Jill Marshall

Personal Freedom through Human Rights Law?

Autonomy, Identity and Integrity under the European Convention on Human Rights

International Studies in Human Rights

MARTINUS NIJHOFF PUBLISHERS

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International Studies in Human Rights

Volume 98

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MARTINUS
NIJHOFF
PUBLISHERS

LEIDEN • BOSTON
2009

This book is printed on acid-free paper.

Library of Congress Cataloging-in-Publication Data

Marshall, Jill, 1966–
Personal freedom through human rights law : autonomy, identity, and integrity under the European Convention on Human Rights / by Jill Marshall.
p. cm. — (International studies in human rights, ISSN 0924-4751 ; v. 98)
Includes bibliographical references.
ISBN 978-90-04-17059-9 (hardback : alk. paper) 1. Human rights. 2. Convention for the Protection of Human Rights and Fundamental Freedoms (1950) 3. Liberty. 4. Autonomy. 5. Identity (Philosophical concept) 6. Integrity. 7. Persons (Law) 8. Privacy, Right of. 9. Freedom of information. 10. Freedom of religion. I. Title.
K3240.M369 2008
341.4'8—dc22

2008033135

ISSN 0924-4751
ISBN 978 90 04 17059 9

PRINTED IN THE NETHERLANDS

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Acknowledgements

Examining conceptions of personal freedom and identity and linking these to the European Court of Human Rights' jurisprudence is not an easy task. In the last few years, this project has been a large part of my life from its fruition as research on the Islamic headscarves cases and women's autonomy. Along the way, various people have greatly supported me, offered in the form of friendship, relief from the project or comments on drafts of different versions of the work. I'd like to thank my friends and family for being there and to specific colleagues for their support and sometimes comments on earlier versions of specific parts of this book: including Alison Diduck, Malgosia Fitzmaurice, Roy Gilbar, Emily Jackson, Nicola Lacey and Harriet Samuels. Thanks also to Duncan Richards for his research assistance and to Lindy Melman and all the team at Martinus Nijhoff/Brill for their great work.

Certain sections of chapter nine have been drawn from work published as "Conditions for Freedom? European Human Rights Law and the Islamic Headscarf Debate" (2008) 30 *Human Rights Quarterly* 631.

This book is dedicated to my parents, Iris and Roy Marshall.

Chapter 1

Introduction to the book

> *The [European Court of Human Rights]… reiterates that 'private life' is a broad term, encompassing, inter alia, aspects of an individual's physical and social identity including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world… [f]urthermore,… the court has previously held that private life includes a person's physical and psychological integrity and that the state is also under a positive obligation to secure to its citizens their right to effective respect for this integrity.*[1]

A sense of one's own personal identity is crucial to human beings. Without a sense of identity, the self can disintegrate, be lost, obscured and vulnerable. Indeed, modern selfhood – encapsulating some idea of what it means to be my own person, to be *me* or for you to be *you* – has recently been described as "flexible, fractured, fragmented, decentred and brittle…"[2] Lack of self, a sense of seflessness, can be experienced as incapacity, objecthood and 'otherhood', damaging and unfair.[3] Ideas of the self or personhood have been proposed, debated and dissected throughout history in many different genres and areas of study. They arguably fall into all fields of analysis and can be seen particularly as the focus in psychology, sociology, anthropology, biology and, of course, philosophy. It is with the categorisation of personhood and the self in human rights law with which this book is concerned. The particular context for this analysis is the case law of the European Court of Human Rights in Strasbourg (called the ECtHR or the Court throughout). The

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[1] *Tysiac v Poland* Application no. 5410/03 Judgment 20 March 2007 at paragraph 107, citing *Pretty v the UK* (2002) 35 EHRR para 61, *Glass v UK* Application No. 61827/00; *Sentges v The Netherlands* Application No. 27677/02 8 July 2003; *Pentiacova v Moldova* Application No. 14462/03; *Nitecki v Poland* Application No. 65653/01 21 March 2002; *Odievre v France* Application no. 42326/98, Judgment 13 February 2003.

[2] A. Elliott 2001 at p 2.

[3] R. West 1997 p. 285.

work links philosophical concepts of what it means to be a person to the legal understanding given to it by the European human rights legal system as manifested at the ECtHR. This is a complicated venture and is restricted to analysis of certain human rights provisions in the relevant treaty and human rights instrument, the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950[4] (called the ECHR or the Convention throughout) which is the subject of the ECtHR's scrutiny. The most important such provision is the right to respect for one's *private life* as set out in Article 8. The full text of the Article is as follows:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The Court has distinguished between private life, family life and home and correspondence to varying degrees. Sometimes the right to respect for one's family life, home and correspondence also protected by Article 8 is also relevant to my analysis, although it plays a subsidiary role in it, and also other provisions of the ECHR which will be specifically mentioned in the relevant chapters.

