is the exception (publicity) that eventually has to be substantiated. In B and P, a child residence case, the Court expressed that such cases are:

prime examples of cases where the exclusion of the press and public may be justified in order to protect the privacy of the child and parties. … it is essential that the parents and other witnesses feel able to express themselves candidly on highly personal issues without fear of public curiosity or comment.

(c) In the following we shall focus on two different situations: first, where the hearing is conducted publicly, while the right-holder argues that they should have been held in camera. In such cases questions of conformity with important public interests come to the forefront (5.1.3 below). Next, where the hearing is conducted in camera, while the right-holder claims that they should have been public. Here, the pivot is on evidence for a valid waiver (5.1.2 below).

72 See B and P v The United Kingdom (App no 36337/97; 35974/97) ECHR 24 April 2001.
73 See ibid [38].
5.1.2 Tacit Waiver of Public Hearing

Although the publicity requirement, like other article 6 obligations, applies whenever the charge is being ‘determined’, adaptations are appropriate on appeal. To the extent that the appeal court’s competence, and hence the focus at the appeal hearing is limited to questions of law, publicity may prove to be less urgent. This is especially so where the hearing before one or more previous instance(s) with full competence, with regards to both questions of fact and law, has been conducted publicly according to the main rule.74

A particular uncertainty is the consequence of ECtHR’s finding in Schuler-Zgraggen (24 June 1993), which concerned a civil first-instance case: with reference to the ‘highly technical’ character of the case the Court stated that ‘it does not appear that the dispute raised issues of public importance’. Read in isolation this statement could be interpreted as an acceptance of a considerable freedom for the national court, clearly beyond the exception clause of article 6(1), with regard to whether or not to hold an open hearing. However, the referred statement should more pertinently be interpreted as a justification for allowing an exception from public hearing because a tacit waiver was assumed. This is evident from the following passage: ‘furthermore, its private, medical nature would no doubt have deterred the applicant from seeking to have the public present’ (para 30 of the judgment).75 Such assumptions may, however, be criticisable.

While the main focus of appeal courts often is on questions of law, their competence is not necessarily limited to that. Still, according to national law the hearing is often non-public, but with a possibility for the right-holder to request a public hearing if she so wishes. In such cases the question easily arises whether her passivity can be taken as a waiver of a right that normally shall be respected.

In Håkansson and Sturesson76 the appeal court’s main focus was on questions of law, although the appeal court also had competence with regard to the questions of fact. The proceedings were conducted according to the main rule in national legislation: in camera. By accepting that the applicants’ passivity amounted to a tacit waiver, ECtHR in reality placed a burden of initiative on the applicant to request an exception to the general rule according to the applicable national law in order to have proceedings conducted in accordance with the main rule according to article 6.

74 The same rationale justifies moderations of the right to presence and an oral hearing on appeal, see 7.2 and 7.3 below.
75 See in the same direction Stefan Trechsel and Sarah J Summers, Human rights in criminal proceedings (OUP 2005) 129.
In order to avoid situations like in Håkansson and Sturesson, where an exception for publicity is based on too uncertain ground, it is recommended that the trial court ‘provokes’ an express statement from the right-holder as to his stance to the question of waiver of publicity (see part 2.3 of the first article, NJHR No 3&4 2010).

5.1.3 Waiver in Conformity with Important Public Interests?

(a) If proof for a valid waiver is established, the question arises whether the state is at liberty to close the doors with reference to this waiver. The observation that not only the interests of the parties of the case are involved, but also a more general public interest in information about and confidence in the fair administration of justice, is obvious (everyone’s right according to art 10 to ‘receive … information’). This argues against admissibility for one particular right-holder to dispose over the right. On the other hand, it may be held that the most important consideration supporting publicity, at least traditionally, is its function as a safeguard against abuse of power vis-à-vis the accused (and to some extent similarly parties to a civil dispute). This advocates in favour of paying attention to her stand. A closer examination of the reach of the two opposite interests in contemporary society – whether or not to conduct proceedings publicly – is needed as a basis for the balancing ((b) – (d) below).

(b) The publicity rule is justified not solely by the general society’s – the audience’s – interest in controlling the judiciary. In addition what we can call the pedagogical effect is of some importance. This has two sides: one is the audience’s learning of, and (hopefully) thereby respect for, the functioning of the judicial system. Another, closely connected, is the learning of the discomfort connected to crime. The general deterrent effect thereby obtained, obviously is enhanced by the media’s reporting.

The other side of the coin, then, is the intensiveness of the media’s reporting in contemporary society. Writings and photos in newspapers, live pictures on television and even more modern methods such as ‘CoveritLive’ on the internet, are sometimes perceived as more intrusive, and hence feared more than the formal penalty as such. In short, due to the developments in publishing, publicity may

77 Ibid.
78 The decision is criticised by Frumer (n 59) [894-300]. See also Harris and others (n 28) 276.
79 National courts are, however reluctant to consider any such burden mitigating, see eg Norwegian Supreme Court (Rt. 1994, 28).
be far more intrusive today. This argues for a balancing of limitations in the interest of the involved parties.

Furthermore, while the control function embedded in public hearing originally was of great importance,80 it is probably lessened with the development of more extensive rights for the accused, inter alia the assistance of a trained defence lawyer and the whole range of rights according to article 6 and Additional Protocol No 7.

Still, the scrutiny of watchful eyes of a wider circle is likely to discipline the trial court. But this benefit of publicity is most obvious for the participation of a traditional audience in court, less for person-focused media reporting.

(c) In criminal cases the considerations connected to waiver of publicity are often complex, because of extensive media attention.

Often there is increased attention from the media when it can play on public curiosity, such as cases containing elements of violence or sex. Furthermore there is a tendency to focus on particularities connected to the person accused, rather than the criminal procedure as such.81 With this focus massive media coverage is not rational in relation to the control function. And, especially where it entails disclosure of the right-holder’s identity, including her image, it will easily amount to a disproportionate interference with the right-holder’s private life. On the other hand the media and the general public can and can be expected to invoke article 10 as the basis for freedom to report and to receive information, respectively.

Hence, what has to be balanced is on the one hand this right to information and on the other the right-holder’s right to have his ‘private life’ respected according to article 8. Both rights can be interfered with to the benefit of the interest protected by the competing right: the state can justify a limitation on publicity (to the benefit of the right-holder) with reference to the exception clause of article 10 (‘reputation or rights of others’), and on private life (to the benefit of media and the public) with reference to the exception clause of article 8 (‘rights and freedoms of others’).82

The extent to which these conflicting interests make themselves felt in each particular case varies. Ultimately, the trial court is at liberty to exclude the audi-

80 See for example ECtHR in Axen v Germany (App no 8273/78) (1983) Series A no 72: ‘The public character of proceedings … protects the litigants against the administration of justice…’ [25].
81 The press’ own guiding lines (see for eg ’Code of Ethics of the Norwegian Press’) are not always capable of preventing this.
82 See below on the role of limitations ‘for maintaining the impartiality of the judiciary’.
ence totally where private life is likely to be unduly invaded, such as in cases concerning family life or sexual abuse.

More often a compromise is appropriate: it is the extensiveness of the media’s reporting and the means employed that may put into question its purpose-rationality and its proportionality measured against, for example the private life of parties or witnesses. The control and pedagogical considerations may require presence in the court room, while at the same time private life of the accused or witnesses may require a ban on reporting, especially immediate electronic reporting typically concentrated on private details and images without any other purpose than satisfying public curiosity (and the media’s income).83

The press has an important role as a ‘public watchdog’.84 It can attain the role as other ‘dogs’ as well,85 some more, some less praiseworthy. Its role as a shepherd dog, guiding laymen by communicating law from the court room, and even as a rescue dog, revealing miscarriage of justice, are equally important. However, (more) often it attains the role of a hunting dog, in the tracks of its next meal: where intimate personal details, sell best if presented first.

The trial court has a responsibility to balance the conflicting interests of its own motion. However, the right-holder’s point of view on the desirability of a public hearing ought to be taken into consideration. Hence, the state is at liberty to pay attention to a waiver from the right-holder, be it a party or a witness,86 of the right to a public hearing with reference to the protection of private life. In the balancing of the right to private life and the right to receive information, there presumably is a wide margin of appreciation for the state. But is this margin without limits, or can there under certain circumstances be a right to have the trial – or part of it – conducted in camera?

83 National legislation varies, but there is a reasonable tendency to limit the admissibility of coverage the more intrusive it is. Hence televised coverage is usually more limited than textual newspaper reporting. This is in conformity with Recommendation 2003 (13) from The Council of Europe advising that televised reporting from the court room only should take place in accordance with law and ‘only where it does not bear a serious risk of undue influence on victims, witnesses, parties to criminal proceedings, juries or judges’.
84 See prominent examples from ECtHR’s case law.
85 Terminology borrowed from PO Träskman (dissertation to Ragna Aarli, Bergen 13 November 2009).
86 Our main focus is on the accused. Victims and parties to a civil dispute, too, may waive the right to publicity.
5.2 Continuation: Possible Basis for a Right to a Hearing in Camera

5.2.1 Introduction

*Campbell and Fell*\(^{87}\) is sometimes referred to as a case confirming that there is no negative right to public hearing. In that case the Court held that ‘ordinary criminal proceedings … nearly always take place in public, notwithstanding the wishes of the accused’. However, in this case the private life of the parties was not at stake. Rather, the accused complained about the lack of publicity, and the Court’s statement was aimed at drawing a parallel between the disciplinary proceedings in question (that in accordance with the practise had been conducted non-public) and the system in ordinary criminal proceedings (that take place in public). Nevertheless, it is common to assume that the right to a public hearing in article 6 has no negative equivalent.\(^{88}\)

However, the right-holder may invoke several preferred rights as a basis for a claim to exclude the audience from its normal right to information. A possible obligation for the trial court to prioritise such rights for the accused before the freedom of expression is envisaged in the text of article 10(2): exception from the freedom of expression (and right to information) may be necessary ‘for the protection of the reputation or rights of others’, which includes his convention rights, for example, the right to respect for private life, ‘or for maintaining the authority and impartiality of the judiciary’. The latter alternative is a right for the accused according to article 6(1) and at the same time an ‘important public interest’ for the protection of the judiciary.

5.2.2 Private Life

Although, the state has a wide margin of appreciation in balancing the public’s access to information against the private life of the accused, it must be assumed that the latter in exceptional cases may constitute a preferred right for the accused. According to current case law the right to private life includes both a right to protection of reputation and of personal information (name, photo, fingerprint, DNA and the like).\(^{89}\) As the examples show, private life may be affected even though the information is not in itself sensitive. In *A v Norway* the publica-

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87  *Campbell and Fell v The United Kingdom* (App nos 7819/77, 7878/77) (1984) Series A no 80 [87].
89  See generally *A v Norway* (App no 28070/06) ECHR 9 April 2009 [64] with further references and *van Dijk and others* (n 88) 685-686.
tion of photos showing the applicant from behind, his working place and his home was considered an interference with article 8 because he was recognisable ‘for persons who already knew him’.

It should, however, be underlined that the state has a wide margin of appreciation and that the proportionality of interference with the press’ and public’s right to expression and information will be thoroughly examined. This means that only attacks that attain a certain level of gravity will be covered by article 8.90

Furthermore, The Court will be careful to examine that any restrictions on the right to information go no further than necessary: most often limitations on reporting is sufficient, so that exclusion of the audience’s access to the court room will be considered disproportionate.

The private life of others, first and foremost the victims may have a claim for protection of their private life as well.91 This right may serve as a third-party right conflicting and prevailing over the audience’s right to receive information to the benefit of the accused.

5.2.3 The Protection against Inhuman or Degrading Treatment

In T and V,92 which concerned the prosecution of children, the Court considered whether a public hearing violated article 3. In its considerations it referred inter alia to article 40(2)(b) of the UN Convention on the Rights of the Child which states that ‘in principle, no information that may lead to the identification of a juvenile offender shall be published’. It found that in relation to the applicants:

the public nature of the proceedings may have exacerbated the signs of post-traumatic stress disorder, involving a constant preoccupation with the events of the offence, a generalised high level of anxiety and poor eating and sleeping pattern [showed by the applicant].93

Nevertheless, in concreto it found no violation of article 3, because it did not find that the:

particular features of the trial process as applied to him caused, to a significant degree, suffering going beyond that which would inevitably have been engen-

90 Ibid.
91 In a sexual abuse case both the accused and his victims will normally prefer non-publicity.
92 See T. v The United Kingdom App no 28945/95 (ECtHR, 16 December 1999)
93 See ibid 1999 [77].
dered by any attempt by the authorities to deal with the applicant following the commission by him of the offence in question.94

Even though there is a threshold of severity in article 3, the case illustrates that the conflicting interests may be pushed to extremes where minors and similar vulnerable persons are involved. The more the case is subject to curiosity and attention, the more there is a risk that this attention, exposed by an unreserved public hearing, may imply inhuman or degrading treatment of this particular right-holder. At the same time these right-holders cannot effectively further their own best interests. Hence, they ought to have a vigilant representative and governance by the trial court; the situation necessitates alertness on the part of the trial court. Within its relatively limited field of application, article 3 is probably the firmest basis for a right to a hearing in camera.95

5.2.4 The Presumption of Innocence?
The presumption of innocence is an important guarantee (see 8 below). Still, it can hardly be a major argument for proceedings in camera. Even though commenting from public officials may infringe the presumption of innocence,96 the protection should, however, be secured by other means: by regulations and instructions in advance and, eventually, by subsequent sanctions for breach. Even in the event there may be indications that an official will violate the principle, it appears obviously more adequate to replace her than to close the hearing.

Further, in principle it may be argued, at least de lege ferenda, that the authorities should have a positive obligation to make efforts to prevent the presumption of innocence being violated by private actors, such as the media’s reporting.97 It should be underlined, however, that the risk of such private violations may be hard to foresee. Consequently, the main efforts will be on whether adequate remedies have been applied, such as instructions to the jurors or lay judges at the commencement of the hearing to disregard the statements and sanctions directed against the responsible party, and it is probable

94 Ibid.
95 If the gravity-threshold of art 3 is passed, there is no room for balancing, see inter alia the Chahal v The United Kingdom (App no 22414/93) ECHR 1996-V.
97 So far ECtHR adheres to the view that the presumption of innocence can be violated by expressions by public officials only (see eg A (n 89)).
that the matter will be considered in relation to the impartiality-requirement of article 6.\textsuperscript{98}

5.2.5 The right to an Impartial Tribunal
Unlike the situation where public officials utter incriminating statements, media coverage is often a continuing process. Hence, additional remedying measures may be relevant, \textit{once one has experienced} reporting, before and during the main hearing, that may have a damaging effect on the impartiality of the trial court, especially on jurors and laypeople.\textsuperscript{99} As a consequence, there may be an obligation not only to instruct the members of the court to disregard the reporting,\textsuperscript{100} but ultimately to continue proceedings in camera, eventually to ban reporting or certain kinds of reporting.

5.2.6 The Right to a Fair Hearing
New technology creates new challenges. Real time reporting is not only particularly intrusive for the private life of parties or witnesses, its possibilities of real time communication with the general public also has potentially damaging effects on other aspects of \textit{procedural fairness}. A practical situation is this: a member of the audience sends electronic messages to a witness who is waiting outside the court room to give statement.\textsuperscript{101} As a consequence there may be an obligation to proceed in camera, eventually to ban reporting or certain kinds of reporting.

\textsuperscript{98} See Arrigo and Vella v Malta (App no 6569/04) ECHR 10 May 2005.
\textsuperscript{99} However case law shows that freedom of expression (and right of the audience to receive information) according to art 10 often prevails over conflicting rights of the accused. In Pullicino v Malta (App no 45441/99) ECHR 15 June 2000, ECtHR was satisfied that instructions from the senior judge to the jury to disregard comments in media, was sufficient. In Wloch v Poland (App no 27785/95) ECHR 19 October 2000 and Daktaras v Lithuania (App no 42095/98) ECHR 10 October 2000 the applications was dismissed even though the reporting during the case was massive. However, new case law may indicate a stronger protection of the authority and impartiality of the judiciary, see Worm v Austria (App no 22714/93) ECHR 1997-V and Touancheau and July v France (App no 53886/00) ECHR 24 November 2005 that opens for a wider opportunity for the state to interfere with expressions capable of influencing the trial court. Cf Ragna Aarli, \textit{Offentlig rettergang: publikums adgang til innsyn og omtale av straffesaker [Public trial]} (Bergen 2010) 277.
\textsuperscript{100} See eg Noye v UK (App no 4491/02) ECHR 21 March 2003 where importance was attached to the fact that the judges had so directed the jury.
\textsuperscript{101} In Denmark the Court Procedure Act (Retspleieloven) was amended in 2007 by a special provision prohibiting transmission of text from anyone inside the court room, unless expressly has allowed it (s 32 [1] second sentence). Aarli (n 99) 416-417 suggests to provide a law basis according to which a prohibition on such transmission may be laid down.
6. Public Pronouncement of Judgment

The right to publication of judgment is closely linked to the right to a public hearing. ECtHR takes roughly the same point of departure for the two rights: the audience’s right to information protects the parties, contributes to a fair hearing and secures a communication between lawyers and laymen, and hopefully a general confidence in the courts. Hence, ‘the principles governing the holding of hearings in public … also apply to the public delivery of judgments.’