The philosophical concept of the self is further broken down in this analysis by reference to the wording used by the ECtHR in its judgments. That is, it will focus on autonomy, identity and integrity, all of which are elements of personal freedom. Although the court does not explore what these concepts mean philosophically, or in many instances differentiate between them explicitly, I seek to do so philosophically and by reference to the relevant case law. What exactly this personhood means is deeply problematic and has been the subject of much analysis throughout history and, particularly in modern times, has been subjected to many critiques from a variety of quarters – entailing a variation of views as to the existence of any pre-social 'nature' or 'essence' of the self. This can also now be linked to genetics and, to a certain extent, determinism. The more 'social

[4] As amended by its relevant Protocols.

constructionist' minded – those favouring 'nurture' arguments rather than those based on 'nature' – explain personhood either as a creation of structures and forces surrounding us or post-structurally produced by discourse.[5] In all this, social context and conceptions of the good or moral feature to varying degrees. Ironically, supporters of opposite ends of the spectrum on this issue can end up with surprisingly similar conclusions or political programmes. For example, we will see that a postmodernist version of the self as self-creating and potentially ever-changing, has more in common with the self-determining liberal individual than one may initially think.[6] Yet it is not the purpose of this book to examine all of these varieties of selfhood but to see how they link to the ECtHR's case law by reference to the understandings of personal freedom that are presented there.

The developing jurisprudence of Article 8's protection for one's private life by the ECtHR shows that it protects against unwanted intrusions into people's private lives in a traditional sense of guarding a person's private space – be that in their head or in their home, it clearly provides protection against unwanted physical intrusions like rape and abuse in detention. However, additionally, a right to respect for one's private life now includes a right to develop one's personality through what will be explained more fully as a reconceived version of personal autonomy, such personality being developed not only 'alone' but also in our relationships with others and the outside world. This stresses the importance of social conditions and relationships between human beings in creating and developing one's autonomy and one's human personality: a social context is not only needed for this personality to thrive but also for it to form. Yet this social context can cause issues in terms of the ways of living and forms of personality some may wish to follow. In this regard, issues of moral framework and human dignity are explored.

As I have said, whilst Article 8 is the most relevant provision for present purposes, rights to freedom of expression in Article 10, freedom of religious expression contained in Article 9, freedom from torture, inhuman or degrading treatment to be found in Article 3, freedom from discrimination in Article 14 and the right to life in Article 2, are also of importance, and

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[5] See, for example, A. Elliot 2001; C. Taylor 1989 and 1991; J. Butler 1990; W. Brown 1995; M. Foucault 1976; D. Cornell 1992, 1995 and 1998; Guignon 2004.

[6] See N. Lacey 1998.

will be referred to in connection with Article 8. Indeed, arguably all of the ECHR's rights are relevant to human personality given that the protection set out in the ECHR is supposed to apply to everyone in contracting states by virtue of Article 1 and that the entire Convention is concerned with promoting, upholding and protecting human dignity and human freedom.[7] A right to personal self-determination has been described as a pre-condition for an effective and full enjoyment of other human rights, civil and political, economic and social and cultural.[8] It is beyond the scope of this book to cover all such rights, as my focus rests specifically with how *private life* has been developed in the case law. Perhaps the most important other rights not covered as subjects in their own right are a right to liberty and security of the person and detention matters;[9] a right to education,[10] the right to marry,[11] and the right to a family life, although these are touched upon in some discussions. Articles 8 to 10 are explicitly qualified rights in that they provide protection as set out in the relevant first paragraph to each Article of the ECHR but they are subject to restrictions set out in the second paragraph of each Article. An interference with the right will be justified if lawful, within the legitimate aims specified, and necessary in a democratic society because of a pressing social need and if it is proportionate to the legitimate aim pursued.[12] Although the wording for legitimate aims differs, the balancing of one individual's rights with the public interest or the rights of others is involved.[13] This balancing exercise with others' rights is often presented as entailing conflicts and necessarily involving a separation of the public and private spheres in which such conflicts will be inevitable: the state traditionally having no right to interfere in the private sphere, while in the public sphere, the individual has to conform to identities of citizenship. The interpretative principles of the ECHR, such as the margin of appreciation, allowing

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[7] See, for example, Judge Martens in *Cossey v the UK* Judgment of 27 September 1990 Series A No. 184, 24–25.

[8] See P. van Dijk 1993.

[9] Article 5 of the Convention.

[10] Article 2 of the First Protocol to the Convention.

[11] Article 12 of the Convention.

[12] See, for example, the wording of Article 8(2) above.

[13] See generally A. McHarg 1999. S. Greer 2003, 2004 and 2006.

states some leeway in applying the Convention,[14] autonomous concepts[15] as well as the tests of balancing of interests between an individual and the community as whole, and between an individual and others' rights, and proportionality, are problematic and have a bearing on the interpretation by the ECtHR of any so-called right to personal autonomy.

The analysis in the book is arranged around themes evinced from my interpretations of the court's jurisprudence on private life into personal autonomy, identity and integrity and is divided into four Parts. Part I comprises two chapters, the first of which, chapter two, provides some scene setting by interpreting the different conceptions of personal freedom and showing how they connect to human rights law generally. These ideas are set in their European context which provides an introduction to the ECHR and the Court's jurisprudence in chapter three. Although the interpretative principles mentioned above are not the focus of this book, these are also examined in that chapter. Part II comprising chapters four and five focuses on privacy and personal autonomy. The first of these chapters analyses how scholars and the Strasbourg institutions have defined these notions. Chapter five sets out a chronological development of the Court's jurisprudence on definitions from privacy to personal autonomy. This includes an evaluation of the Court's jurisprudence on the formation of the human personality through and with relationships with other human beings and the outside world, including one's environment. My analysis then moves on to personal identity in Part III which explores the meaning of this concept and picks up on three characteristics crucial to perhaps everyone's identity: sex, knowledge and understanding of one's origins and past experiences, and one's religious or other belief system. After definitions of personal identity and different versions of personal freedom into self-determination and self-realisation are explained in chapter six, the arguably progressive stance of the Court in establishing sexual identity rights is examined in chapter seven. Case law on homosexuality and transsexual persons is analysed while in the following chapter, the importance of access to information about one's origins, childhood and other details thought important to one's personal identity are explored, philosophically and by reference to the case law of the ECtHR. After that

[14] There is a vast literature on this subject, such as R. St.J. Macdonald 1993 E. Benevisti 1999 at p. 843; P. van Dijk et al. 2006; R. Gordon et al. 2001.

[15] See G. Letsas 2004.

analysis, I take up the issue of Article 9 jurisprudence, evaluating and critiquing what I see as the court's different treatment of the importance of religion to many people's identity, with focus in particular on the Islamic headscarf cases. Part IV investigates the perhaps elusive concept of personal integrity which is often categorised into bodily or physical integrity and moral or psychological integrity. Explaining how this is somewhat difficult to do, I then examine the jurisprudence of the Court by reference to unwanted physical intrusions which all have psychological effects such as rape, sexual assault and medical interventions, by the state and by private parties for which the state is increasingly being held to account under international human rights law and through the Court's development of 'positive obligations'. The importance of retaining and assisting the development of integrity, including mental health, availability of abortion, and the way the disabled are treated has also been the subject of the Court's case law and these issues are examined in this chapter.

As already mentioned, the philosophical ideas discussed here – personal freedom, autonomy, identity, and integrity – are huge ones and many may question the possibility of a court of law deciding what these mean. It is often claimed that we have human rights (morally and legally) *because* we are autonomous, have an identity and integrity as persons: the latter is prior. So human rights law is often interpreted as the guardian of the rights individuals inherently possess. Thus it is assumed that individual rights will be protected when people are left alone, not interfered with, usually by the state. This view assumes that human rights laws are needed to stop state action from abusing individuals' rights. The most obvious examples of such violations are probably torture by government officials or agents and the withdrawal of a free and fair trial. While such protection is fundamental to the protection of the person, as a definition of human rights protection it is unduly limited and based on what Robin West has called "*a neurotic understanding of the person*": a Hobbesian conception of the existence of the individual as atomistic, self-centred and concerned with his or her own interest first, with a pre-social freedom.[16] The way the jurisprudence is developing, it is possible to argue that we are autonomous, have identity and integrity *because* we have the legal human rights to these qualities. This issue of *creating* conditions to enable

[16] T. Hobbes *Leviathan* (1651 reprint of the original, 1960). See R. West 2003.

human freedom through human rights law is one of the strands running throughout this book. The three ideas of autonomy, identity and integrity are all intertwined with human freedom and the different conceptions of freedom – most notably described as negative and positive by Isaiah Berlin – are explored in the context of providing enabling conditions to make people free. That is, human rights law can be interpreted as part of the social conditions which can enable people to be free to live lives of meaning: to become "conscious of [themselves] as . . . thinking, willing, active being[s], bearing responsibility for [their] choices . . ."[17] To expand, social conditions enable individuals to shape their identity and to become who they are. Depending on the content of those conditions, people's abilities will be increased or decreased to be more able to make good informed choices for themselves and to live lives of meaning to them. Human Rights law can be used as an enabling tool, by changing the social conditions to enable people to make their own choices or as a restricting tool, preventing certain choices and ways of life through legal prohibitions or bans. Human rights law should importantly be providing legal recognition that everyone is entitled to these rights. If, however, the Court decides that the applicant's way of life is not acceptable, either by not engaging Article 8 at all or, if engaged, ruling that the state's interference with that right is justified, usually by reference to one of the legitimate aims such as public morals or the rights and freedoms of others, this affects that applicant's personality. This occurs by preventing them from living as they wish and also can have a deeper impact on changing their perception of themselves, perhaps a devaluation or demoralisation, through this lack of recognition of their way of life.

Yet a note of caution with this perspective is aired. Often, similar arguments can be interpreted as validating an account of persons as victims, unfree and without agency. This is based on views that those who live in oppressive social conditions will be unable to make their own choices and therefore lack agency. As such, their 'choices' aren't really *their* choices and should be disregarded. Such 'essentialism' has been a particular concern in feminist work, focusing on the consequences for women if they are presented as victims lacking in agency and needing help in a paternalistic way. It is also evident in some identity politics work if one is categorised as a victim by reference to one's skin colour,

[17] I. Berlin 1969 at p. 131.

ethnicity or race.[18] Two versions of personal freedom can be interpreted as existing in the Court's jurisprudence and they impact in different ways on the relevant applicant's autonomy, identity and integrity. These may to some seem like the traditional negative and positive freedom categories but I show that they can both be variants of positive freedom with the need for social conditions often to be provided by the state. One is self-determination or self-creation: becoming the person you want to be – evolving and changing in line with your choices, self-constituting. The other represents versions of autonomy and personal identity as self-realisation or self-discovery: often described, perhaps misleadingly because it means so many different things to different people, as 'authenticity', entailing the discovery of the 'real you' already there within you and living in line with that. This can sound similar to a restrictive essentialism and to the extent that the self-realisation version is becoming more popular, caution needs to be exercised to prevent the re-introduction of imposed standards that have potential to hinder personal freedom.