It is striking that the right to public pronouncement of judgment, unlike public hearing, according to the text of article 6(1) is without exception. However, at variance with the text, the Court has read in several limitations. Of particular interest to our topic are such implied limitations in the interest of the right-holder. To a certain extent this is required by logic: a full publication of the judgment would easily undermine the legitimate purpose of holding a hearing in camera. Hence, in B and P the Court applied exception-purposes related to public hearing (‘protection of juveniles’ and ‘administration of justice’) in its consideration of whether restrictions on the publication of judgment was in conformity with article 6. However, there is hardly any basis in case law (or in equity considerations) for a fully-fledged analogy from the exception clauses related to public hearing.

Neither is it recommendable to assume that the two rules – public hearing and publication of judgment – are similar with respect to waiver. Even though there are obvious similarities between the two rules, there is a presumption that waiver holds a weaker position when it comes to the right to publication of the judgment. This is so both because it is more realistic to harmonise the conflicting interests when it comes to publication of judgment compared to public hearing and because several of the interests that supports publicity holds an even stronger position with respect to the latter: While the only possibility to protect private life during the hearing may be to exclude the public completely, an anonymousness of personal information in the judgment may be sufficient. Furthermore, such anonymousness will neither unduly hamper the exercise of the pedagogical function of the judiciary nor the audience’s control of it.

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102 See eg Werner v Austria (App no 216835/93) ECHR 1997-VII 2496 [54].
103 See generally Harris and others (n 28) 276-278.
104 See B and P (n 72).
105 See in opposite direction Harris and others (n 28) 278.
106 Ibid sees no reason to distinguish, see 278.
In short, while the audience may be completely excluded from the trial, the authority to exempt judgment from the public is more reserved. Still, it is important to maintain an expectation of sufficient information in the judgment.\(^\text{107}\) There is an obvious link to the independent requirement of a reasoned judgment included in the fairness-standard in article 6(1).

**7. Waiver of Specific Rights implied in ‘Fair Hearing’**

**7.1 Waiver of Specific Rights implied in ‘Fair hearing’: Starting Point**

As pointed out above, the fair hearing-requirement of article 6(1) has the character of the basic norm of article 6. In a sense all other article 6 rights are specifications of it. These specifications are, however, not exhaustive. The hearing may be considered unfair, even though none of the specific rules are infringed.\(^\text{108}\) On the other hand, the Court may arrive at the conclusion that there is no violation of a specific and seemingly more unreserved article 6 right when read in conjunction with the fairness standard.\(^\text{109}\) In sum, the fair hearing concept entails four functions: it forms a basis (i) for adding ‘new’ rights for the accused; (ii) for granting rights for a party to civil proceedings equal to those ‘exclusively’ belonging to the accused (article 6(3)); (iii) to descend on the hearing as unfair even though there is no violation of specific rights; and (iv) to limit the range of (too) unreserved specific rights.

Two inferences from these functions are relevant for our topic: (i) the right to a fair hearing as such can never be waived; and (ii) a deviation from a specific article 6 right may under certain circumstances be considered fair. I proceed from the assumption that waiver *can* be such a circumstance.

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\(^{107}\) See for example *Ryakh Biryakov v Russia* (App no 14810/02) ECHR 17 January 2008 where the Court was dissatisfied with the information included in the judgment: ‘reasons which would make it possible to understand why the applicant’s claims had been rejected were inaccessible to the public.

\(^{108}\) See *inter alia Barberà, Mesegué and Jabardo* (n 34).

\(^{109}\) An example is this is even though art 6(3)(d) states an unreserved right to cross-examine witnesses, there is no violation of this right if the accused has himself to thank for being unable to examine a witness who is granted anonymity because of threats (see *inter alia Doorson v Netherlands* (App no 20524/92) ECHR 1996-II.
7.2 Waiver of Specific Rights implied in ‘Fair Hearing’:
Presence in Court

7.2.1 Introduction
CCPR article 14(3)(d) states expressly a right for the accused ‘[t]o be tried in his presence’. According to firm case law the same rule is inherent in the fairness-standard of ECHR article 6(1). To be present in court is a right in itself. At the same time it is a precondition for the exercise of a range of other rights essential for an adversarial (and fair) hearing: a right to personal defence, to examine witnesses and to receive the assistance of an interpreter (ECHR article 6.3. c-e, see 9.3 below). The common denominator is the principle of adversary.

If the defendant is present (and intends to remain so), there is technically no question of waiving that right. But his presence may be more or less empty, such as where he, typically through his lawyer, invokes the right to remain silent (see 7.4 below). Hence, the two rights – to be present and to remain silent – clearly show that there is no obligation to speak, even if the accused is (under an obligation to be) present. But his presence secures an opportunity to comment upon and correct detrimental evidences and generally to influence the case in a (to him) favourable direction.

If the accused is absent, his legal representative may be in a dilemma: not knowing the position and whereabouts of his client. Clearly, then he is not in a position to waive the right to presence on behalf of his client. The responsibility for the assessment of whether it is ‘fair’ to proceed in the absence of the defendant rests entirely with the court.

Even though there is identification between the defendant and his lawyer, the court will be under a strict responsibility to assure that the defence lawyer’s waiver on behalf of the defendant is based on a fully informed agreement with the defendant.

A range of situations may raise questions related to waiver of the right to presence in court: the right-holder fails to attend (is there a tacit waiver?); the right-holder disappears after the commencement of the trial (is it in conformity with important public interests to proceed without him on the basis of this de facto waiver?) and; he is expelled due to misconduct (will he then have himself to thank for the inability to attend, so that the continued proceeding in his absence

is fair?). Finally, is it unfair under certain circumstances to proceed in absentia even though the accused expressly has waived his right to be present?

7.2.2 De Facto Waiver: The Right-Holder Fails to Attend

(a) If the defendant fails to attend, his attitude may be interpreted as a de facto waiver. But that depends on the circumstances. Given the importance of the right, positive obligations to secure the defendant’s presence rests heavily on the state.

(b) The key element in this positive obligation has been shown to be that of information. The situation may be that the right-holder is informed about the charge, but not of the hearing. Colozza v Italy, where the defendants had allegedly absconded before the trial had commenced, is illustrative. ECtHR was not satisfied that the defendants had been informed properly about the hearing. Rather, the authorities had not succeeded in informing him. Consequently there was not sufficient proof for a de facto waiver of the right to presence. In subsequent cases FCB and T both against Italy the Court confirms its scepticism towards such presumed waivers.

There are good reasons to distinguish between the situation where the defendant is informed of the hearing, and the situation where he is not so informed, including where the efforts to inform has failed. It is the authorities (the trial court) that set the time table for the (further) process. Hence, obviously it is not sufficient that the accused is informed about the charge, although important in itself.

Hence, the main rule is that there can be no waiver unless the right-holder has been officially notified of the time and place of the hearing (Sejdovic). And the onus to prove that the information has come to the right-holder’s knowledge is on the authorities. Even if it is proven that the right-holder has received information about the hearing, so that his absence may be taken as a waiver, it may run counter to important public interests to proceed without her (see further 7.2.6 et seq).

In Sigbatullin the Court reiterates that

111 See Colozza (n 110).
112 Cf Harris and others (n 28) 248 who distinguishes such situations from waiver.
113 See FCB v Italy (App no 12151/86) (1991) Series A no 208-B and T v Italy (App no 14104/88) (1992) Series A no 245-C. See also Ziliberberg v Moldova (App no 61821/00) ECHR 1 February 2005 and Yakovlev v Russia (App no 72701/01) 15 March 2005 where the accused’s opportunity to participate under no circumstances could be considered effective when they, respectively, had received the notification the day before and four days after (!) the hearing.
114 See Sejdovic v Italy (App no 56581/00) ECHR 1 March 2006.
… in view of the prominent place held in a democratic society by the right to a fair trial Article 6 of the Convention imposes on every national court an obligation to check whether the defendant has had the opportunity to know of the date of the hearing and the steps to be taken in order to take part where, as in the instant case, this is disputed on a ground that does not immediately appear to be manifestly devoid of merit.115

And in Samokhvalov116 the state party had contended that the relevant national provisions implied that the right-holder had to make a request if he wished to take part in the appeal hearing in question. The Court, however, did not agree that he should have understood that:

… it is questionable, whether the applicant, who had not been assisted by legal counsel, could have understood the tenor of those provisions in the way the Government suggested. It is true that Articles 375 and 376 of the new CCrP describe the procedure for applying for participation at the appeal hearing … , however, they had entered into force only on 1 July 2002, the date on which the appeal hearing of the applicant’s case had taken place. Furthermore, it follows from the appeal decision of 1 July 2002 that the appeal court had not verified whether the applicant had been duly informed of the hearing and of the steps to be taken in order to participate in it. Neither did that decision state that the applicant had failed to submit a request for participation in the hearing and had waived his right, and therefore that his failure to appear would not preclude examination of the case. In such circumstances, the Court considers that it cannot be said that in the present case the applicant had waived his right to take part in the hearing in an unequivocal manner.117

In Hermi118 the Court reiterated its earlier statements (para 74):

The Court has held that where a person charged with a criminal offence has not been notified in person, it cannot be inferred merely from the fact that he

115 See also inter alia Colozza (n 110) [28]; Goddi v Italy (App no 8966/80) (1984) Series A no 76 [30]; FCB (n 113) [33]; T (n 113) [28] and Somogyi v Italy (App no 67972/01) ECHR 18 May 2004 [72].

116 See Samokhvalov v Russia (App no 3893/03) ECHR 12 February 2009 [60].

117 See ibid [60].

118 Hermi (n 44).
has been declared latitante (that is to say, wilfully evading the execution of a warrant issued by a court), relying on a presumption with an insufficient factual basis, that he has waived his right to appear at the trial and defend himself (see Colozza, cited above, pp. 14-15, § 28).\(^{119}\)

However, if the authorities have made sufficient efforts to inform, waiver may be inferred. The statements in Hermi are indicative:

In any event, the Court observes that, even assuming that the applicant had a right under the Convention to appear at the hearing of 3 November 2000, he was duly informed of the date of that hearing and waived his right to appear.\(^{120}\)

Among the relevant factors ECtHR underlined that the authorities had reasonable ground to assume that the applicant understood the summoning to the appeal hearing, even if written in Italian.

With regard to the last point, and unlike the Chamber, the Grand Chamber considers that it is clear from the case file that the applicant had sufficient command of Italian to grasp the meaning of the notice informing him of the date of the appeal court hearing. It observes that, at the first-instance hearings on 25 February and 24 March 2000, the applicant himself stated that he could speak Italian and that he had understood the content of the charge and the evidence against him (see paragraphs 13 and 14 above). The truth of that assertion and the fact that it had been made spontaneously were not disputed by the applicant or his lawyers during the domestic judicial proceedings. Moreover, as the Government rightly pointed out, at the time of the appeal proceedings the applicant had been living in Italy for at least ten years, and when he was arrested in 1999 had been able to provide the carabinieri with details about the factual basis of the allegations against him.\(^{121}\)

Obviously, the right-holder’s passivity after having received the writ, gave cause to assume his waiver:

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\(^{119}\) See ibid [70].

\(^{120}\) See ibid [89].

\(^{121}\) See ibid [90].
In the Court’s view, these elements gave the domestic judicial authorities sufficient reason to believe that the applicant was capable of grasping the significance of the notice informing him of the date of the hearing, and that it was not necessary to provide any translation or interpretation. The Court also notes that the applicant does not appear to have informed the prison authorities of any difficulties in understanding the document in question.122

Finally, his continued passivity, even the day the hearing was to commence, supported the conclusion that the right-holder (in any event) had waived the right to participate.

In addition, the Court notes that the Rome Court of Appeal interpreted, in substance, the applicant’s omission to request his transfer to the hearing room as an unequivocal, albeit implicit, waiver on his part of the right to participate in the appeal hearing (see paragraph 20 above). In the particular circumstances of the present case, the Court considers that that was a reasonable and non-arbitrary conclusion.123

The situation in Botten124 has to be contrasted from that in Hermi. According to the state of law at the present time, the accused was not summoned to appear at the hearing before the Supreme Court where he was convicted (for the first time). Under such circumstances it was not reasonable to interpret the conduct (his passivity) as a waiver of the right to be present. The Court, referring to the positive obligations of the state, stated:

...The Supreme Court was under a duty to take positive measures to this effect, notwithstanding the fact that the applicant neither attended the hearing, nor asked for leave to address the court nor objected through his counsel to a new judgment under Article 362 para. 2 being given by the Supreme Court.125

Further, it is also required that the trial court assures that the accused understands the consequences of his absence. In Jones ECtHR did not accept that there was a waiver because the authorities had not shown that the accused could reasonably...

122 See ibid [91].
123 See ibid [92].
124 See Botten v Norway (App no 16206/90) ECHR 1996-I.
125 See ibid [53].
have foreseen what the consequences of his conduct would be: He was on bail and did not surrender on the day the trial was to (and actually had) commence(d): He argued successfully (before ECtHR) that, according to English law, the trial could not proceed to a conclusion where the accused was absent and unrepresented.

(c) Positive obligations may extend beyond adequate information. An accused residing abroad or at some distance from the scene of the trial and who cannot afford to attend, cannot generally be considered to have waived his right to be present. If the court has knowledge (as where he has informed about his inability) or should have had such knowledge (the efforts to find out about the reasons for his absence are insufficient), there is an obligation to take adequate action. The relevant action is most often to provide the right-holder with (means to) transport so that he is enabled to appear in court.

7.2.3 De Facto Waiver: The Applicant Absconds
It may be necessary to proceed despite the absence of the accused if he absconds. In such situations society (here represented by the trial court) cannot accept that a right-holder (the defendant) blocks the vital function of the criminal prosecution. A general precondition for the acceptability of proceeding in his absence is, however, that serious efforts have been made to secure his presence. To the extent it is proved that information about the hearing is conveyed to the accused, there is a presumption that he has waived the right to presence. If he absconds after the commencement of the trial, this is even more evident. Still, the trial in absentia may run counter to important public interests (7.2.6 et seq below).

7.2.4 De Facto Waiver: The Right-Holder Excludes Himself
The right-holder may in different ways challenge her position to participate. By way of example she may be weakened by a hunger strike, such as in Ensslin, Baader and Raspe. As the main rule this must be considered equal to a de facto waiver. Most often, the circumstances are less dramatic: the right-holder sim-

126 See generally part 2 of the first article (NJHR No 3&4 2010).
127 Cf again Harris and others (n 28) 248 who distinguish this situation from waiver.
128 See Ensslin, Baader and Raspe v Germany 14 DR 64. The decision of ICTY (4 July 2011) to remove Radko Mladic – the accused inter alia of the genocidal Srebrenica-massacre – form the court room due to his deliberate interruptions of, and after several warnings from, the presiding judge, is a recent example of a defendable application of the corresponding rule governing the proceedings before ICTY.
129 Under such circumstances the right to assistance (representation) by a lawyer is even more important (see 9.3 below).
ply fails to attend without having submitted a doctor’s certificate confirming inability or a similar justification for the absence. Generally more than just the fact that the right-holder fails to attend is needed to prove tacit waiver. Hence advisably the trial court should postpone the trial or, as a safety valve, allow a remedy against an eventual conviction in absentia if the right-holder subsequently can substantiate that his absence was due to an acceptable cause (7.2.9 below).

In terms of evidence the situation is different where the defendant initially is present, but absconds after the trial has commenced. The entire situation, the ongoing hearing with all its personnel, judges, witnesses and lawyers present, counts for a presumption that the defendant implicitly has accepted the continuation in his absence.

7.2.5 De Facto Waiver: Expulsion of the Right-Holder due to Misconduct

The defendant can disqualify for his right to attend the hearing through misconduct.130

One reason for the right-holder’s absence may be that he is removed because of his conduct. Naturally, in line with the principle of proportionality, the presiding judge is under an obligation to try to secure the defendant’s continued presence by warning him that his behaviour may result in his removal, eventually by reminding him of contempt of court-sanctions. If the right-holder, despite such efforts, continues to disturb so that it is impossible to conduct proceedings orderly, the court will be entitled to remove the defendant and to proceed without him. To a large extent it must be up to the judge’s discretion to decide on the particularities of each case whether or not the accused should be given a second chance if he is willing to conduct himself.

The search for alternatives, such as binding and gagging the defendant, will easily conflict with other important considerations, both dignity (cf art 3), effective communication with the lawyer and, due to the emotional disturbances the measure may bring in its wake, with the right to fair and impartial hearing as well.131

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130 Even such a situation may pertinently be regarded a de facto waiver. See differently Harris and others (n 28) 248.