It has recently been stated that what highlighted the topic of identity more than any other theoretical and political current was feminism.[19] As Elliot puts it, explaining everyday life as a terrain of struggle in the reproduction of unequal power relations, feminists have focused on the historical interplay of sexuality, sex and gender in analysing constructions and contradictions of personal identity and the self.[20] Although this book is not a detailed feminist analysis of the case law of the ECtHR relating to women's lives, feminist analysis and critiques of the self informs it. Such work has the potential to enhance and improve the lives of everyone. Human rights law's purpose often rests on ideas of equality and justice as well as freedom, ensuring the protection of everyone's rights in society. The ECtHR has stated that "[e]quality of the sexes is . . . one of the major goals in the Member States of the Council of Europe" and that "very weighty reasons would have to be advanced before the difference in treatment on the ground of sex could be regarded as compatible with the Convention."[21] It has also recently stated that gender equality is "one of

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[18] See, for example, N. Lacey 1998; J. Conaghan 2000; A. Harris 1990; C. Battersby 1998; G. Bock and S. James 1992; J. Butler 1990; W. Brown 1995; J. Halley 2006.

[19] A. Elliot 2001.

[20] A. Elliot 2001 at p. 14.

[21] *Abdulaziz, Cabales and Balkanades v the UK* (1985) Series A No. 94 at para 78.

the key principles underlying [the] Convention."[22] Yet it appears a self-realising version of equality as sameness and its paternalistic consequences may be evident in at least some of the case law of the Court. What exactly this means for individual applicants who do not neatly fall within the permitted given categories will be critiqued, particularly by reference to case law on Islamic headscarves. Whilst personal freedom is thus enabled through the ECtHR's jurisprudence on Article 8's now protected right to personal autonomy, identity and integrity, it needs to be acknowledged that the two versions, of self-determining and self-realising, can pull in different, and often contradictory, directions.

[22] *Sahin v Turkey* Application No. 44774/98, Grand Chamber Judgment 10 November 2005 at paragraph 107.

Part I

Human Rights and Freedom

Chapter 2

Personal Freedom and Human Rights Law

> *[T]he principle which is basic in human rights and which underlies the various specific rights spelled out in the Convention is respect for human dignity and human freedom. Human dignity and human freedom imply that a man should be free to shape himself and his fate in the way that he deems best fits his personality.*[23]

Introduction

Any interpretation of law needs to be seen in the light of the fundamental objectives of that area of law. For human rights law, the objective is to safeguard, and potentially develop, the human dignity and human freedom of everyone. Celebrating its 60th anniversary this year, the Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly in December 1948, in the aftermath of the atrocities of the second world war, states that everyone is entitled to the realisation of the rights needed for one's dignity and the free development of their personality.[24] It is not supposed that such a personality 'just happens', takes place in a vacuum, without assistance or support from, or interconnection with, other people. Instead, the UDHR declares that "[e]veryone has duties to the community in which alone the free and full development of his personality is possible."[25]

The introduction of this human rights order after the second world war, has, in recent years, been dubbed the 'second wave' of human rights.[26] The

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[23] Dissenting opinion in *Cossey v UK* Judgment of 27 September 1990 Series A No. 184, 24–25.

[24] UDHR Article 22.

[25] UDHR Article 29.

[26] F. Klug 2001.

UDHR delegates aimed not just to "set people free" but to "find common values" to enable people to be free whilst retaining and strengthening the human bonds "so necessary for human development."[27] The UDHR is referred to in the ECHR's preamble as an inspiration, setting out human rights to which everyone is entitled to within its jurisdiction. Before examining the case law of Article 8 on how this freedom translates into the individual lives of applicants and in turn filters through to the rest of us, it is necessary to examine what human or personal freedom, and the related conception of human dignity, is generally portrayed as meaning and how human rights law relates to these concepts.

As mentioned in the book's introduction, personal autonomy, identity and integrity are intertwined with ideas of human freedom or liberty.[28] Autonomy has been called the 'close cousin'[29] and the 'twin'[30] of positive freedom. What exactly personal freedom means will be analysed in this chapter, acknowledging that this concept has been subjected to rigorous debate throughout history and such literature is complex and vast. Views range from an individual being free if there are no external impediments to their actions[31] to individuals being "forced to be free" in communal association because it is said that they may not truly know what is in their best interests.[32] The issue of whether individuals' *choices* are really free in the sense of being formed in conditions of oppression or at least in circumstances which are not in those individuals' "real" interests has

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[27] All quotes from F. Klug 2001 p. 368.

[28] I use the terms human freedom and liberty interchangeably.

[29] I. Carter et al. 2007 at p. 323.

[30] J. Christman 1989.

[31] T. Hobbes *Leviathan* 1651/reprint of the original, 1960, where individuals are free in a state of nature, and restrict their freedom by entering into the social contract. In the absence of imposed constraints or interferences, the person making a choice is taken to be free.