131 As an illustration, see US Supreme Court in Allen v Illinois (397 US 337, 90 S Ct 1050 (1990), where it was considered that binding and gagging a rebellious defendant would have a significant effect on the jury’s feelings, and therefore was no adequate option.
7.2.6 Waiver in Contravention with Important Public Interests? Introduction

If, according to the principles described above, the defendant’s conduct must be considered to imply a tacit waiver or if he expressly conveys a message to the court that he waives the right to be present, the question arises whether it nevertheless may be considered unfair (or in contravention with ‘important public interests’) to proceed without him. Case law confirms that the ‘public interest’ part of the formula applies to waiver of the right to presence.\(^\text{132}\)

However, it is to be observed that ECtHR’s scrutiny here is reserved. That has to do with considerable variations among the Convention States with regards to the admissibility of trying persons in absentia. This variation prompts the Court to approach the question with caution: the states are allowed a wide margin of appreciation. Hence, to the extent that waiver is proven, much is needed before the Court will decide that the hearing as unfair. However, the question of remedies against a conviction in absentia is of importance (see 7.2.9). Two additional factors may be of interest for the consideration, at least \textit{de lege ferenda}: the importance of the right-holder’s presence for the lightening of the case (7.2.8 below) and the gravity of the case (7.2.7 below).

7.2.7 Waiver in Contravention with Important Public Interests? The Gravity of the Sanction

Some national legal systems contain provisions baring prosecution in the absence of the accused because of the character of the case, hereunder the gravity of the sanction the right-holder risks incurring.\(^\text{133}\)

Strasbourg case law has not defined any definite limit. However it has applied the general formula, which includes the requirement that waiver ‘does not run counter to important public interests’. The character of the case and especially gravity of the sanction is part of this theme; the graver the sanction the defendant risks, the better reasons not to proceed in absentia, even if there is a waiver of the right to be present. Connected to this fairness consideration is one of a more matter-of-fact-nature: while economic sanctions may be enforced independently of the right-holders personal presence (pay draw, execution or the like), execution of

\(^{132}\) See \textit{inter alia} Sejdovic (n 114) [86].

\(^{133}\) According to The Norwegian Criminal Procedure Act section 281 proceedings in absentia cannot be conducted if the prosecution will claim a penalty of more than one year imprisonment. Cf US Supreme Court who has held that when an accused is charged with a capital offence and is in custody, the right to be present can never be waived (see \textit{Diaz} 233 US 422, 32 S Ct 250 (1912)).
graver sanctions, such as imprisonment, presupposes at any rate his personal
discernment. In other words; a trial in absentia may be futile.

7.2.8 Waiver Excluded due to Important Public Interests:
The Character of the Case
While the trial court – with the assistance of the defendant’s lawyer – is fully
capable in relation to questions of law, a full and satisfactory illumination of the
factual aspects of the case often presupposes the presence of the defendant, espe-
cially where these aspects are closely linked to the right-holder’s personality or the
relevant information cannot be derived from other sources.

In Hermi the essential question for the consideration of the conformity with
article 6 was whether the applicant’s absence from the appeal hearing was in con-
formity with ‘fairness’ (or important public interests). The Court held that since
only questions of law were to be handled, the presence of the accused was not indis-
pensable. Hence, in such cases article 6 will not require the presence of the accused,
even if there is no waiver. No surprise, then, that such proceedings will be in con-
formity with the Convention if the right-holder has waived his ‘right’ to be present.

Once factual aspects may be subject to examination and determination, the
presence of the accused more often is needed, so that he has the right to be
present. Presumably, this right is mandatory only to the extent that the absence of
the accused would be detrimental to the adversarial character (and hence the fair-
ness) of the proceedings.

A comparison between Hermi and Botten is of interest. In Botten ECtHR
accepted that the Norwegian Supreme Court normally can review a decision of the
City Court without the presence of the accused. However, since the delivering of a
new judgment in the case implied an assessment of questions of fact related to the
sentencing, he had the right to be present and the opportunity to forward his views.
However, his presence can hardly be said to have been crucial for a satisfactory illu-

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134 See also Trechsel (n 75) 253.
135 Even if the Court can decide on the facts it may be of importance if the defendant previously has given statements that can be read out at the hearing. Under the circumstances this can substitute his expected contributions at trial. The competence of the court with regards to the determination is of importance as well. If it is limited to confirm or quash a lower court’s decision, a trial in absence of the accused is less worrying compared to where the case can be decided on the merits, especially if such competence is (or may be) used to the detriment of the accused (reformation in pejus).
136 See Hermi (n 44).
137 Hermi (n 44).
138 Botten (n 124).
mination of the case. So, if *waiver had been proven*, I assume that no violation would have been found in the *Botten* case.\(^{139}\) (As we remember, a violation was found because the applicant’s passivity did not imply a waiver (see 7.2.2 above)).

Scarcity on specific case law makes it hard to define exact limits for the admissibility of waiver based trials in absentia. It is probably safe to assume that much is needed before such trials will be considered unfair. However, that may be the case if the *factual basis for the decision is clearly insufficient* without the presence of the defendant.\(^{140}\)

7.2.9 Waiver Excluded due to Important Public Interests: the Importance of Procedural Safeguards including Remedies

Efficiency-considerations, (and) the very aim that criminal prosecution is seeking to achieve (law-obedience through deterrence) may dictate proceedings in the absence of the defendant. But if proceedings are conducted *in absentia* alternative means to secure a *fair and adversarial process*, are even more important; the adversarial process is probably the most important guarantee against incorrect decisions,\(^{141}\) especially determinations in disfavour of the accused. In order to compensate the obvious negative effect of the absence of the accused for a proper illumination of the case, procedural safeguards, especially *legal representation*, are of particular importance.\(^{142}\)

Closely related to this is the question of whether *remedies to a trial conducted in absentia exist*. In a case where the right-holder can require attendance there ought to be a procedure for a new trial (on appeal or before the same instance) if she subsequently substantiates that her absence was excusable (in other words that she has not validly waived the right to presence). In order to make this remedy effective, the convicted must be notified of the conviction. If she remains passive, it may be reasonable to consider this a waiver of the right to use remedies and on the whole as a waiver of the right to be present.\(^{143}\)

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\(^{139}\) Ibid.

\(^{140}\) Cf the recommended standards in the Council of Europe: Criteria Governing Proceedings in the Absence of the Accused (CM Res (75) 11).

\(^{141}\) See *Vladimir Romanov v Russia* (App no 41461/02) ECHR 24 July 2008.

\(^{142}\) See *inter alia* the *Poitrimol v France* (App no 14032/88) (1993) Series A no 277-A where the applicant was ‘punished’ for being absent by being denied to be represented by a lawyer (see further 9.3.3 below).

\(^{143}\) See the recommended standards in the Council of Europe Criteria Governing Proceedings in the Absence of the Accused (CM Res (75) 11). In accordance with these a violation of art 6 was found in *Somogyi* (n 115) because of lack of an adequate procedure to try the correctness of the accused signature acknowledging receipt of the hearing notice. See also *Sejdovic* (n 114).
7.2.10 Waiver of Presence in Court: Concluding Remarks

The absence of one party is disadvantageous in relation to the fundamental principle of adversarial proceedings. Waiver of the right to presence may, however, significantly reduce the qualms connected to this disadvantage. Not surprisingly therefore, waiver is one of the grounds that may permit proceedings in absentia.

The main focus for the consideration of whether this justification is present is on the proof for and validity of waiver (7.2.1-7.2.5 above). The scrutiny with its conformity with ‘important public interest’ is far more reserved in this context. However, case law has confirmed that the requirement is relevant. And it is suggested that especially the gravity of the case and the importance of the accused’s presence for the proper illumination of the case are the key factors in this consideration (7.2.6-7.2.9 above). To the extent that the presence of the accused is required by fairness, the trial court is under an ex officio obligation to secure it.144

7.3 Continuation: Oral Hearing

Although article 6 is silent about it, the main rule is that there is no fair hearing without an oral hearing.145 However, as for the right to be present a range of factors may justify a deviation from this point of departure, among which the character and gravity of the case is of most practical importance.146 Obviously there is a close connection to the right to a public hearing as well: a public hearing presupposes an oral hearing, but not necessarily vice-versa.

Along the same lines as for public hearing in one’s presence, ECtHR has accepted that waiver of an oral hearing may be in conformity with ‘important public interests’. Most often the dispute is on whether there in fact is a waiver. In Döry147 the Court accepted that the written procedure was justified by the right-holder’s tacit waiver of an oral hearing:

the proceedings before the administrative courts were normally in writing, the applicant could have been expected to request a hearing before that court if she attached importance to it. She did not do so, however, and the Court

144 See similarly Ferguson Crim LR 2002, 554-556.
145 See Jussila v Finland (App no 75053/01) ECHR 23 November 2006 [40].
146 Hence, see Ekbatani (n 110) where both presence and lack of oral hearing constituted violations of ‘fair hearing’.
147 See Döry v Sweden (App no 28394/95) ECHR 12 November 2002 [38].
therefore finds that she can reasonably be considered to have waived her right to a hearing before the County Administrative Court.\textsuperscript{148}

This line of reasoning may be criticised, and ought at least to be applied with caution and safeguards.

7.4 Waiver of Specific Rights implied in ‘Fair Hearing’: Privilege against Self-Incrimination

7.4.1 Legal Basis for the Right: A Negative Right?
The privilege against self-incrimination is not expressed in article 6 (or elsewhere) in ECHR (but cf CPR art 14(3)(g). However ECtHR considers it a fundamental right, implied in the concept of fair hearing.\textsuperscript{149}

This privilege is inseparably linked to the concept of constraint. A right-holder who out of his free and informed will incriminates himself by a confession or a statement to the same effect, obviously has the right to do so. A confession may carry advantages for the right-holder, \textit{inter alia} a more lenient sanction and a trial in camera (so that his private life and reputation is protected). Thus, it is often supported by a rational motivation. Nevertheless, it should be underlined that a guilty plea may be interpreted as a waiver of the privilege against self-incrimination, but not implicitly as a waiver of other rights, such as the right to a trial, for example.\textsuperscript{150}

Although logically feasible, the inherent element of compulsion in the concept of self-incrimination renders it a stretch to describe the right to confess as its negative equivalent. It seems more natural to regard the privilege against self-incrimination as a negative equivalent to the right to freedom of expression (see part 10.4.5 of the first article).\textsuperscript{151}

\textsuperscript{148} See ibid [38].
\textsuperscript{149} See the Funke v France (App no 10828/84) (1993) Series A no 256-A.
\textsuperscript{150} In Norwegian law this finds a reflection in the Criminal Procedure Act (1981) s 248 that for a summary procedure \textit{inter alia} requires confession and consent from the accused to the simplified procedure.
\textsuperscript{151} In early stages case law was searching for the most pertinent legal basis for the protection against self-incrimination. In K v Austria (App no 16002/90) (1993) Series A no 255-B the Commission anchored it in art 10. An interference in the form of a fine and five days imprisonment for refusing to give statement before a court was considered ‘unnecessary in a democratic society’ and hence a violation of the right to remain silent according to art 10 (see [51-52]). Later case law prefers to take art 6 as the point of departure for the consideration. The need for flexible solutions (negative consequences of silence are not always in violation of the Convention) is met by the fairness-standard of art 6, rather than the necessity-standard of art 10.
The consideration of whether or not the right to protection against self-incrimination is waived will pivot on the validity of the statement or confession (or similar evidential contribution from the accused). A first point to be stressed is that the right-holder, before any interrogation starts, should be informed of his right to remain silent.152 Otherwise a waiver will, as a general rule, not be intelligent. Further waiver must be voluntary and intelligent, not tainted with constraint or similar invalidating causes.

7.4.2 Waiver: Especially about Invalidity

(a) A confession is personal.153 Naturally, a trial court should never base a conviction on a confession on behalf of others. So, for example it should never rely on parents’ declaration of guilt on behalf of their child. Rather, focus should eventually be on remaining evidence (among these the parents’ account for what it may be worth) to base a conviction.

(b) If the accused has been subjected to torture or similar cruel treatment, his confession must be considered invalid without further ado.154 The footprints of duress are still evident where different kinds of threats towards the right-holder are used. Such methods may easily strip a confession of its character of a voluntary relinquishment of the privilege, and hence render it invalid.

(c) The same holds true if the right-holder is hypnotised or exposed to truth-serum. Similarly, there is no valid waiver if the right-holder is tricked into a confession or an incriminating statement. A practical situation is where a policeman in cognito lures the right-holder to speak. The consideration whether or not the practice has the

152 Hence, the basic elements of the famous Miranda-formula ((384 US 436, 86 S Ct 1602 (1966)) presumably applies in a European context as well. According to ct that Miranda a person subjected to a custodial interrogation must be warned that he has the right to remain silent, that if he speaks statements may be used against him and that (in order to secure this right) he is entitled to the assistance of a lawyer, both before and under an (eventual) interrogation.

153 See for example Panovits v Cyprus (App no 4268/04) ECHR 11 December 2008 where there was a violation of the applicant’s, a 17 year old boy’s right to fair trial by the fact that he was convicted on the basis of a confession without the presence of a lawyer. ECtHR does not, however, question his capability to determine whether or not to give statement.

154 Art 15 of The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) prohibits in absolute terms the use of statements made as a result of torture (with the obvious exception as evidence against a the torturer). The rationale behind the prohibition rests partly on purely humanitarian ground, partly on the weakened reliability of such evidences. A series of Supreme Court decisions related to the so called war against terror in the aftermath of 9/11 2001 take a firm stance with reference to the two mentioned purposes. See among other authorities A v Secretary of State for the Home Department (No 2) [2005] UKHL 71 which turned down the use of evidence obtained by torture.
character of unacceptable tricks or tolerable methods is difficult. It depends *inter alia* on how active the police are and on the situation in which the defendant is. The more active the police are in terms of provoking a statement from the right-holder by targeted questioning, the easier a confession (or statement) thereby obtained will have to be considered invalid. This is especially so if the right-holder is in a vulnerable situation: clearly, she is more susceptible to (an invalidating) influence if she is deprived of her liberty and/or has a close relationship to the agent.\(^{155}\)

\[(d)\] It is also difficult to assess the situation where she confesses after lengthy interrogations, especially under hard detention-conditions. This will have to be a concrete consideration where the rule is whether or not the situation forced the right-holder to confess. Among the relevant factors are the duration of and the conditions under detention, whether the right-holder has been implicit or even promised certain advantages as a reward for a confession, or cajoled into a waiver. In order to prevent such situations the question of representation, especially legal assistance, is of utmost importance.

7.4.3 Continuation: The Importance of Legal Assistance during Interrogation

There are good reasons to be sceptical if a confession is given even if from a mature and informed defendant, without any possibility to prior consultation with a lawyer. A prime function of the assistance from a lawyer is to assure that the defendant is not coerced or tricked into a confession.\(^{156}\)

\(^{155}\) In *Bykov v Russia* (App no 4378/02) ECHR 10 March 2009 the majority (11-6) emphasised *inter alia* that the right-holder had not been subject to any direct pressure, that he was free during questioning and that he had no close relationship to the agent. *Bykov* is to be compared to *Allan v The United Kingdom* (App no 48539/99) ECHR 5 November 2002. Allan was detained, and hence in a *vulnerable* situation. Already from the time of the arrest he was informed of and had *availed himself of the right* to remain silent. Despite that fact, an informant (co-prisoner) was placed in the applicant’s cell. *The police had performed actively* by equipping the informant with a recorder and by currently giving him instructions ‘for the purpose of eliciting information from the applicant’ \([13]\). Hence, there was a violation of art 6(1). An example from the Norwegian Supreme Court (Rt. 1999 page 1269) is this: the prosecution had lured the accused, a prison guard suspected of having assisted a prisoner to escape, by using a hidden microphone and tape recorder to record the suspect’s conversations with an inmate and a police officer, both incognito. With reference to the fundamental character of the privilege against self-incrimination, the Court quashed the high court’s conviction since the contested statements were capable of having been influential.

\(^{156}\) In *Öcalan v Turkey* (App no 46221/99) ECHR 12 March 2003 the applicant had been interrogated for a period of seven days immediately after his forced return to Turkey without having had the opportunity to see a lawyer. In the situation where his incriminating statements, which constituted ‘major contributing factors in his conviction, this was considered a violation of art 6(3)(c). The connection to the prohibition against (the use of evidence obtained by) ill-treatment is obvious: without a lawyer present one could not know if the statements were valid.
In undercover cases the defendant is not aware that he is questioned by the police, and it is immanent that the assistance of a lawyer is not an issue. This consideration counts heavily against accepting as evidence incriminating statements from an uninformed defendant. Worrying too is the situation where the interrogation continues after the right-holder has made it clear that he wishes to remain silent, or where the interrogation continues despite the right-holder’s claim for a lawyer. In both instances the interrogation must cease and may not resume until he unconstrained changes his mind or are provided with a lawyer.

A distinction may be made as to whether the right-holder merely invokes the right to remain silent in addition the right not to proceed without a lawyer. In the latter case it seems logical to assume that the police are barred from any further interrogation, while the option to interrogate on a separate crime seems to be open in the first-mentioned case. It can be argued that in such cases the chance that the defendant may feel coerced by the second interrogation is more remote. Naturally, it will be even easier to allow a reopening of the interrogation if the defendant initiates contact and demonstrates interest to speak.

Even if the accused has waived the right to a lawyer, this waiver has to be carefully scrutinised. Consequently, there is a close relationship between (waiver of) the protection against self-incrimination and the right to legal assistance (see 9.3 below).

7.4.4 Continuation: The Right to Silence is Undermined by Negative Consequences. Relationship to Presumption of Innocence

Closely related to the protection against self-incrimination, but still distinct, is adverse inferences drawn from the right-holder’s silence. In Murray (John) ECtHR found no violation of article 6 by the fact that national law allowed inferences to be drawn from the accused’s silence, and that such inferences were in fact

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157 Thus, it seems a little strange when ECtHR in Allen (n 155) points at the fact that the conversations with the informant in disguise had taken place ‘without any of the safeguards which would attach to a formal police interview, including the attendance of a solicitor and the issuing of the usual caution’.

158 Several evidential issues may arise: *inter alia* how clear the invocation must be. In comparison attention may be drawn to the more rigid and category-based American law. In The Edwards-decision the Supreme Court (451 US 477, 101 S Ct 1880 (1981)) held that once there is an actual request for counsel, the police may not question the defendant unless he has initiated contact.

159 Cf US Supreme Court in Arizona v Robertson (486 US 675, 108 S Ct 2093 (1988)), that seems more strict.

160 Arguably, while silence is no active contribution from the right-holder to his own conviction, inferences based on it may amount to presumption of guilt and hence rather should be considered in relation to the presumption of innocence.

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drawn. However, in the case there was a substantial amount of other evidence. The considerations may be different if the trial court to a 'decisive extent' bases its decision on the accused's silence. In such case the risk of erroneous evidential inferences and ditto risk of miscarriage of justice, increases.\textsuperscript{162}

Therefore, silence needs to be corroborated by more important evidences. It is probably correct to assume that only 'common sense-inferences' from silence may be drawn. Even in such cases the admissibility of drawing such inferences ultimately depends on an overall assessment of its fairness. In addition to the weight attached to it, regard must be had to the situation in which the right-holder is, including the degree of compulsion it entails, the information he has received and whether he has had proper assistance.

The opinion in \textit{Murray} is confirmed in more recent case law. In \textit{Beckles} ECtHR stated that the option of drawing adverse inferences from an accused's silence refers both to silence during police interviews and during trial.\textsuperscript{163}

8. Waiver of the Presumption of Innocence (Article 6(2))?

8.1 Points of departure

The wording of article 6(2): ‘everyone … shall be presumed innocent’ – read in conjunction with the phrasing ‘entitled to’ in article 6(1), indicates that there can be no waiver of the right to be presumed innocent. The fundamental character of the right indicates the same. This implies a restriction on public officials' freedom of expression: no one can be declared guilty of a criminal offence except when ‘proved guilty according to law’, that is, after conviction by a competent court according to a fair trial.\textsuperscript{164}

\textsuperscript{162} Cf eg 9.4.2 below on the importance of the weight of the evidence in question.

\textsuperscript{163} \textit{Beckles v The United Kingdom} (App no 44652/98) ECHR 8 October 2002; see especially [57].

\textsuperscript{164} Consequently, the question may be raised if there is a violation of the presumption of innocence whenever there is a violation of some other provision of art 6 (so that the right-holder has not had a 'fair trial'. There are certain statements in case law that could be interpreted so: in \textit{Barberà, Messegué and Jabardo} (n 34) the Court considered it a consequence of the presumption of innocence that it is for the prosecution to inform the accused (cf art 6(3)(c)) of the case that will be made against him, so that he may prepare (cf art 6(3)(b)) his defence (cf art 6(3)(c)) accordingly. However it appears more pertinent to consider such specific items in relation to each specific guarantee in art 6 (see in the same direction \textit{Trechsel} (n 75) 166). It is hard to see what will be achieved by applying art 6(2) in addition to every \textit{lex specialis} breach of art 6. Only where the case reveals an issue with an independent bearing on the presumption of innocence, art 6(2) should be applied.
8.2 Guilty Plea is normally in Conformity with ‘Important Public Interest’

Clearly, there is a violation if public officials declare guilt (such as in Allenet de Riebemont),\(^{165}\) irrespective of any consent to it from the right-holder. Such situations are, presumably, of lesser practical importance.

However, while public authorities cannot declare guilt prior to conviction, there is nothing preventing referring to a plea of guilt from the accused. Furthermore, article 6(2) does not hinder a procedure by which the determination is based mainly on the guilty plea of the accused. As explained above he may have a rational motivation to do so: a speedier determination, less publicity and a more lenient sanction\(^{166}\). The fairness standard (or ‘important public interests’) will however set limits with regard to in which cases such confession-based simplified procedures are acceptable (typically concerning the severity of accusation and expected sanction).\(^ {167}\)

8.3 Importance of Validity of a Guilty Plea

A precondition in all cases is, however, that the guilty plea is not obtained by the use of pressure or any other unfair means. Any such pressure may, depending on the circumstances, violate a range of provisions: the extraction of the confession may be considered inhuman (and hence violate art 3); the presumption of innocence as well as the protection against self-incrimination (arts 6(1) and 6(2)) may be violated by any evidential use of the extracted confession;\(^ {168}\) and the right to an ordinary court procedure may be violated due to the unjustified confession-based summary procedure (art 6(1)).

\(^{165}\) Allenet de Riebemont (n 96)

\(^{166}\) See part 1.3.5 above.

\(^{167}\) Guilty pleas and similar acknowledgements of guilt is a feature in a wide range of summary and administrative procedures: The accused may accept a determination of the case by a ticket or by not taking an administrative sanction to court (see 1.3 et seq above).

\(^{168}\) See inter alia Panarisi v Italy (App no 46794/99) ECHR 10 April 2007.
9. Waiver of ‘Minimum Rights’ in Article 6(3)

9.1 Introduction

In the same way as for article 6(2), the wording of article 6(3) – ‘has the following minimum rights’ – indicates that waiver is excluded. However, not only the text of the provision is relevant, it has to be interpreted in ‘context and the light of its object and purpose’ (Vienna Convention art 31 (1)). Hence, the question whether a particular article 6(3)-right can be subject to waiver may not be answered uniformly.

Several of the minimum rights are of such a character that they presuppose that the right-holder invokes them actively: if the accused does not claim to obtain the attendance of (additional) defence witnesses (art 6(3)(d)), the court is normally entitled to consider this right waived. And if he does not claim further information, time or facilities for the preparation of his defence (art 6(3)(a)-(c)), the court may under the circumstances proceed from the assumption that the accused is satisfied (that there is a tacit waiver of additional utilisation of the rights). However, the question whether the non-implementation of the right is in conformity with ‘important public interest’ may present challenges.

The point of departure ought to be that the responsibility for the implementation of the ‘minimum rights’ rests heavily on the trial court. It will easily affect the confidence in the courts negatively if the case is conducted without the observance of one or more of the minimum rights.

9.2 Waiver of ‘Minimum Rights’ in Article 6(3): Information and Preparation

9.2.1 Points of departure

There is a close functional connection between the rights in article 6(3)(a) and (b): there can be no effective preparation of the defence unless the right-holder has received information of the accusation against him. This is even more evident from the requirement facility in litra (b): information obviously is an essential facility for the preparation of the defence.169 In principle, therefore, article 6(3)(a) could be regarded superfluous. However, the right to information could also be regarded as a more independent right: information at an early stage of the pro-

169 See Trechsel (n 75) 193.
ceedings is required in order to protect the accused from a Kafkaesque suffering.\footnote{Ibid. The van der Leer-case v The Netherlands (App no 11509/85) (1990) Series A no 170-A addressed a similar question in relation to the less explicit art 5(2). Since the text of art 5(2) merely grants an ‘arrested’ a right to information of any ‘charge’, a strict literal interpretation of art 5(2) would exclude a right to information for anyone deprived of his or her liberty outside the realm of criminal prosecution. Such an interpretation was rejected by the Court, which underlined the close link between paragraphs 2 and 4 of art 5 (art 5-2, art 5-4): ‘Any person who is entitled to take proceedings to have the lawfulness of his detention decided speedily cannot make effective use of that right unless he is promptly and adequately informed of the reasons why he has been deprived of his liberty’. In other words information is a \textit{condictio sine qua non} for the preparation and argumentation of one’s case in court.}

By requiring both prompt basic information and gradually more detailed information as the trial approaches, case law takes both perspectives into account. The connection between the two (separate) rights in litra (a) and (b) is underlined. At the same time there is a certain ‘task distribution’ between the two: the basic information – the charge that describes the facts allegedly committed and the applicable criminal law provisions – is covered by litra (a), while further information providing more details, including evidence invoked by the prosecution, is covered by litra (b).

9.2.2 Waiver

It is unlikely that the accused should have any rational motivation to make himself unable to conduct a defence by waiving the right to be informed of the charge. And, even if so, the fundamental importance of these rights for an adversarial – fair – proceeding, indicates an important public interest in providing them irrespective of the stance of the right-holder.

More likely the dispute may concern whether the right-holder’s passivity reflects a waiver of further information than has been provided at an early stage. It is in the nature of the rights in article 6(3)(a) and (b), that they play a major role in the initial phase of the proceedings. However, their importance is not exhausted at this stage. The need for information is dynamic. Different stages of the proceedings may offer a set of new requirements.

The \textit{Melin-case},\footnote{See Melin v France (App no 12914/87) (1993) Series A no 261-A.} for example, shows the applicability of the information requirement on appeal: the applicant claimed that he was unable to prepare his defence adequately before the appeal court because he had not received a copy of

\footnote{\textit{Ibid.} Clearly, an unwilling right-holder may reject to utilise it. Such a situation will activate and even sharpen the obligation to proceed with an appointed representative (see 9.3 below).}
the first instance’s judgment. The majority of the Court (5-4) accepted the government’s argument that there was a de facto waiver. Since the applicant was a lawyer he could reasonably be expected to perform more actively in order to obtain access to relevant documents.

However, certain cautiousness with any presumption that the right-holder understands or ought to understand the legal situation is required. A waiver cannot reasonably be inferred from his passivity without further ado. Under the circumstances fairness requires that the right-holder is addressed directly in order to clarify his stance to waiver of rights (see recommendation in part 2.3 of the first article, NJHR issue 3&4 2010).

Another example of the dynamic character of the rights in litra (a) and (b) is where the original indictment is extended after the commencement of the trial. In line with the logical connection between information and preparation, there must be a new communication and additional time to cover a defence in relation to an extension of the charge. Again, the presiding judge ought to ask the accused whether additional time to prepare the defence is necessary.

The situation may be that the right-holder is passive, while his representative – his defence lawyer – acts. To a large extent identification between the two is appropriate. However, the trial court’s responsibility for the fairness of the proceedings indicates that the lawyer’s stance may be set aside, either because it is not found to reflect the will of the right-holder or plainly because it contravenes ‘important public interests’ to proceed, in any case without a clear signal from the right-holder. Again, such clarification may be provoked by a simple question from the panel.

A question (and eventually an affirmative answer) could have remedied the situation in Barberà, Mesegué og Jabardo. In this case ECtHR found that the reading out of certain documents violated the fair hearing-requirement, even though accepted by the defence lawyers. Not only is there a close connection between the rights in litra (a) and (b) of article 6(3), the same holds true for the relationship between the provisions of litra (b) and (c).

173 See inter alia Sipavicius v Lithuania (App no 49093/99) ECHR 21 February 2002 with further references.
174 See among other authorities Kemal Kahraman and Ali Kahraman v Turkey (App no 42104/02) ECHR 26 April 2007 where it was emphasised that ‘… mere nomination does not ensure effective assistance since a lawyer appointed for legal aid purposes may be prevented from performing, or shirk his or her duties. If they are notified of the situation, the authorities must either replace or oblige the lawyer to fulfil those duties’ [35].
175 Barberà, Mesegué and Jabardo (n 34).
176 See ibid [82-83].
9.3 Waiver of ‘Minimum Rights’ in Article 6(3): Defence

9.3.1 Introduction

(a) An effective preparation of the defence (litra (b)) is a precondition for a ditto exercise of the rights in litra (c), whether the right-holder ‘defends himself in person or through legal assistance’. At the same time legal assistance may be a necessary ‘facility’, already for the preparation of the defence.

The connection between preparation and assistance reveals the nature of the two rights: they are not limited to the trial, but apply to previous stages of the case as well. The further a case moves and the more complicated it becomes, the more dangerous it becomes for the defendant: the indictment means that the prosecution considers the evidences sufficient and intends to take the case to court for conviction. Consequently, the further the case moves, the more urgent, both from the perspective of the defendant and the society, is the importance of an effective defence. Even though the importance of the right is especially evident at the hearing, it is useful to have in mind that deficiencies at earlier stages (eg during an interrogation) may be transmitted to the trial. Especially in relation to questioning of the defendant and essential witnesses, assistance may be of importance at any point where such crucial events take place.

(b) The two first rights in article 6(3)(c) are features (or aspects) of the essential right to defence (in itself a condictio sine qua non for an adversarial (and hence ‘fair’) procedure.

For this reason a waiver of the right to any defence – personally or through a lawyer – is probably impracticable, and should at any rate be considered unacceptable. Hence, if the defendant refuses to defend himself, there is, at least as a basic rule, a condition that the defence is conducted through a lawyer. In other words, a trial without any defence disregard the principle of equality of arms and adversarial proceedings, and ‘runs counter to important public interests’: As pointed out above, the defendant’s legal assistant plays an important role not only in advocating the defendant’s case, but more generally in supervising the fairness of the procedure, for example, in assuring that the defendant is not coerced or tricked into a confession (7.4 above).

(c) The challenges in relation to waiver of and preferred rights are partly on evidence and interpretation, partly on whether it is in conformity with important

177 Clearly, the defence may be summary, as in summary trials, see 1.3.5 above.
178 See also the Commission’s report in Ensslin, Baader and Raspe (n 128) 64, where the defence lawyer’s function as a public watch dog for procedural regularity is underlined (114).
public interests to conduct the trial with the implementation of one of the rights only: can the right-holder’s choice to defend himself implicitly be taken as a waiver of the right to council and vice versa? I take as a point of departure that clear indications of waiver are needed. Further, even if a valid waiver of one of the rights is proven, it may ‘run counter to important public interests’ not to implement it.

9.3.2 Waiver of Personal Defence: on the Condition of Assistance by a Lawyer?

(a) If the accused is present, he will normally defend himself, both personally and through his defence lawyer.

The right to defend oneself personally or through legal assistance presupposes, as a general rule, that the defendant is present. However, while the defendant can be taken to the court room, if need be with force (7.2 above), there is no legal possibility to force him to speak (cf also 7.4). The right-holder’s determination not to defend himself cannot, however, be taken as a waiver of the right to be defended by a lawyer as well. To the contrary, representation is particularly important in cases where the defendant is absent or silent. To leave the defendant without any defence will normally ‘run counter to important public interests’.

In (b) below we shall focus on the question whether there is proof for a waiver of personal defence (and if so whether there is an obligation to appoint a defence lawyer).

(b) The fact that the accused fails to attend at the hearing cannot be taken as a waiver of the right to defence council. Often the defendant will not have reflected on the matter. And at any rate, ‘important public interests’ will easily come into play. When the accused fails to attend, the public interest in seeing a fair and balanced procedure before an independent tribunal even more urges that the defendant is represented (see 7.2 above).

In Karatas and Sari\textsuperscript{179} ECtHR had, under the special circumstances of the case accepted the Government’s contention that the applicants had absconded and therefore acted in a way that amounted to a de facto waiver of the right to be present and defend themselves in person. As to the right to assistance from a lawyer, the Court considered that a defendant’s failure to appear could not justify deprivation of the right to legal assistance, and therefore that there had been a violation of article 6 § 3 (c). And in Poitrimol it was considered an obvious article

\textsuperscript{179} See Karatas and Sari v France (App no 38396/97) ECHR 16 May 2002.
6-violation when the defence council was rejected with reference to the defendant’s unauthorised absence.\textsuperscript{180}

The obligation to grant a defence is primarily an obligation to secure the attendance of a lawyer, which, in cases where the defendant is without ability to pay, normally is achieved by money (‘to be given it [the assistance] free if the interests of justice so require’). Furthermore, there are certain positive obligations on the state in order to secure that the defence is effective.\textsuperscript{181}

9.3.3 Active Assertion of the Right to Legal Assistance: Implicit Waiver of Personal Defence?

The fact that the defendant calls for legal representation should not without further ado be interpreted as a waiver of the right to defend himself. The state will generally be obliged to give him the opportunity to supplement the assistant (see the Cooke\textsuperscript{182} judgment), \textit{inter alia} by giving his own comments to the case:

\textsuperscript{180} See Poitrimol (n 142). The Court accepts that sanctions can be imposed on defendants in order to encourage them to appear before the courts. But it was right in considering a sanction that further undermined the equality of the parties as disproportionate. More generally, even if there are good reasons to discourage misconduct from the accused, there are equally good reasons to be sceptical when it comes to sanctions that consist of loss of rights. See also the Mollend and Morris (n 110) and Khalfaoui v France (App no 34791/97) ECHR 14 December 1999 cases where loss of rights for ‘punitive’ purposes were set of. See finally Trechsel (n 75) 256.