[32] Most famously seen in J.J. Rousseau 1968. To answer the question Rousseau's social contract will resolve requires discovering how: "*each, while uniting himself with all, may still obey himself alone, and remain as free as before.*" This is assisted by the General Will: in conforming to which, the citizen wills what must rationally be willed, the good of all, on which his own well-being depends. And if, irrationally, he refuses to obey the law so set down he will "*be compelled to do so by the whole body… [he] will be forced to be free.*"

been a continuing theme throughout political and legal theory.[33] Indeed, it has been asked whether conditions exist to enable a choice to be made which can *ever* be said to be free. Connected to what type of freedom one is talking about is the whole reason for wanting to know: why is freedom a good?[34]

Different Conceptions of Freedom

In the West, conceptions of freedom, equality and rights originated as the basic tenets of classic liberalism – as can be seen, for example, in Locke: all men are created free and equal; all men are by nature free and equal.[35] These have been translated into modern liberalism as variants of the idea that each and every person by virtue of their capacity for reason is of equal worth and has rights to be treated as such. So equality and freedom of the person means that each has rights – to be expected from their governments and from other people. This premise of rationality has however been used to exclude other humans from "humanity" and to exclude them from their right to equality and freedom on grounds of their lack of rationality. Yet this very fault, seen as illogical, was often the focus of political activism to combat racism, anti-slavery campaigns, and sexism.[36]

Although distinctions between what are seen as the traditionally two types of freedom or liberty – negative and positive – have been made throughout history, Isaiah Berlin's classic and well known formulation neatly encapsulates these differences. Even though the distinction is historically made between these two types, disputes also occur within

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[33] See, for example, J.J. Rousseau 1968; I. Kant 1988; G.W. Hegel 1977; J.S. Mill 1991; L.T. Hobhouse 1964; T.H. Green 1941; S.I. Benn 1988; Q. Skinner 1984; I. Carter et al. 2007.

[34] See, for example, D. Feldman 2002 at pp. 5–6 who says that we can question whether freedom is deontological or teleological but at a certain point this distinction collapses. Any idea of freedom or liberty must necessarily depend on an evaluation of the proper ends of human beings in the light of a vision of the human condition, an issue discussed later in this chapter and in the next in the context of human dignity.

[35] J. Locke 1988.

[36] See, for example, S.M. Okin 1979 and 1989; G. Lloyd 1984; A. Jaggar 1983; C. Pateman 1988; L.M. Antony and C.E. Witt 2002.

the camps of negative and positive liberty theorists.[37] As we shall see in this book, they can go in different directions in terms of what it means to one's identity: towards self-determination or towards self-realisation. According to Berlin, negative freedom describes individuals being free when unobstructed by others: "free from". Berlin then goes on to define positive freedom as individuals being free when they are able to make their own choices and plans, entailing an element of internal liberation and ability to decide through some sort of rational method: "free to". This conception of freedom means a person has a:

> wish above all to be conscious of myself as a thinking, willing, active being, bearing responsibility for my choices and able to explain them by reference to my own ideas and purposes. I feel free to the degree that I believe this to be true and enslaved to the degree that I am made to realise that it is not.[38]

Negative and positive freedom have been described as historically developing in ways as to come into direct conflict with each other.[39] Negative freedom rests on an idea of the self as pre-social: the idea being that by nature one is free and unconstrained – man in the state of nature is free to do whatever he wants. So one is free when left alone. Much of the Anglo-American tradition rests on this conception and, as we shall see, often ideas of human rights in such jurisdictions rely on this version of the self. I will investigate these issues in more depth in the autonomy section in Part II of this book. Negative freedom has been said to emphasise the role of external barriers, while positive freedom has been described as emphasising the internal with this being the "key dividing line between the two models"[40] The two concepts as articulated by Berlin may be seen to reflect two different conceptions of the person. One is innately separate, individualistic, unconnected, rights oriented, even antagonistic, as seen in the negative version of freedom. The other is innately connected, communitarian, even selfless, concerned with responsibility, as seen in the positive version.[41] Berlin, ultimately dismissing positive freedom, sees it as derived from discovering in some way one's "true" or "dominant" or "higher" self. If this is the case, then certain people have a more developed "higher" self

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[37] See further on this I. Carter et al. 2007.

[38] I. Berlin 1969 at p. 131.

[39] I. Berlin 1969.

[40] N. Hirschmann 2003 at p. 16.

[41] N. Hirschmann 2003 at p. 16. See further analysis in Part II below.

than others, so that entity, in the form of the collective or "organic single will", often to be represented by the state or government, could logically impose upon or coerce the so described 'less enlightened', members of society in the name of some goal, most notably seen in Rousseau's famous diktat that individuals could, and should be, "*forced to be free*".[42]

Yet positive freedom can expand negative freedom. Hirschmann describes this as happening in three ways.[43] Firstly, there needs to be a positive provision of conditions to take advantage of negative liberties. Secondly, the focus on internal barriers and compulsions which are at odds with one's 'true' self entails ideas of second order desires, with the related view that others can claim to know you better than yourself. Thirdly, the 'social construction' of the choosing person or 'subject of liberty' is involved. Yet, most present day positive freedom theorists distance themselves from totalitarian versions and veer away from claiming others know better, or at least if they think this, the role of law in convincing you is often played down to avoid authoritarian consequences. Many now focus on the processes by which goals are pursued rather than on the actual realisation of goals.[44]

An absence of impediments or restrictions to people's developmental powers and of humanly imposed impediments including the coercion of one person by another, direct interference with a person's activities by the state, and also lack of equal access to the means of life and means of labour are all relevant.[45] Such freedom means social pressures need to be removed and other social conditions improved to allow individuals to develop their human potential and capacities to the full. This type of freedom can be seen in J.S. Mill's work and was taken up by T.H. Green and L.T. Hobhouse who saw that freedom as *self-direction* and *self-development* clearly meant government *had to intervene* in the lives of its citizens to increase their freedom.[46] Conditions to make people free: growth and learning and the reliance on one's environment are emphasised. Educating people to develop their own selves in a harmonising way with others and their surroundings is seen as important thus making people capable of