\textsuperscript{181} Former case law did not apply a particularly ambitious test. In Imbrioscia v Switzerland (App no 13972/88) (1993) Series A no 275, the questioning of the accused in the absence of his lawyer was not considered a violation because a lawyer’s presence was not requested. Although the Court is rather scant on this point, it seems fair to infer that if such a request had been made, the attendance of a lawyer should have been secured. The question whether a clarification of the accused’s intention to waive the right to a lawyer should have been sought by the trial court, is not addressed. Arguably it should and have been answered in the affirmative. (In his dissenting opinion Judge De Meyer, referring to the Miranda-rule (384 US 36 1966), requires active information of the right to legal assistance. More recent case law indicates a distinction as to the character of the ‘error’ committed by the lawyer: while there normally can be no responsibility for weak argumentation and similar, the rule is opposite when it comes to more technical errors, such as time limits for filing an appeal (see \textit{inter alia} Czekalla v Portugal (App no 38830/97) ECHR 10 October 2002. Sannino v Italy (App no 30961/03) ECHR 27 April 2006 confirms a more active responsibility: the appointed lawyer withdrew. The appointment of a new was tainted with errors (he was informed of the date of the hearing, but not of the appointment). For that reason the new appointed lawyer never showed up at subsequent hearings. The applicant was represented by constantly new lawyers with inadequate knowledge of the case. Despite the applicant’s rather passive conduct, that could be taken as a waiver of the right to assistance, the trial court had an independent responsibility for securing an effective defence. This is a faithful implementation of the requirement of assistance whenever it is called for by the ‘interest if justice’.

\textsuperscript{182} See Michael Edward Cooke v Austria (App no 25878/94) ECHR 8 February 2000.
The Court, having regard to the nature of the main issue before the Supreme Court, namely a new assessment of the applicant’s personality and character, including his state of mind at the time of the offence, his motive and his dangerousness and aggressiveness in general, and taking into account the gravity of what was at stake for the applicant – a possible increase in sentence to life imprisonment – does not consider that his case could have been properly examined without gaining a personal impression of the applicant. It was, therefore, essential to the fairness of the proceedings that he be present at the hearing of the appeals and afforded the opportunity to participate, together with his defence counsel.\(^{183}\)

More concretely this means that the accused at any time must be allowed to give his comments or supplementing statements. An exception to this is where merely legal questions are to be discussed\(^{184}\) (cf also 9.3.4).

9.3.4 Tacit Waiver of Assistance by Choosing Personal Defence?
The question of waiver is even more accentuated when it comes to the first mentioned, alternative right in article 6(3)(c). The fact that the defendant appears in court and even defends himself, is no sufficient basis for an inference that he has waived his right to assistance.

True, article 6(3)(c) does not require it expressly, but it must be assumed that the authorities (the prosecution or the trial court), in order to make the right to assistance effective are under an obligation to inform about this right.\(^{185}\) Furthermore the information should include the requirements, such as the representative’s legal and linguistic qualifications, and his ability to take on the commitment in time so that the proceedings are not delayed (see generally 4.2 above).\(^{186}\)

9.3.5 Preferred Right to Personal Defence: State’s Freedom and Obligation to Respect Waiver of Assistance
(a) It may at first reflection be surprising that an accused in any imaginable situation should wish to do without counsel. But her preference may be rational, at least

\(^{183}\) See ibid [42].

\(^{184}\) Cf Kremzow v Austria (App no 12350/86) (1993) Serie A no 268-B and Josef Prinz v Austria (App no 23867/94) ECHR 8 February 2000 on the one hand, with Botten (n 124) on the other.

\(^{185}\) Cf the position under CCPR art 14 where the court is required to inform the accused of the right to counsel if he chooses not to defend himself. See Manfred Nowak, \textit{UN Covenant on Civil and Political Rights} (Engel 2005) 337.

\(^{186}\) See generally Trechsel (n 75) 267-270.
understandable. Her experiences with lawyers may be bad or she may have mistrust in lawyers from the district where the criminal act for which she is accused has taken place. It might have helped the situation to appoint a counsel from another district, but that option may be barred due to expediency-considerations (4.2.3 above).

(b) Article 6(3)(c) is special in the sense that the text hints at the relevance of the right-holder’s wish: ‘defend himself in person or through legal assistance of his own choosing …’. However, a literal interpretation of this sequence of the text does not solve the question whether it is for the state or the accused to choose between the two rights.187 (The verb ‘choosing’ refers to the choice (undoubtedly for the defendant) between different lawyers).

Read in context with its next sequence, which set some limits by requiring free legal assistance ‘when the interests of justice so require’, the societal interest in a fair procedure is lifted more to the foreground: when there even is an obligation for society to pay for a lawyer ‘if the interest of justice so requires’, this interest obviously dictates the active participation of the lawyer paid for.

On the basis of this contextual interpretation of the text the option ‘to defend himself …’ is no more than a point of departure. There is at the most a limited negative right to conduct the defence without a lawyer. This is, furthermore, exactly what is confirmed by Galstyan: 188

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). It is clear from the text of Article 6 § 3 (c) that an accused has the choice of defending himself either ‘in person or through legal assistance’. Thus, it will normally not be contrary to the requirements of this Article if an accused is self-represented in accordance with his own will, unless the interests of justice require otherwise.189

187 Pakelli v Federal Republic of Germany (App no 8369/78) Series A no 64 does not solve the question as it plainly states that ‘a person who does not wish to defend himself must have recourse to legal assistance’ (emphasis added).
188 See Galstyan v Armenia (App no 26986/03) ECHR 15 November 2007.
189 See ibid [91]. CCPR seems to go far in granting an independent right to personal defence: ‘Although in principle accused persons have no influence on the selection of a counsel assigned to them under a legal aid scheme; they may at any time make use of the right to defend themselves when an ex-officio counsel is appointed against their will (eg in military trials)’, see Nowak (n 185) 337. Further, in Michael and Brian Hill v Spain (Communication No 526/1993) UN Doc CCPR/C/59/D/526/1993 the right of a British accused to defend himself, through an interpreter, was violated by the fact that this request had been denied by the court, and, instead, a lawyer had been assigned to him.
In the following the question is when the right-holder’s choice to defend himself exclusively can be set aside with reference to ‘the interest of justice’ and when – eventually – the state is under an obligation to respect his preference.

(c) Already early case law urged caution with a plain literal interpretation of the wording of article 6(3)(c), underlining that the public interest in a fair criminal procedure is evident.

With the point of departure in this theme it is, however, clear that the state must point at a related reason to overrule the defendant’s waiver.

Of crucial importance for the respect and implementation of the defendant’s waiver of counsel is his own ability to conduct the defence. In fact this is the overriding theme. It is, however, useful to analyse it with factors related to the case ((d) below) and to the defendant personally ((e) below) in mind. Before we approach these general questions, two more special situations should be mentioned.

There are stronger reasons to respect the defendant’s decision not to have an additional lawyer to assist him, and even more so if he runs the risk of paying the costs in case of conviction.190

(d) Where the pivot is on questions of law, there is a presumption that the defendant will need a legal assistant to counterbalance the prosecution. Hence, the trial court will, with reference to the ‘the public interest’ in seeing the principle of equality of arms respected, be entitled, and may even be obliged, to set aside a waiver of the right to counsel. The same holds true if the facts of the case are complex, or the accusation or the sanction to be expected is of certain seriousness.

First instance trial normally decides on both questions of fact and questions of law. If neither the law nor the facts of the case are complex, the accusation does not concern a grave offence and the sanction risked incurred is modest, the state is free to respect a waiver of counsel. Typical examples will be traffic-cases,191 hereunder cases concerning drunk driving. However traffic-cases as well may appear less trivial, by example if the defendant disputes that he had knowledge of the content of alcohol in the consumed beverage. If no important public interest is involved, there probably is an obligation to respect a waiver. In such cases auto defence attains the status of a right.

190 In the Croissant v Germany (App no 13611/88) (1992) Series A no 237-B case the applicant, himself a lawyer, had wished to retain two lawyers. Nevertheless, the state did not violate art 6 by appointing a third.

191 See the once controversial Öztürk (n 41) where art 6 was held applicable in a minor traffic offence-case.
On appeal there normally is an increased focus on law. To the same extent there is a presumption against acceptance for waiver of council. Proceedings before supreme courts or constitutional courts regularly ought to be conducted with a lawyer. Consequently, in such cases there is no right for the defendant to be unrepresented.

In relation to the seriousness of the sanction it is necessary to assess not only the likely duration of a prison sentence, but also eventually the nature of the sanction. If the defendant risks incurring special measures such as indefinite detention because of prospects of reoffending, a legal representative should be mandatory. Opposite, if he merely risks an economic sanction, the trial court should be freer to accept the defendant’s waiver. In Galstyan192 the Court even considered the risk of a shorter period of detention as sufficient lenient to allow a waiver:

noting that the applicant was accused of a minor offence and the maximum possible sentence could not exceed 15 days of detention, the Court does not discern in the present case any interests of justice which would have required a mandatory legal representation.193

Hence, no violation of article 6 was found in the case.

Special challenges may arise in cases where the defendant has confessed, either before the police, the prosecution or the court. The case then is more trivial with respect to the question of guilt. One should not however underestimate the importance of a critical view on the confession as such, inter alia by a demand for supporting evidence. Such a critical view is regularly best performed by a lawyer. Not uncommonly it is first revealed during the trial that there may be a mismatch between the confession and ‘supporting’ evidence. The appointment of a lawyer may then be required.

Further, it is important to bear in mind that the determination of the sanction, too, is part of the ‘determination of the criminal charge’ according to article 6(1). Hence, the risk of a serious sentence urges the participation of a lawyer, even in confession-cases. A practicable solution is to link the assessment to the prosecutor’s demand, or more generally the sentence that the court (likely) may consider. To conduct a murder-case without a lawyer, will, even if the defendant has confessed, run counter to important public interests.

192 Galstyan (n 188).
193 Ibid [91].
(c) Naturally there is a close connection between the complexity of the case and the defendant’s qualifications to conduct an adequate personal defence. While a resourceful defendant – he is for example himself an experienced lawyer – will have the preconditions to conduct his defence in a complex case, assistance will be required for an intellectually deprived, even in a routine case. Hence, with better qualifications one should expect that the option to perform the defence personally attain the character of a right. However, in Correia de Matos194 the Court allowed a rather broad margin of appreciation by accepting that ‘the interest of justice’ justified appointment of a legal assistant in contravention with the wish of the accused, himself a lawyer.195

It may be argued that the Court in Correia de Matos, with reference to a wide margin of appreciation, too easily accepted the national court’s consideration, and thereby abstained from an independent assessment of whether an implementation of the applicant’s ‘right to defend himself’ might have been in conformity with, or even have strengthened, ‘the interest of justice’. Still, the fact that the applicant was to a considerable degree allowed to forward his views in court, speaks in favour of accepting the trial as ‘fair’, and hence the decision in Correia de Matos as acceptable.

An alternative approach, not to appoint a lawyer, may prove dangerous. If it turns out that the defendant is unable to conduct a proper defence, additional time necessary to have appointed a capable and prepared lawyer will be necessary – valuable time will be lost.196 On the other hand, there may always be a risk that the conducting lawyer – be it the defendant himself or an appointed lawyer – may prove to be incapable and due to be replaced. Arguably, ‘auto defence’ offers greater challenges connected to an objective appreciation of the case, and hence to perform an effective defence. Furthermore, the trial court may fall short of valuable contributions by not appointing an independent and intelligent defence lawyer.197

If the defendant appears competent, or rather, does not appear incompetent, the onus on the trial court to provide a justification for setting aside the defendant’s choice increases.

194 See Correia de Matos (2001) ECHR 2001-XII.
195 See ibid; naturally, this can be seen as a special application of the obligation to take positive steps to ‘secure’ the right (art 1 of the Convention), see part 1.2 of the first article (NJHR No 38&4 2010) and on this particular point Trechsel (n 75) 263.
196 Incompetence may amount to disruptive behaviour, which clearly not only allows, but also may oblige the court to replace the defendant with a representative. An equally clear obligation to replace rests on the court due to defendant’s bad health.
197 Compare Trechsel (n 75) 264.
(f) In short there are strong arguments both in favour and against interpreting article 6(3)(c) literally to mean an unreserved right for the defendant to opt for a personal defence excluding representation. And it ought to be accepted that the trial court most often is in the best position to appreciate and balance the majority of these arguments. Consequently, the holding that there should be a wide margin of appreciation in this respect is logical. However, this margin is never unlimited. 198

The point of departure is that there is a right to personal defence and that any exception to this right – like exceptions to other rights – needs a justification. The justification may concern the case or the persons involved in the defence. While it is hard to see why it should be acceptable to disrespect a lawyer’s wish to defend himself in a less serious case (even if complex), it is easy to accept that a defence lawyer should be appointed in serious cases where there are reasons to fear incompetence, including lack of objectivity, on the part of the defendant.

It is recommended that the trial court proceeds with caution. Where the defendant runs the risk of severe sanctions, especially long prison sentence, it will be within the state’s margin of appreciation to turn down a claim for auto defence. 199 It should be stressed, however, that soft solutions most often are available: article 6(3)(c) speaks of assistance, not of replacement, of the defendant in the exercise of the defence. Consequently, even where a defence lawyer is appointed in contravention with the wish of the defendant, the latter should be given ample opportunity to argue his case. 200 And to the extent that the defendant and his lawyer disagree, the defendant’s view must prevail. 201

198 See the ruling of ECtHR in Sunday Times v UK (App no 6538/74) (1979) Series A no 30: ‘Nevertheless Article 10 (2) does not give the Contracting States an unlimited power of appreciation ….’ Although linked to art 10, this statement is more generally applicable. See in the same direction MacDonald, The Margin of Appreciation Festschrift (Robert Ago 1987), who states ‘In theory there is no limit to the articles of the Convention to which the margin of appreciation could be applied, for the Court has never imposed a limit’ (192).

199 See Trechsel (n 75) 264 with reference to Report from Independent Experts appointed by the Council of Europe to determine the situation for alleged political prisoners in Azerbaijan.

200 As mentioned above, the Court seems to have paid attention to this in the Correia de Matos case (n 194).

201 See similar Trechsel (n 75) 251.
9.4 Waiver of ‘Minimum Rights’ in Article 6(3): Witnesses and Cross-Examination

9.4.1 Introduction

Article 6(3)(d) contains two rather distinct rights: the right to present defence witnesses (9.4.3) and the right to cross-examine witnesses for the prosecution (9.4.2). Both rights can explicitly or by implication be waived, such as for example where the accused opts for a summary procedure, typically based on his confession (see generally 1.3.5 above). In order to achieve the purpose, a speedier trial, a simplification of the procedure, inter alia by reducing the amount of witnesses, is necessary.202

Like other article 6(3) rights the rights in litra (d) are constituent elements of an adversarial procedure and hence fairness.203 This coupling creates at the same time a basis for modification of the rights (see generally 2 above). In relation to article 6(3)(d) this modification means that the proceedings may be considered ‘fair’ even though there has been no regular access to examination. That is the case if the contested statement is less than decisive.204 It might as well be considered ‘fair’ to deprive the right-holder of his access to examine a witness who he has threatened:205 she will have herself to thank for the loss of opportunity to utilise the right – a sort of de facto waiver. The situation is similar, but not identical, where the defendant misbehaves in court: she will have herself to thank for not being present and hence for not being able to exercise the right to examine. But in such cases there is no argument against letting her legal assistant exercise the right on her behalf.

202 See inter alia Panarisi (n 168).
203 The Court frequently underlines that the fairness-standard (art 6(1)) and the special rule (art 6(3)) should be seen together, see inter alia Bönisch v Austria (App no 8658/79) (1985) Series A no 92 [29] and Unterpertinger v Austria (App no 9120/80) (1986) Series A no 110 [29].
204 The most used term delimiting the essentiality-condition defining when cross-examination is required is ‘decisive’, see inter alia Kostovski v The Netherlands (App no 11454/85) (1989) Series A no 166 [44] and Delta v France (App no 11444/85) (1990) Series A no 191-A [37]. I fully agree with Trechsel (n 75) 296-298 which holds that case law is not always consistent, and that the trial court should have to acquit if the non-contested evidence is insufficient to convict. (See Jørgen Aall, Rettergang og menneskerettigheter ['Human Rights in Criminal Procedure'] (Bergen 1995) 403: ’reelle hensyn … taler for å anse beviset vesentlig, slik at det ikke kan leses opp også ellers hvor anklagde vil måtte frifinnes hvis man tenker seg beviset bort.’ (The evidence should be considered decisive, so that it cannot be read out, also if the accused will have to be acquitted without it).
205 See inter alia Doorson (n 109) where the interest to protect a witness justified anonymity.
If there is more than one defendant, their right to examine will have to be considered separately. Nevertheless, there may be a connection between the two (or more) right-holders when it comes to waiver (see 9.4.2).

9.4.2 Waiver of the Right to Cross-Examine Witnesses
(a) A trial which is conducted without cross examination may be considered ‘fair’ (in conformity with ‘important public interests’), because the right is validly waived. Validity (in a narrow sense) has proven to be the crucial question in relation to waiver of the rights in article 6(3)(d). We shall shortly return to this (in (c)) after a brief comment on ‘important public interests’ (in (b)).

(b) Naturally, even though the right-holder should be encouraged to exercise his right to cross-examine, he cannot be forced to make use of it. Neither can a duty to examine be imposed on the lawyer in contravention with the instructions of his client. But the court should make efforts in order to clarify whether it is the right-holder’s intention to waive the right.

In order to secure a fair trial it is assumed that the trial court may be entitled (and even obliged) to examine a witness ex officio. Certainly, this is the case if there are reasons to believe that the witness has information capable of preventing miscarriage of justice.206 The obligation may extend further: although the states has a wide margin of appreciation when it comes to evidential issues,207 it is likely that ECtHR will look to the fact that a majority of the Convention States, in their criminal procedure law, places the responsibility for a proper enlightenment of the case on the trial court.208 In other words it may be regarded in contravention with important public interest not to examine a witness that may have information essential for the proper determination of the case, for sentencing, for example.209

Still, this fairness issue is rarely accentuated, because the considerations more often revolve around whether there is proof for a valid waiver. But it may retain

206 I remind that there is no waiver of the presumption of innocence (see part 8 above).
207 See inter alia Bricmont v Belgium (App no 10857/84 ) (1989) Series A no 158 [89] and Khan v The United Kingdom (App no 35394/97) ECHR 12 May 2000 [34].
208 This does not contradict the fact that the points of departure in the common law and continental law systems are different, with (main) responsibility for calling evidence on the parties and the court respectively. Examples of cases where national law imposes more stringent regulations: Sadak and others v Turkey (App nos 29900/96, 29901/96, 29902/96 and 29903/96) ECHR 17 July 2001 [67] and Anduradousky v Russia (App no 24015/02) ECHR 28 September 2006 [54].
209 In Bricmont (n 207) ECtHR stated that ‘there are exceptional circumstances which could prompt the Court to conclude that the failure to hear a person as a witness was incompatible with Article 6 ….’ [89].
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importance in its influence on the requirements of proof for waiver. The Court has underlined that it must be unequivocal.210

(c) Several aspects of the question whether there is a valid waiver of the defendant’s right to examine or have examined witnesses may occur, inter alia: to which extent can the passivity of the accused be interpreted as a waiver? And, to which extent are the actions – or rather passivity – of his lawyer to the detriment of the accused (in other words, is there relationship between the two). Both aspects have been addressed in case law.

The answer to the latter question may be inferred from the general position on the relationship between the applicant and his lawyer (above): to a wide extent there is identification. SN v Sweden211 concerned a case where special features were considered necessary to protect the witness. More concretely, a sexually abused ten year old child had given statement outside the court room, to the police. The interview was videotaped and played at the trial. As this was the decisive evidence, it was crucial whether the rights of the defence were respected. The Court relied heavily on the fact that the applicant’s lawyer had accepted the way in which the interview was to be conducted. He thereby, on behalf of his client, waived any right to further or ordinary questioning.

The Court is not totally consistent when it comes to whether or not an explicit waiver is required for the deviation of the right to cross-examine. In Sadak212 it underlined the importance of diligence on the part of the state to secure the real opportunity for the accused to cross-examine witnesses against him. This obligation seems to contain three elements, at least: first a clarification of whether the accused wants to exercise cross-examination; second to make efforts to obtain the witness; and third to provide adequate arrangements for the examination. In Kaste and Mathisen213 the latter element was decisive. The relevant witness was present in court. But since the presiding judge had refused the opportunity for the defence lawyer to pose precise questions to the witness with reference to their prior general statement that it did not intend to answer questions, the right to cross-examine was violated.

Kaste and Mathisen also illustrates the first mentioned situation: the Government argued that the first applicant by not opposing the reading out of the wit-

210 See inter alia Sadak (n 208) [67]; Bonev v Bulgaria (App no 60018/00) ECHR 8 June 2006 [41] and Andandonskiy (n 208) [54].
211 See SN v Sweden (App no 34209/96) ECHR 2 July 2002.
212 See Sadak (n 208).
213 See Kaste and Mathisen v Norway (App nos 18885/04; 21166/04) ECHR 9 November 2006.
ness’ statement *de facto* had waived the right to cross examine it. Although the Court took the failure to act into consideration, it found good reasons for this passivity in the fact that the lawyer for the second applicant had protested in vain.\textsuperscript{214} Under such circumstances, it considered that it would have been futile for the lawyer for the first applicant to protest:

the Court has taken note of the first applicant’s explanation as to the order of interventions, to which the Government did not object, namely that counsel for the second applicant spoke first. Having regard to the High Court’s treatment of the second applicant’s objections and requests (see paragraphs 10 and 12 above), it appears that it would have been futile for the first applicant to make the same objections and requests. In these circumstances, the Court does not find it established that the first applicant had waived unequivocally, either expressly or tacitly, his Article 6 § 3 (d) rights.\textsuperscript{215}

The Court seems, however, to have hesitated:

if the first applicant’s counsel was of the view that it was important for his case that D’s depositions should not be read out, one could, in principle, have expected him to have pointed this out.\textsuperscript{216}

Obviously, it would have been safer for the applicant (or his lawyer) to protest explicitly. Nevertheless, it is recommended that the presiding judge ‘provokes’ a clarification, as in *Ozerov*\textsuperscript{217} where the accused and his defendant were asked if they had any objections, and in reply ‘explicitly stated that they had no objections’ to the reading out of statements.

In *Craxi*\textsuperscript{218} ECtHR started with a reminder about the standard-test regarding waiver: proof, validity and conformity with important public interests. It decided the question on the first point, rejecting the state’s argument that there was a waiver. The passivity of the defendant and his lawyers did not amount to a tacit waiver because there was no real opportunity to contest the reading out of the disputed testimony. According to national law the presiding judge was under an

\textsuperscript{214} See the similar reasoning in *Igro v Italy* (App no 11339/85) (1991) Series A no 194-A [29].
\textsuperscript{215} *Kaste and Mathisen* (n 213) [47].
\textsuperscript{216} Ibid [48].
\textsuperscript{217} See *Ozerov v Russia* (App no 64962/01) ECHR 18 May 2010.
\textsuperscript{218} See *Craxi v Italy* (App no 34896/97) ECHR 15 December 2002.
obligation to have statements from witnesses refusing to give evidence in court read out. In *Igro*, also versus Italy, the tone is the same. These cases are to be contrasted with *Pullar v UK*. According to the relevant national law the High Court could rely on a written statement only if it were undisputed. The ECtHR was satisfied that there were several courses of action open to the applicant’s counsel, among them to call the witness to give oral evidence before the court. Hence, when no action was taken, there was a waiver, and no violation.

By contrast again, in *Vladimir Romanov* the Court found no indication that the applicant or his counsel expressly had waived the right to cross examine by stating that they had no objections to the reading out of the statement. ECtHR seems to demand that the presiding judge is more active: no tacit waiver could reasonably be discerned in a situation where the district court merely had mentioned that ‘the witness’ absence was for a good reason’ and had proceeded to the reading out of the depositions without asking the applicant or his lawyer whether they agreed. Substantiated by the fact that no domestic legal provision required an accused to explicitly ask for a presence of a witness testifying against him, ECtHR also found no evidence that the applicant or his lawyer was cautioned of the necessity of insisting on the witness’ presence. Consequently there was no (valid) waiver of the right to cross-examine and a violation of article 6.

9.4.3 Waiver of Defence Witnesses
Concerning the right of the accused to obtain and examine defence witnesses, passivity may often reasonably be interpreted as a tacit waiver. If she does not actively present any (further) witnesses, the trial court may normally consider that the right to do so is waived.

However, in principle, the trial court has the responsibility (on behalf of the society) for supervising whether this lack of (further) witnesses for the defence is detrimental to the ‘fairness’ of the process (the overriding principle in article 6(1)). Consequently, in the same way as for cross examination, the trial court has, exceptionally, an independent responsibility to call and examine witnesses, at

219 See *Igro* (n 214).
220 See *Pullar v The United Kingdom* (App no 22399/93) ECHR 1996-III.
221 See *Vladimir Romanov* (n 141).
222 Cf, by contrast, *Vozhigov v Russia* (App no 5953/02) ECHR 26 April 2007 [57] and *Andandonskiy* (n 208) [54].
223 See also *Bonev* (n 210) [40] with further references, and *Bocos-Cuesta v The Netherlands* (App no 54789/00) ECHR 10 November 2005 [66].
least to the extent that their statements can be presumed to prevent miscarriage of justice.

In Bricmont the Court stated: ‘There are exceptional circumstances which could prompt the Court to conclude that the failure to hear a person as a witness was incompatible with Article 6.’ But such an obligation presupposes that the trial court has (or should have) knowledge of such (potentially) important information. In a situation where the right-holder remains passive, it will most often not have. Hence, both considerations to the enlightenment of the case and to the certainty of whether or not the right-holder intends to waive, indicates that the court should seek clarification by asking the defendant whether he wishes to present (additional) witnesses.

9.5 Waiver of ‘Minimum Rights’ in Article 6(3): Interpretation

9.5.1 Introduction: The Importance for Fair Administration of Justice

According to article 6(3)(e) everyone charged with a criminal offence has ‘the right to have the free assistance of an interpreter if he cannot understand or speak the language used in court.’ It is probably not very practical that a defendant should want to waive his right to an interpreter. But the possibility cannot be ruled out, for example where she for political reasons (in vain) insists that her language should be spoken in court. Just as it is obvious that the right-holder cannot force her language upon the entire court and all the participants to the proceedings (lawyers, witnesses and so on), it is equally obvious that the court cannot conduct the proceedings if it has (or should have had) knowledge of the right-holder’s inability to understand what is said in court or make himself understood. There can be no doubt that such trial will run counter to important public interests (fair administration of justice).

Again, the crucial question is whether passivity can be taken as proof for (tacit) waiver. Several distinctions have to be made.

224 See Bricmont (n 207) [89].
225 Such as in Zana v Turkey (App no 18954/91) ECHR 1197-VII. Cf also Trechsel (n 75) 328.
226 The societal interest is also reflected in the fact that the interpretation shall be given ‘free’, that is an once and for all exoneration from any obligation for the right-holder to pay, even if he is convicted and has means to pay (cf the situation in relation to the right to legal assistance, 9.3 above). Further, in contrast with art 6(3)(c), art 6(3)(e) says nothing about any choice for the right-holder. This too indicates that the interpreter primarily is committed to the state, there is no acting for the defence (see similar Trechsel (n 75) 333).
9.5.2 ‘Cannot Understand the Language Used in Court’

(a) Two rather distinct problems may arise in relation to the ‘understandable’ criteria. One aspect relates to physical conditions, such as the reduced hearing capacity of the right-holder or, or in combination with this, disadvantageous acoustic conditions in the courtroom. Such difficulties fall outside article 6(3)(e), but may be covered by article 6(1) (‘fair hearing’).\(^{227}\)

(b) Another aspect covered by article 6(3)(e) relates to the content of statements given in court. The text defines the ‘charged’ as the holder of the right to understandable information (‘if he cannot understand’). For the proceedings to be ‘fair’, it is an obvious requirement, however, that all actors participating in the proceedings must understand and be understood.

At least three constellations may arise: the most typical situation is where the defendant is foreign and a witness (be it for the defence or the prosecution), or any other essential actor in court, is national. Obviously covered as well is where both the defendant and the witness are foreign (speaking another language than the one used in court). The situation is less obvious if the witness is foreign and the defendant national. It may be argued that this situation is outside article 6(3)(e).\(^{228}\) However, with certain flexibility (in favour of the right-holder) the term ‘used in court’ may be interpreted to cover the language used by any actor participating in the court proceedings. At any rate interpretation is required to make the proceedings ‘fair’, unless the right-holder declares that he waives the right to interpretation.\(^{229}\) Again, it may be added that the court should perform actively, here by asking the defendant if he comprehends the content of the relevant statements.\(^{230}\)

9.5.3 Inability in Relation to Essential Documents, Important Pre-Trial steps and the Hearing in general

(a) If the right-holder is unable to understand or make himself understood, there is an obligation to appoint an interpreter ((b) below).

(b) It is intrinsic in the situation that an accused that is in need for an interpreter is compromised. The fact that he does not – or at least may not – understand the language of the proceedings places him in a particularly vulnerable


\(^{228}\) In this direction PSV v Finland (App no 23378/94) ECHR 18 October 1995. See also Trechsel (n 75) 333.

\(^{229}\) Trechsel (n 75) 333 agrees to this interpretation ‘in substance’.

\(^{230}\) Often the presiding judge or legal assistant may translate or explain sufficiently.
position that calls for vigilance on the part of the trial court (and other involved authorities). Most often this will be evident, due to the right-holder’s language or poor linguistic abilities, for example. But the court will not always have such indications, such as where he invokes the right to remain silent. In absence of any indications, the court is safe if it informs about the right to an interpreter.

Again, the exercise of one right depends to a large extent on the exercise of other rights: if the defendant has the assistance from a lawyer, it is an obvious part of the latter’s task to assure that his client understands the charge and will understand the language spoken in court. He is expected to communicate the eventual need for an interpreter to the court.

Nevertheless the court bears the primary responsibility for the appointment. This means an independent responsibility irrespective of the defence lawyer’s conduct. Even more obviously, the court is under an obligation to show vigilance in cases where the defendant is not represented.

Cuscani\textsuperscript{231} underlines the overall responsibility for the trial court in assuring that the defendant understands. Even though the defence lawyer on behalf of the right-holder \emph{de facto} had waived the right to an interpreter by stating that ‘I think that we shall have to make do and mend’ (referring to the fact that the applicants brother – whose language-skills was untested – could do some translation), the Court held that:

the verification of the applicant’s need for interpretation facilities was a matter for the judge to determine in consultation with the applicant, especially since he had been alerted to counsel’s own difficulties in communicating with the applicant.\textsuperscript{232}

It is to be noted that the case concerned serious charges in which the applicant faced a heavy prison sentence.\textsuperscript{233}

(c) If the problem is that the right-holder ‘cannot … speak’ the language used in court the situation is most often manifest, so that the court will have an \emph{ex offi-}

\begin{footnotesize}
\begin{itemize}
\item[231]\textit{Cuscani v The United Kingdom} (App no 32771/96) ECHR 24 September 2002.
\item[232]See ibid \[38\].
\item[233]Precedents form the CCPR-Committee indicates that the right to an interpreter (CCPR art 14(3)(f)) is subject to waiver. In \textit{Griffin v Spain} (No 493/1992) the interpreter spoke poorly English, and translated mostly to French, a language the accused did not understand. The Committee accepted that the accused, a Canadian who stood trial in Spain had waived his right to an interpreter, even if this caused that he did not understand the discussions in court. Especially given the gravity of the case – he was convicted to eight years of imprisonment in a drug dealing case – the Committee’s reasoning is open to criticism. See further Nowak (n 185) 344.
\end{itemize}
\end{footnotesize}
cio obligation to appoint an interpreter. However, a right-holder who makes use of his right to remain silent (7.4 above) may thereby leave the court unaware of his linguistic situation. Again it is recommendable the right-holder is asked directly whether or not he wish to speak.

(d) When it comes to essential documents (indictment, statements from witnesses and experts capable of influencing the outcome of the case) the situation is in principle as for the hearing. There is an ex officio obligation for the court to assure that the right-holder understands. However, it will normally be in good faith if there are no indications that an interpreter may be needed. (Already the right-holder’s statement of personal data may give an indication).

9.5.4 The Scope of Right to Interpretation: Special Items during the Hearing and Special Documents

A distinction has to be made between the need for interpretation in general and the need for interpretation ‘in special’. There may be an ex officio obligation on the part of the court to appoint an interpreter. At the same time there is no obligation to have translated every document (that is of no direct importance to the determination of the case). Furthermore, the court cannot be responsible for shortcomings in minute detail. If the right-holder is dissatisfied with the interpretation, he is required to complain.\(^\text{234}\) In Protopapa\(^\text{235}\) the Court stated:

In the instant case the applicant was remanded for trial before the Nicosia District Court. An interpreter was present at the hearing on 21 July 1989. Even if the Court has no information on which to assess the quality of the interpretation provided, it observes that it is apparent from the applicant’s own version of the events that she understood the charges against her and the statements made by the witnesses at the trial (see paragraph 14 above). In any event, it does not appear that she challenged the quality of the interpretation before the trial judge, requested the replacement of the interpreter or asked for clarification concerning the nature and cause of the accusation.\(^\text{236}\)

No violation of article 6 was found.

\(^{234}\) See similar Trechsel (n 75) 329, but slightly different Stephanos Stavros, The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights (Dordrecht 1993) 257.

\(^{235}\) Protopapa v Turkey (App no 16084/90) ECHR 24 February 2009.