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[42] J.J. Rousseau 1968.
[43] N. Hirschmann 2003 at pp. 6–10.
[44] See I. Carter et al. 2007 at p. 4.
[45] C.B. Macpherson 1973 at p. 96.
[46] See, for example, L.T. Hobhouse 1964 at p. 65.

directing their own lives.[47] There is recognition that non-interference in social systems or structures already hierarchically arranged by reference to class, sex/gender, race, religion or other such categories, simply strengthens existing power structures. Thus there is an acknowledgment that inequalities affect a person's ability to take advantage of political and legal rights and their opportunities for self-development. Access for all – including access to claims as a rights' holder to enforce human rights laws – to the means to be free or social conditions of freedom is necessary to increase this version of personal freedom.[48]

The real value of people's liberties in practice depends on the extent to which a society recognises a responsibility to provide the infrastructure which allows them to participate and maximise the fulfilment of their choices.[49] A person will therefore be unfree if the range of his or her choices is constrained either by human interference or by shortage of resources or physical capacity. It becomes an argument therefore that liberties are of value only if supported by rights-claims which obligate other members of society to make available the resources each person needs to give effect to his or her choices. On this version, negative freedom is complemented by positive social and economic rights which are justified as necessary to make negative liberty equally valuable to all. In other words they seek to create a bridge between the value of liberty and the different values of equality and social justice which can all be harmonised.[50] So it can be seen that this type of personal freedom strongly relates to conceptions of social justice and forms of equality. In depth analysis of these concepts and their interconnections is beyond the scope of this book but the ideas do rear their heads at various points in the context of human rights laws' purposes and the ECtHR's jurisprudence.[51]

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[47] L.T. Hobhouse 1964 at p. 66.

[48] C.B. Macpherson 1973. See also analysis in the context of feminism and individualism by V. Held 1993 at p. 182.

[49] See E. Jackson 2001 at p. 11.

[50] E. Jackson 2001 at p. 12. See also Judge Tulkens dissenting opinion in *Sahin v Turkey* 10 November 2005.

[51] The most comprehensive and highly regarded theory of justice which links to personal freedom is John Rawls's: see J. Rawls 1971. In the 'original position', behind a 'veil of ignorance' where people do not know what place they have in society and their own specific characteristics, it is argued that people will choose his two principles in an order of priority, of firstly, equal basic liberties, and secondly inequalities arranged

Motivational conditions have been highlighted as necessary for freedom because people need to discriminate between desires and *exercise a capacity to evaluate* wants, not just to satisfy them.[52] If existing desires shaped by social forces operate as *internal constraints* of which people are unaware through ignorance or simple acceptance without questioning of social conditioning and lack of knowledge of any available alternatives, or worse – brainwashing or massive oppression which could be subtle or hidden – many have said that the persons affected cannot be said to be exercising free choice.[53] For, if wants and preferences are socially conditioned by power relationships, then acting on those wants shows a lack of freedom. Empirically, it has been demonstrated that people's desires and preferences respond to their beliefs about social norms and about their own opportunities.[54] Emotions, desires and preferences are not given or "natural" but are often shaped instead by social norms many of which can subordinate certain sections of society to others. So the idea of freedom as making choices must take into account the social formation and *deformation* of preference, emotion and desires.

Many feminists in particular argue that sometimes people are so embedded in the social practices of the community in which they live that it is virtually impossible for them to question the fairness of their situations. So, often they cannot be said to be free or making free choices. This may be because of the social construction and power dynamics involved, particularly evident in the gender structure, often working disadvantageously against women.[55] It will therefore be important to ensure that conditions appropriate to re-examining ways of life and life plans and projects are readily available. Feminists frequently point out ways that customs, practices and beliefs that men and women have accepted as normal in fact encode deeply sexist attitudes that restrict women, and often men, in illegitimate,

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to the advantage of the least well off, coupled with equality of opportunity. People are seen as autonomous in the sense that they can rationally choose and revise their own conception of the good. Basic liberties enable people to do this without others' interference and are therefore important enough to mean that free and rational people would not risk losing them for the sake of greater economic and social advantages.

[52] C. Taylor 1979.

[53] See M. Ramsay 1997 at p. 55.

[54] M.C. Nussbaum's analysis in M.C. Nussbaum 1999 at pp. 11–12.

[55] See, for example, C.A. MacKinnon 1989; 2005; D. Rhode 1990; C. Littleton 1987; N. Hirschmann 2003; R. West 1988.

unjustified, and unnecessary ways.[56] These deeply problematic aspects to freedom are also seen in the concept of personal autonomy, as already mentioned, the 'close cousin' of positive freedom; personal identity and integrity which will be analysed further in Parts II, III and IV of this book respectively. Autonomy invokes ideas of self-legislation of one's person. Identity focuses on what it means to be me and for you to be you, while integrity encompasses ideas of psychic, moral and physical space in some sense. Having introduced these different conceptions of freedom, I now explore how these connect to human rights and are protected through human rights law.