\(^{236}\) See ibid [83].
10. Précis on Waiver of Procedural Rights

The importance of a fair administration of justice, as required by ECHR article 6, reaches beyond the sphere of the parties to the individual case. General confidence in a fair administration of justice is an ‘important public interest’. Consequently, there can never be a waiver of the right to a *fair determination* of a criminal charge as such (or of a dispute over one’s rights or obligations for that matter). However, waiver may render a deviation from certain *aspects* of the ordinary fair hearing guarantees, even the right to a court hearing itself, in conformity with such ‘important public interests’, typically in more trivial cases.

A precondition is that such deviation from the ordinary procedure really is in conformity with the right-holder’s wish. Hence, inferences from her passivity ought to be applied with caution. To the extent that she has expressed her determination, not to have a public hearing or the assistance by a lawyer, for example, her preference should be respected unless there are more important public interests advocating in the opposite direction: a lawyer may be needed where the complexity of the case exceeds the right-holder’s ability and publicity is normally required to keep up the general confidence in society’s conflict resolution mechanism – the court system.

In quite a number of situations the right-holder can choose between rights. Such a choice may follow from the text of article 6: the accused can choose to *defend himself or through* legal assistance (litra (c)) of the third paragraph). This indicates that there is not only a right to choose the preferred right (personal defence), but also a right not to have the discarded right (legal assistance) enforced upon him. An option may be available for the right-holder even on the basis of less express terms. To a certain extent his preference to have the assistance of a particular lawyer (art 6(3)(c)) should be respected, even if his choice delays proceedings beyond what otherwise would have to be considered a ‘reasonable time’ (art 6(1)).

However, there is no absolute right to waive any of the particular rights laid down in article 6. Rather it depends on a balancing of the right-holder’s self-determination against several public interests, such as efficiency, diligence and confidence in the courts based on *fairness* in their proceedings.
Waiver of Human Rights

Conclusions

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1. General

The questions: whether a waiver of human rights exempts a state from its corresponding obligations, and whether it is obliged to respect a waiver and thereby grant the right-holder a 'negative' right, are related. A negative right presupposes that there is a valid waiver of the positive right, of the right to join a trade union for example. But the subject is more extensive, so that there is not necessarily a uniform answer to these questions. Waiver may relieve the state from its obligation to secure the right in question (art 1 of ECHR) while in the same situation retaining the option to implement the right despite the right-holder's waiver, so that there is no negative right. Our investigation in Articles I-III (NJHR issues 3&4 2010, 1 and 2 2011) has considered the relevance of waiver and negative rights subsequently.

2. Waiver

(a) There is no either-or when it comes to waiver. Extreme positions, such as to hold that waiver never or always should have the effect of relieving the state from its obligation to secure a convention right must be rejected. A fair balance has to be struck between the right-holder’s freedom to waive rights in order to achieve certain advantages (individual self-determination) and conflicting societal considerations (state paternalism). This balancing should be anchored in the specific provisions governing the rights in question read in the light of the general obligation to secure the Convention rights (ECHR art 1).
Case law from The European Court of Human Rights (ECtHR) sometimes allows waiver, and sometimes rejects it. The Court's standard formulation is that:

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.

(b) Because the right-holder's determination to waive may be decisive, firstly there ought to be a thorough examination of whether the facts of the case reveal an informed and unconstrained intention to waive.

We have expressed scepticism when it comes to inferences of waiver from the right-holder's passivity. Such inferences should be limited to situations where the right-holder has an obvious invitation to act if she wishes to utilise a particular right, so that the only reasonable explanation of her passivity is that she intends to waive the right in question. The consideration will draw on both objective and subjective elements. 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 access to information of the relevant law; that there is no public hearing unless required by the right-holder, for example. The subjective element makes it possible, to a certain extent, to take the right-holder's special qualifications into consideration. In Pauger the Court accepted that there was a tacit waiver of the right to be present in court with reference to clear national law governing hearings in the Constitutional Court and the fact that the right-holder as a professor of public law must be expected to be familiar with Constitutional Court procedure.

Generally an express waiver is more reassuring, and most often it is manageable to obtain. Especially when it comes to procedural rights, where the authorities (the presiding judge) continuously administer the situation in which the right-
holder is in, and where the latter normally is on away ground, efforts to clarify her intention to waive is required (see part 2.3 of Article I, NJHR 3&4 2010).

(c) Connected to this is the timing for the exercise of the right. There are stronger reasons to demand an active clarification of the right-holder's stance to waive in situations where it otherwise may be too late to activate the right. This will typically, but not exclusively, be the case for procedural rights: if the trial is conducted in camera or without a lawyer, because the right-holder did not claim those rights when the trial commenced, the train may have left the station. Hence, in such situations, the admissibility of tacit waivers should be strictly limited to situations where the only reasonable inference from the right-holder's passivity is that she has accepted a certain limitation.

(d) The importance of the timing also indicates that there are stronger reasons to be sceptical when it comes to waivers meant to have effect in the future compared to waivers of rights in a current situation. A waiver with reference to a future situation is troublesome both because it is difficult intellectually to have a sufficient grasp of its consequences, in the present, and because the circumstances that formed the basis for waiver in reality may have changed. The qualms connected to a bygone waiver increase proportionately with the lapse of time between the waiver and its implementation.

(e) This brings us to the general question of validity of waiver. As a main rule, most certainly when it comes to personal rights (as opposed to economical rights), there is no valid waiver if the right-holder revokes it (before it is too late such as where a medical operation has commenced). In current issues, such as in case of deprivation of liberty, not only an express statement but the right-holder's attitude (such as attempts to escape) may prove that there is no consent to continued stay so that any prior waiver at any rate must be considered revoked.

Waiver has to be based on the informed will of the right-holder. Connected to this condition is the question whether he is capable and whether his decision is unconstrained. Exactly what particular aspect of the fundamental validity premise that is most likely to be in the centre of attention, will vary with the right in question. Some will probably be surprised to discover that in relation to the most sacred rights, such as the protection against inhuman treatment, forced labour or of personal liberty, the question of conformity with ‘important public interests’ (see (f) below) may be in the background, because the consideration more often is about capability or constraint: sexual activity is obviously not in contravention with ‘public interests’, provided that it is freely agreed to by capable persons. The same holds true for work and medical treatment, even in solitary confinement. In so far as waiver/consent is capable of removing the matter from the ambit of the
right in question (e.g., arts 3, 4 and 5), there is an even more evident need for a thorough control with the validity of the right-holder’s disposition, such as his request to be taken into care (art 5) or to have a medical operation (art 3).

(f) Absence of constraint and the right-holder’s capability are always conditions sine qua non for the validity of his waiver. If these conditions are proven, and only then, the balancing between the right-holder’s self-determination and possible conflicting ‘important public interests’ is brought into focus. The state may be obliged to set aside an intelligent and unconstrained will to waive rights, and so act ‘paternalistic’.

The underlying rationale behind such a paternalistic approach apparently 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 have the right at his disposal in the sense that he, by waiving it, relieves the state of its obligation to secure the right in question.

The relevance of such public interests may flow directly from the text of the provision in question: when ECHR article 5(3), irrespective of any waiver, demands that the arrested ‘shall be brought promptly before a … judge’, the reason is the overriding public interest in limiting the risk of administrative abuse of power inherent in criminal procedure. And when article 7 is satisfied with no less than ‘law’ as the basis for a criminal conviction, the meaning is clearly that the accused’s consent to punishment cannot replace it. The principle of legality in criminal law is too important to be traded off by a single individual and its objectives (first and foremost deterrence), presupposes a general rule as the basis for such sanctions.

More often there is no decisive guidance in the text of the provision as to the (ir)relevance of waiver. But case law may have singled out indispensable rights; the right to an independent and impartial tribunal is one. Again the rationale for its indispensability lies in the importance of public confidence in the administration of justice, especially in criminal cases.

(g) For the assessment of issues not yet clarified by text or case law, one has to take as a point of departure, the overriding question whether the relevant right entails elements that reach beyond the right-holder’s sphere. Generally it can be assumed that the core of the right is indispensable, while elements in the periphery may be waived.

(h) As for procedural rights in ECHR Article 6 the consideration will start with the basis in the ‘fairness’ requirement laid down in the first paragraph. One will consider whether the deviation is ‘fair’ (partly) because of the waiver. Again, we
find that there is a transfer of the assessment in favour of the state because of the waiver.

Obviously, fairness is the core requirement of the trial: there can be no waiver of the right to a fair hearing as such. But certain aspects of this superior right may be deviated from with reference to waiver. Take the accused’s right to be present in court as an example: the absence of one party is disadvantageous in relation to the fundamental principle of adversarial proceedings. Even if waiver of the right to presence reduces the qualms connected to this disadvantage, the trial court is under an *ex officio* obligation to secure fairness. In graver cases or cases where the accused may contribute to a proper illumination of the questions to be decided, the accused’s presence may be required. A golden mean whereby the will of the right-holder (not to be present) is respected while at the same time fairness is secured may be reached by requiring the attendance of a lawyer. In other words, due to the important public interest in adversarial proceedings the right-holder cannot waive both personal defence and defence by a lawyer.

(i) Similarly, core elements of substantive rights cannot be waived. When it comes to non-derogable rights this core is a wide one. It will easily ‘run counter to important public interest’ to deviate from an implementation of the right on the basis of waiver. Waiver of the protection against ill-treatment (ECHR art 3) will more easily ‘run counter to public interests’ compared to waiver of the right to correspondence (art 8). By way of example, ECtHR has stated that ‘even assuming the conditions referred to … above were satisfied [that the waiver was informed and so valid in the narrower sense], no waiver of the right not to be subjected to racial discrimination can be accepted, as it would be counter to an important public interest’ (*DH v The Czech Republic*). Similarly, the protection against bodily harm cannot be waived unless the interference is supported by an independent important purpose, typically the improvement of health by a medical operation.

However, even in the field of non-derogable rights there is a periphery where waiver (consent) plays a self-sufficient role. Less serious bodily interferences, for the purpose of medical training or experimentation, for example, that otherwise would have run counter to the protection against ill-treatment (cf CCPR art 7), may be acceptable because of consent.

When it comes to derogable substantive rights (typically those in arts 8-11) the consideration connected to the core-periphery dimension finds a reflection in the

5 D. H. and others v. The Czech Republic App no 57325/00 (ECtHR, 13 November 2007)
parallel to the ordinary conditions for interference, most often set out in the second paragraph of the relevant article (law, purpose and necessity). While waiver of such rights plays an independent role in that it most often can substitute law, there are limits with regards to the proportionality, hereunder the purpose rationality, of the waiver-based ‘interference’; for a waiver-based right deviation to be in compliance with the Convention, conformity with important public interests is required. However, where waiver of a derogable right is substantiated, the state has more leeway. This is natural, because waiver is an exercise of self-determination, itself a human right. If the matter genuinely concerns only the right-holder, it will hold a strong position. Otherwise self-determination needs to be strengthened by additional rights on the right-holder’s hand (eg protection against inhuman treatment) or rights or interests of others (such as in the Rommelfanger case, see Article I, section 4.3.3).

(j) The right involved is not the only issue when it comes to considering the proportionality of the interference. Its character and intensity are also of importance: waiving the right to wear casual clothes or have long hair at work is one thing, accepting continuous surveillance something else (and more intrusive), even though both interferences concern private life (ECHR art 8). Similarly, there are stronger reasons to be sceptical about a waiver of the right to a fair hearing by a court (ECHR art 6) if deprivation of liberty is involved compared to a case where the sanction is a fine. The same logic applies, of course, in the field of property rights, where the scrutiny, in principle, will 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.

(k) 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 ECHR found no reasons to respect the right-holder’s waiver of protection of integrity in the case concerning punishment for wilful participation in sadomasochistic activities. The moral considerations outweighed waiver. Similarly, even if a right-holder wishes to terminate his 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.7

6 Rommelfanger (n 3)
7 See ECtHR’s reasoning in Pretty v The United Kingdom ECHR 2002-III discussed further in Article II section 2.2.6.
(l) 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.

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 the applicant’s original waiver was supported by his counterparty’s interests, even his Convention rights: this will typically be the situation where the case concerns the impact of the Convention in the relationship between individuals. Rommelfanger had accepted abstaining from making certain utterances relating to his employer. While the fact that 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 will only be set aside if it strikes at the very substance of the right in question. In other words, in such situations it will only be turned down where it has qualified unreasonable effects.

However, even in the field of balancing the interest and rights of private parties waiver is subject to a control. In reality, 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 were 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 (whistle-blowing).

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 additional interests and rights on the right-holder’s hand will add to the importance of waiver.

8 Rommelfanger (n 3)
9 Ibid
10 Ibid
True, not seldom there are heavy weights in both scales, as in Laskey, Jaggard and Brown where the moral considerations trumped the agreement between the right-holders.11 However, generally it can be assumed that the more exclusively intimate the interest, the less character of ‘a public interest’, and consequently the more well founded to respect a waiver. Consequently, there is a presumption that the individual should have a wide opportunity to determine the most sensitive aspects of his private life, including his sex life.

Self-determination is at the same time a core-dimension in the subject matter of waiver and a bridge to the closely related questions of negative and preferred rights.

3. Negative and Preferred Rights

(a) The question of whether or not a right-holder can claim the opposite of what one particular right expressly grants him is clearly related to the question of waiver. It presupposes that there is a valid waiver of the positive right (A). And with a more critical approach to the proof for a valid and socially acceptable waiver a wider recognition of a right to waive is possible and in conformity with the general obligation to protect human rights effectively and the tendency to interpret them dynamically (or progressively).

Nevertheless, the problem to be discussed in relation to negative and preferred rights goes beyond those related to waiver. 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 (right A’). The basis for such claim may either be a creative (negative) interpretation of Article X or another (preferred) right articulated in Y.

It might appear so, but it is not illogical to reject a negative interpretation (A’) of an Article (X) granting a particular right (A), while 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. True, so far ECtHR has rejected that there under the Convention is a right to die. Presumably this view will be maintained in relation to the (negative) interpretation of article 2. But to the extent that the right-holder (convincingly) can argue that he is subjected to ‘inhuman treatment’ in contravention of article 3 if he is denied, or even if he is not helped to die, the legal situation is less certain (at least lex ferenda).

11 Laskey, Jaggard and Brown v The United Kingdom ECHR 1997-I 120
(b) The basis for a negative right is the (negative) interpretation of the text of an article providing a positive right. The textbook example is the negative right to organise (or more precisely: to be free from negative consequences of staying unorganised), granted by ECtHR through its resilient interpretation of the expression ‘to join trade unions’ in article 11.12

Further examination reveals that there are a number of rights that are or may be interpreted negatively. Whether a negative interpretation is appropriate depends on the balancing of competing interests. The Convention states a (positive) freedom of expression (art 10). To a certain extent this provision forms the basis for a right to remain silent as well, such as in case of protection against self-determination and journalists’ right to protect sources are examples (see part 10.4.5 and 10.4.6 of Article II, NJHR 1 2011). The right to freedom of religion is stated in article 9. Obviously, the right may be violated if the right-holder is sanctioned for not being religious (or more practically, not manifesting or committing to a particular religion (see part 9.4 of the same Article).

A negative interpretation of article 12 has so far been rejected. But there are signs in case law emphasising the obstacle an existing (and unwanted) marriage constitutes the possibility to (re-)marry that may develop into a right to divorce (see part 8.4 of Article II).

(c) A right to waiver may alternatively or additionally be based on a preferred right. A very general basis for a right to waive may be found in the right to self-determination enshrined in article 8. The comprehension that a right-holder on the basis of article 8 can determine his own matters, including a waiver of his human rights, and even claim respect for that determination, may at first sight seem plausible. 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.13 Even if the right-holder’s activity directly affects himself only, the state is responsible for the balancing of his individual freedom against a variety of preferred interests and considerations: his determination must not run counter to important public interests, see a variety of such interests in article 8(2), most importantly ‘health’ and ‘morals’. Self-determination, then, is in the core, but does not solve the overriding challenge: to weigh self-

12 See Young, James and Webster v UK (1981) Series A no 44
13 A first limitation is obvious: If self-determination is exercised in a way that affects ‘rights of others’, the state is entitled (see Article 8.2) and may even be obliged to interfere to secure the rights of others (see for example Article 2 – ‘the right to life shall be protected by law’). This situation is, however, outside our topic.
determination against the state’s responsibility to prioritize other interests (paternalism\(^{14}\)).

A claim to have respected the exercise of self-determination in a particular context is strengthened if the right-holder (additionally) can anchor his preference in a more specific negative or preferred right. There is no Chinese wall between the situations where a negative right by itself supports a conclusion in contravention with a certain positive right and situations where primarily a preferred right supports it. This is particularly apparent since the just-mentioned right to self-determination (most) regularly will support a negative interpretation of a right. By example, the right to negative freedom of association (art 11 of the Convention as interpreted in Young, James and Webster) is supported by the positive right to self-determination (determination not to join).