Human Rights

Human rights have been described as the rights to freedom and well being of all agents[57] and as those rights one has simply because one is human.[58] As such they are said to be universally held and they hold universally against all other persons and institutions.[59] Everywhere, it seems, rights talk is being evoked.[60] At the same time as human nature or a core essence and, as we see in Parts II and III, as an idea of the 'unitary essential self' is under threat, many have questioned whether we can justify human rights foundationally.[61] As Conor Gearty has recently expressed it:

> we have a paradox: the idea of human rights has been reaching dizzying heights in the worlds of politics and law whilst its philosophical base has been increasingly called into question, challenged as to its very existence in ways that would have been unthinkable in previous epochs.[62]

Linking to the different conceptions of negative and positive freedom, some would say rights are best provided through state intervention to provide social conditions for freedom to come to fruition, while others would

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[56] E. Jackson 2001 at p. 23.
[57] A. Gewirth 1981.
[58] J. Donnelly 2003.
[59] J. Donnelly 2003.
[60] M.A. Glendon 1999.
[61] See R. Rorty 1993.
[62] C. Gearty 2006 at p. 8.

argue that state non-interference is key.[63] In a democracy, rights to freedoms are often enshrined in human rights law, to enable people to make choices and have their choices respected without being dictated to by the state or others, indicating in many ways the fundamental quality of the value of the choices being that individual's. As such, human rights law is seen as one of the most useful legal tools to the empowerment of personal freedom, aiming to attain at least a certain level of global social justice and safeguards from human rights' abuses. Benhabib states that on the one hand, a worldwide consciousness about universal principles of human rights is growing; on the other hand, particularistic identities of nationality, ethnicity, religion, race and language, by virtue of which one is said to belong to a sovereign people are asserted with increasing ferocity. [64] The mere fact of being human proves in itself an entitlement to claim goods which are necessary to live the life one wants to live – some say this needs to be an autonomous and dignified life as we will see later – regardless of where one happens to be born or live. Therefore human rights law is concerned in some way with foundational rights or ultimately one foundational right in some sense: rights or a right that is not inferable from any other right and from which other rights, derivative rights, are to be inferred.[65]

A common interpretation of the purpose of human rights law may be to protect the rights which individuals inherently possess, largely corresponding to an idea of negative freedom. It is the protector of rights, freedom or liberties people inherently have, in, some may say, a state of nature, by being born human. Thus it is assumed, as I have stated above, that individual rights will be protected when people are left alone, not interfered with, usually by the state. It implies that rights laws are needed to stop state action from abusing individuals' rights through interference of their lives. Yet the positive aspect of these foundational human rights has been said to lie in their derivation from one unifying or underlying right entitling its holders to be secured a certain broadly designated personal condition. The most favoured of these are personal well-being, autonomy, self-respect, and agency.[66] The correlative duties, while including many

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[63] I. Berlin 1969; A. Ryan (ed) 1979; Q. Skinner 1984; C.B. Macpherson 1973.
[64] S. Benhabib 2002a at p. 151.
[65] H. Steiner 2006.
[66] H. Steiner 2006.

forms of non-interference, also extend to the provision of what are reasonably conceived to be the necessary political, economic and social means of obtaining them.[67] It could therefore be said that these provisions and conditions enable the potential or capacity for freedom of the person to be brought into being, or brought to fruition, or at least increased. Such rights entail and imply entitlements and choice: ultimately the individual chooses whether or not to exercise those rights.

The discourse of human rights has traditionally been advocated as assisting the oppressed, based on ideas of the freedom and equality of all human beings universally. Rights have been described as nothing more than the symbolic expression that one is equal in his or her freedom with everyone else or that one is a legal subject.[68] Rights' consciousness requires experiences with the legal system that confirm the subjectivity of persons: that they are rights' holders capable of enforcing their rights and are able to do so in the legal system. Rights have been described as bridging the moral and legal, with it being argued that the liberal rights tradition should be refashioned to provide defensible conceptions of the good society.[69] Rights discourse offers a recognised vocabulary to frame political and social wrongs and is accurately described as a constant source of hope. Rights are ascribed to people because they are the beings who exhibit certain capacities that are worthy of respect. So, it has been said that: *"[r]ights is… still so deliciously empowering to say. It is a sign for a gift of selfhood"*.[70] The empowering function of rights' discourse provides a focus that translates into action.[71] Institutions and political organisation are essential to ethical life because they provide the proper environment for achieving expressive, integrated lives.[72] It has been argued that asserting rights as a human has an essential conceptual background in some notion of the moral worth of certain properties or capacities, without which it would not make sense.[73]

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[67] H. Steiner 2006 at p. 474.
[68] See C. Douzinas 2000 at p. 391.
[69] R. West 2003 at pp. xii and xiv; see also analysis by N. Lacey 2004.
[70] P. Williams 1991.
[71] See C. Romany 1994.
[72] C. Douzinas 2000 at p. 380.
[73] The expressions are Tasioulas's: see C. Taylor 1979, 1989, 1991, 1992 and 1994.