Hence, the two concepts may apply concurrently or alternatively. As the concept of negative rights de lege lata is given a relatively narrow application (although wider than commonly realised), the extension to preferred rights is (potentially) more far-reaching: even if a negative interpretation of a positive right is rejected, the right-holder may invoke another preferred right in support of his claim.

In the extension of the divorce-example (where a negative interpretation of art 12 so far has been rejected), it may be argued that the right-holder, under certain circumstances, can base such a right on the preferred right to protection against inhuman treatment.

Also the Court (so far) has rejected a negative interpretation of the right to life (art 2). According to the legal status after Pretty\(^{15}\) the state has a right to punish assisted suicide (and equivalent ways of ending life). Whether or not it is under an obligation to do so is not decided. So far this means that there is no negative right to life (no right to die), but a waiver of the right to life may serve as a basis for an excuse for the state party who allows someone to die. The political nature of the issue and the heterogeneous approach to it among the Convention States suggest that the states retain a considerable margin of appreciation. However this may change if sufficiently many of them utilize the freedom under the Convention to accept active euthanasia. A right to die under circumstances which would otherwise amount to inhuman treatment may evolve with the basis in article 3.


\(^{15}\) See Pretty (n 7)
When it comes to procedural rights (art 6) negative and preferred rights play a substantial role. True, there clearly can be no right to an ‘unfair’ hearing or to a partial tribunal. Obvious public interests advocates against it (see (b) above). But the hearing may be fair, even though some of the rights have been abandoned on the request of the right-holder. Within the limits of the overriding ‘fair hearing’ requirement inter alia a right to prioritise postponement of trial due to further evidence or change of lawyer probably may attain the character of a right.

Conversely, and subject to the same ‘fairness’ limitation, there is a right to prioritise speediness and confidentiality by skipping witnesses or opting for a summary trial. Such option may genuinely be in the interest of the accused and at the same time in the interest of the society. It should be underlined though that there ought to be a thorough control with the fairness of the result of such choices. Evidently there is no unlimited right to a simplified procedure.

Further, it is common to assume that the right to a public hearing has no negative equivalent: that there is no right to closed hearing. However, even this point of departure may have to be modified with reference to preferred rights, most probably with reference to the protection of the private life of the parties (art 8) or their right to be protected against inhuman or degrading treatment (art 3).

Many of the article 6 rights, especially the ‘minimum rights’ in the third paragraph, leave a room for choice between alternatives, where the implementation of one is sufficient to secure fairness (or, ‘important public interest’). Depending on the character of the case and the right-holder’s qualifications, a right to personal defence (auto defence) may imply a right to conduct trial without a lawyer, in other words a negative right to legal assistance.

4. Overall Conclusion

While it is true that the core of the Convention rights are ‘inalienable’ in the sense that they cannot be deviated from on the basis of waiver, the content of aspects more in the periphery of the rights may to a considerable degree be influenced by waiver so that the state party is entitled and may even be obliged to respect it.

True, the competence of the Court is limited by the (positive) rights listed in the Convention. It cannot create new rights by duplicating positive rights into corresponding negative ones (see ECtHR’s express statements in Johnston).  

16 See Johnston and others v Ireland (1986) Series A no 112.
Obviously, 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. However, there is (not only regarding the ECHR system) a tenuous distinction between (unacceptable) creation of new rights and (acceptable) ‘creative’ interpretation of existing ones. This is especially true in relation to open-ended rules, such as a majority of the Convention rights. And it may be observed that the Court by way of dynamic interpretations of the Convention already has lent ear to the right-holder’s preference not to have enforced a right upon him in a number of cases. Hence, I cannot fully endorse the perception that ‘there can be found in the Convention itself or in the case-law of the European Court of Human Rights no right to waiver.’

17 See Oliver de Schutter (n 14).
Book Review


Reviewed by Tore Lindholm

In the Introduction Beitz states, ‘[t]he doctrine of international human rights is the articulation in the public morality of world politics of the idea that each person is a subject of global concern’ (1). Human rights norms seek to protect, he submits, important human interests against threats of state-sponsored neglect or oppression which we know from historical experience are real and can be devastating when realised. So, the worldwide practice of human rights offers the hope of constraining one of the two main perils of a global political order composed of independent states, the other main peril being the propensity to war (11). In the Conclusion (ch 8) Beitz adds, ‘the articulation of a doctrine of international human rights is among the most ambitious elements of the settlement of World War II. This doctrine, progressively elaborated in a series of international covenants and conventions, supplies the norms of an increasingly elaborate global practice’ (197).

In the intervening six chapters (ch 2 through ch 7) Beitz tries ‘to present a reasonably sympathetic analytical account of the idea of human rights as it exists within this practice, together with a description of the kind of justification that human rights, so conceived, should be capable of’ (197, italics added).

How does Beitz initially demarcate ‘the practice of human rights,’ what is his pre-analytic notion of ‘human rights in the sense in which they occur in contemporary political discourse?’ (11). This is crucial, since Beitz’ basic question is ‘what an ordinarily competent participant in the discourse of human rights would understand herself to be committed to if she were to acknowledge that a human right to such-and-such exists’ (11). Surprisingly, for his answer he does not elaborate on the cosmopolitan notion that each person is a subject of global concern; nor analyse the legal instruments supplying the norms of the practice of human rights; nor address domestic legal enforcement of, and defenders’ activism for, human rights at the national level. Beitz’ theoretical detour around domestic practice is outlandish, if domestic practice is in the present-day world a main vehicle for effective implementation of internationally acknowledged human rights. But, Beitz’s book does not engage in ‘bringing human rights home’. The aim is, rather, to re-conceptualise international political theory of human rights, by
describing and explicating ongoing practice and discourse in the field of ‘international human rights’: its intrinsic aims and rationales, is practitioners, including the built-in room for substantive disagreements among international and transnational practitioners.

Why Take up the Political Theory of International Human Rights?

Beitz’s re-conceptualisation is, he says, stimulated by two observations. What we might label his *edifying observation* is that human rights since the end of World War II has become an elaborate international and transnational practice on several fronts: ‘in international law, in global and regional institutions, in the foreign policies of (mostly liberal-democratic) states, and in the activities of a diverse and growing array of nongovernmental organizations (NGOs). ... Participants in this practice take its central moral ideas with great seriousness. Many are empowered by them. Some risk their lives for them. Its beneficiaries and potential beneficiaries regard the practice as a source of hope’ (1-2).

Beitz’s contrary stimulant, his *subversive observation* as it were, ‘is that the discourse and practice of human rights can also evoke a disabling skepticism, even among those who admire its motivating ideas’ (2). Such skepticism consists of ‘a disparagement of human rights as grounds of political action’ (2, italics added). Political disparagement may be triggered by elements of the human rights enterprise itself: the indistinctness of the interests human rights protect, the questionable ‘universality’ of human rights, the elasticity of the permission to interfere across borders seemingly generated by human rights, and the potential costs of acting consistently to protect and promote human rights (2).

The tension between his *edifying observation* and his *subversive observation* sets Beitz on the track of counteracting political human rights skepticism, including his own misgivings. Beitz himself finds, over and above the political disparagement of human rights by others, that ‘the practice of human rights is bound to seem puzzling: it is unclear, for example, whether the objects called “human rights” within this practice are in any familiar sense rights ... It is not clear what responsibilities attach to human rights, nor on which agents these responsibilities fall, and what kinds of reasons should motivate these agents to care about them. It is not even clear why one should regard human rights as grounds of international action as all: one might, instead, regard them as standards whose security within a
society is the exclusive responsibility of that society’s government’ (2, italics added). These, then, are obscurities to be cleared up by Beitz’s political theory of international human rights.

Beitz’s understanding of the emerging, albeit not yet ‘mature’, modern practice of and discourse on human rights is presented, specified, and buttressed by empirical evidence in chapter 2, ‘The Practice’ (14-48). Then, in chapters 3 and 4, Beitz sets the stage for his main constructive argument, by refuting two traditional approaches to human rights justification: ‘The more clearly we appreciate the substantive scope of international human rights doctrine and the variety of practical purposes for which appeal to human rights is actually made, the more difficult it is to assimilate them to any familiar moral idea. Even friends of human rights may be left wondering if the enterprise represents anything morally coherent. One might be tempted to regard it, instead, as no more than an unstable construction, explicable only historically’ (2–3).

By ‘familiar moral ideas of human rights,’ Beitz has in mind two main modes of ‘top-down’ justification: ‘Some philosophers have conceived of human rights as if they had an existence in the moral order that can be grasped independently of their embodiment in international doctrine and practice – for example as “natural rights” or their secular successors, as fundamental moral rights possessed by all human beings “as such” or “solely in virtue of their humanity”, or as conditions for social institutions about which all the world’s social moral codes agree’ (7). Briefly, naturalist and agreement theories of international human rights norms are presented, discussed, and then rejected in separate chapters, 3 and 4 (73-95). Both familiar modes fail to fit, or they fail to make good sense of, the emerging modern practice of and discourse on international human rights, as spelled out by Beitz in chapter 2.

Beitz offers perspicuous criticisms of natural-law and agreement justifications of modern human rights. His objections are not easily faulted – and certainly not if we take his definition of the practice of modern human rights as a lead. I shall return to this point. But first I must introduce Beitz’s alternative approach: his explication of the idea of human rights as it exists within the emerging practice of international human rights.
The Idea of a Practical Conception

Beitz gives ongoing practice and discourse in the field of internationally acknowledged human rights a new theoretical interpretation, in terms of a three elements/two-levels model of global human rights practice (‘5: A Fresh Start’; 96–125). Labeled a ‘practical conception’ (102) it is a significantly revised and expanded version of the perspective on human rights taken by John Rawls in *The Law of Peoples* (*LP*). From *LP*, Beitz adopts seeing human rights as having peculiar political functions in an international society of independent territorial states – although functions that go well beyond Rawls’ normative stipulation. Whereas Rawls’ sole focus was on demarcating states’ immunity against legitimate coercive interventions from abroad, Beitz describes a wide range of international political measures for which protection of human rights might be, and in the present-day world often are in fact, taken to be a reason. International organs, governments, and transnational NGOs may seek to prevent or remediate a state’s failure to respect and enforce human rights by resorting to a variety of *stratagems and measures of cross-border practices*. Beitz discusses inter- and transnational human rights-support from the outside under six different headings: ‘Accountability’, ‘Inducement’, ‘Assistance’, ‘Domestic contestation and engagement’, ‘Compulsion’, and ‘External adaptation’ (33–40). Clearly, *coercive intervention* into a culprit state is not, on Beitz’s account of the practice of international human rights, the main human rights-based option open to outside agents when rights are violated or threatened in a given country.

Alas, what thus remains from *LP* is that ‘[h]uman rights are ... revisionist appurtenances of a global political order composed of independent states’ (197). And not only that: as with Rawls in *LP*, only ‘international and transnational agents that participate in human rights practice’ (33) are included in Beitz’ demarcation of the practice of human rights. Even when discussing ‘domestic contestation and engagement’, as one of the six ‘forms of action for which justification tends to be sought in considerations about human rights’ (32), Beitz excludes from his demarcation of the practice of human rights the ongoing activities of *domestic* human rights defenders, scholars, lawyers, teachers, NGOs, labor unions, religious and life-stance communities, insofar as they aim at protection of internationally acknowledged human rights in their country of residence. Beitz does of course note, yet his theoretical model overlooks, the ‘increasing significance’ of ‘processes of domestic engagement’ (39) in defense of human rights.

Beitz rightly warns against ‘philosophical parochialism’ (67) as well as cultural...
parochialism (83) in some ‘top-down’ endorsements of human rights. Perhaps one may warn against parochialism triggered by goggles of international relations theory, and fortified by traditional US reservations against being committed to international human rights at home? It is hard to make sense of Beitz’s failure to consider the theoretical significance of worldwide domestic engagement for human rights as codified in international law.

We may ask: in what sense is Beitz’s practical conception of human rights intended to provide us with normatively valid directives? It seems his answers are meant to be normatively binding – but only at one remove. Beitz explicates the way participants understand the practical inferences to be drawn from assertions about human rights, ‘how these objects called “human rights” operate in the normative discourse of global political life. Whether we should accept claims about human rights as sources of reasons for action for us is a further question. But we cannot think clearly about this further question without first understanding the practice in which these claims are made and responded to’ (105). A reason for according some normative authority to the presumptive answer given by ‘an ordinarily competent participant in the discourse of human rights’ is that the global practice of human rights exists and ‘we have prima facie reason to regard the practice of human rights as valuable’ (11). Bluntly put: human rights claims based in Beitz’s political theory may be morally binding, to the extent we endorse the aim and practices of international human rights and also accept Beitz’s particular presentation and interpretation of the practice of international human rights. We may, in passing, note that a moral presumption for obedience to law is touched in a discussion of human rights as ‘background norms’ (210) but nowhere squarely addressed in the book under review. Nor does Beitz want to take seriously the prospect that ‘ordinarily competent participants in the discourse of human rights’, informed by the circumstances of modernisation and globalisation, may elaborate good reasons well-grounded in their respective and diverse worldviews for standing up for internationally codified human rights – at home as well as abroad. Such a ‘hope would not satisfy the aspiration that motivated our initial interest in agreement conceptions, which was the thought that human rights should be recognizable as common concerns among all the worlds cultures’ (95). In spite of this negative conclusion, which is uncontroversial, his discussion of ‘progressive convergence’ across cultural divides (88-95) shows that he is not unfamiliar with the contrary ideas of Abdullahi An-Na’im and Charles Taylor.
A Three Elements/Two-Level Model of International Human Rights Practice

Having surveyed history, doctrine, and implementation of international human rights and informed by a wide range of relevant source materials, Beitz proposes his *abstract, generalized model of modern international human rights*. The model offers three elements of human rights norms and two levels of human rights addressees (holders of the duty to safeguard human rights):

Element 1: the Norms of Human Rights

‘Human rights are requirements whose object is to protect urgent individual interests against certain predictable dangers (‘standard threats’) to which they are vulnerable under typical circumstances of life in a modern world order composed of states’ (109). Here, Beitz adopts Shue’s notion of a human right.

Element 2: First-Level Domestic Addressees of Human Rights and the Requirements Directed to Them

Human rights apply in the first instance to the political institutions of states, including their constitutions, laws, and public policies. These ‘first-level’ requirements may be of three general types: (a) to respect ...; (b) to protect ...; and (c) to aid ... (109). Here, Beitz follows the standard Shue/Eide doctrine of states’ threefold domestic obligations under international human rights law.

Element 3: Second-Level International and Transnational Addressees of Human Rights and the Requirements Directed to Them

‘Human rights are matters of international concern. A government’s failure to carry out its first-level responsibilities may be a reason for action for appropriately placed and capable “second-level” agents outside the state in three overlapping circumstances: (a) the international community may through its political institutions hold states accountable for carrying out the first-level responsibilities listed above; (b) state and non-state agents with the means to act effectively have pro tanto reasons to assist an individual state to satisfy human rights standards in cases in which the state itself lacks the capacity to do so; and (c) states and non-state agents with the means to act effectively have pro tanto reasons to interfere in
an individual state to protect human rights in cases in which the state fails through a lack of will to do so’ (109).

The requirements to inter- and transnational addressees specify Beitz’s significantly expanded version of LP’s take on international human rights – while still seeing them as appendices of a political order composed of independent states. These requirements are the grounds for Beitz’s argument about ‘the kind of justification that human rights, ... should be capable of’: any justificatory argument affirming that P is a human right is tantamount to affirming that if a state has failed to provide protection for P, then such failure would be a suitable object of international concern and give rise ‘in the central range of cases’ to legitimate cross-border (international or transnational) protective activity (137).

The remainder of Beitz’s book is analyses and inferences, often perspicuous and interesting, always based on his three elements/two-level model and his peculiar stance on human rights justification drawn from that model. Of his many interesting discussions I would particularly recommend his balanced and rich analysis of the international pathologies arising from the starkly uneven distribution of power and resources among states. Public appeals to human rights can be used to justify transnational measures and strategies that are intended to – and also in fact do – secure some national foreign policy objective, over and above other objectives (‘Pathologies’, 201–209). Here, Beitz follows the lead of Koskenniemi.

The Idea of Human Rights is an excellent book and a challenging but rewarding read. Restrictions of space permit no further discussion of what I hold to be its one striking weakness: (i) Beitz’s three elements/two-level model ignores, in my view, the theoretically most significant and normatively most important part of the worldwide practice of human rights as we know it: the domestic and local pursuit of protection of internationally acknowledged human rights.

I might add two related objections: (ii) internationally codified human rights norms, including their official grounding in human dignity, plays a more authoritative role than Beitz would admit in the global practice of human rights, as understood by most ‘ordinarily competent participant[s] in the discourse of human rights’; (iii) defense, promotion, and support of human rights, whether engaged in at local, or national, or transnational levels is to a significant degree communicatively rational action: by people engaging in argumentation, deliberation, persuasion, and shared questioning, producing new shared understandings; it is not limited to strategic or instrumental means/ends rationality. Beitz knows as much when discussing domestic contestation and engagement (37–38). But his model of international human rights practice and the kind of human rights justification it permits does not allow for it. Or so I would like to argue.