Human Dignity and Human Rights

Often human dignity is said to be 'the valuable status protected by human rights.'[74] Yet human dignity is an 'especially vague and ambiguous concept'.[75] Respecting human dignity has been defined as promoting autonomous choice. For example, Raz states that "respecting human dignity entails treating humans as persons capable of planning and plotting their future. Thus respecting people's dignity includes respecting their autonomy, their right to control their future…"[76] In a similar vein, human dignity has been said to be violated when people are treated as objects even for the benevolent efforts of others when the running of their lives against their own will is taken over by others who decide what is best for them.[77] Such definitions are problematic as we shall see in a moment. Some scholars have sought to ground human rights in a version of human dignity as autonomy.[78] At the very core of such dignity is therefore "our capacity to reflect on, to choose, and to pursue what we ourselves decide is a good life."[79] James Griffin's account of the existence conditions of human rights proceeds in three stages. First, human dignity is identified as the valuable status protected by human rights. Since human dignity centres on one's status as a person or an agent, the second stage elaborates the values implicit in this personhood or agency. It is these values that human rights protects:

> To be an agent, in the fullest sense of which we are capable, one must (first) choose one's own course through life – that is, not be dominated or controlled by someone or something else (autonomy). And one's choice must also be real; one must (second) have at least a certain minimum education and information and the chance to learn what others think. But having chosen one's course one must then (third) be able to follow it; that is, one must have at least the minimum material provisions of resources and capabilities that it takes. And none of that is any good if someone then

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[74] See J. Griffin 2001.
[75] E. Jackson 2006 at p. 26.
[76] J. Raz 1979 at p. 221.
[77] A. Pedain 2003.
[78] See in particular J. Griffin 2001.
[79] See J. Tasioulas's examination of Griffin's work in Tasioulas 2002 at p. 83 also Gearty 2006's discussion of their work.

> blocks one; so (fourth) others must also not stop one from pursuing what one sees as a good life (liberty).[80]

As Tasioulas explains, this is a substantive theory – it seeks to ground the existence of rights in human goods, specifically autonomy and liberty. Richard Rorty claims human rights have no philosophical foundation but advocates refocusing instead on passion and courage, empathy and listening to the story of the person whose rights are being violated[81] but by overlooking the ethical justification of the sort defended by Griffin, it has been argued that Rorty's attack on philosophical justification is deprived of most of its force.[82] However, at the same time, it is alleged that the universality of rights grounded in considerations of personhood is not assured.[83] For this presupposes that a "special value" or "special importance" be given to autonomy and liberty, which is said not to be true of all cultures. Some cultures may not accord the same significance to autonomy and liberty as Western societies, perhaps attaching greater importance than societies in the West to living harmoniously with others, including other species, avoiding infliction of pain and suffering, cultivating highly refined aesthetic and religious sensibilities and so on. One interpretation of Griffin is that human rights – rights possessed by all simply qua human – are a sub-set of all rights, hence a sub-set of the standards of justice.[84] It has been proposed that Griffin's account be expanded into a pluralist account. Linking to the moral framework, as we see Taylor do, as explained later in this book, it is, for example, the independent importance of religious matters to human life that makes it a violation of personhood to infringe another's freedom of conscience. By contrast, the example of being free to drive the wrong way down a one way street does not engage one's personhood because it does not bear in the appropriate way on anything that might feature in a half-way plausible conception of the good life.[85] A pluralist interpretation of human dignity is

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[80] J. Griffin 2001b: p. 311.

[81] R. Rorty 1993.

[82] J. Tasioulas 2002.

[83] J. Tasioulas ibid.

[84] See J. Tasioulas 2002 at 81–90: he states that if this interpretation is adopted, we need a clear and non-arbitrary basis for regarding some rights and not others as human rights. This is what Griffin's criterion is supposed to provide.

[85] The expressions are Tasioulas's: see J. Tasioulas 2002.

said to centre on the fact that all human beings have certain fundamental interests and that through their capacity for practical reason, they are able to relate to those interests in a distinctive way. On this understanding of the status protected by human rights, autonomy and liberty are among the interests that ground human rights but they are not exhaustive of them. If we were to reduce the pluralist account to a slogan, it would be that human rights are to certain minimal conditions of a good life which may be equally rendered in Griffin's formulation that one has a right to "the base on which one might construct a happy life"[86]

However, Conor Gearty, in his recent exploration of human rights theory, has sympathy with sceptics like Rorty on this point. He expresses the view that even if "…there is no core self but rather layers of accidentally accrued identity" this does not mean that we cannot embrace "goodness and dignity and right and wrong as words that…work to make the world a better place."[87] On this rendering, compassion is said to be the term upon which our modern human rights vocabulary can be most effectively built.[88] Gearty expresses the view that the reason people are interested in human rights at all is because of a commitment to equality of esteem and this inevitably moves on to the notion of individual human dignity. In his view, human rights language, rooted in an imaginative understanding of what compassion can be made to entail, asserts that:

> we are all equal in view of our humanity and that our dignity, rooted in wonder at the brute fact of our achievement, demands that we each of us be given the chance to do the best we can, to thrive, to flourish, to do

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[86] J. Tasioulas 2002 at p. 90; J. Griffin 2001b:312 see also A. Sen 1999.

[87] C. Gearty 2006 at p. 58. Gearty advocates seeking a foundation for human rights in Charles Darwin. He asks what are the particular features that this 'clever animal' the human has, over and above the other animals? He points out three such features: first, this animal is self-conscious, capable of critical self-reflection; second, it is aware of its own death and of death in general; third, it is capable of a set of contradictory impulses the import of which it understands because of its self-consciousness. It understands therefore that there is a capacity for acts of compassion, hospitality and kindliness but also for cruelty, humiliation and callousness. Gearty explains that recent work on evolution has recovered this tension in Darwin, with it increasingly being acknowledged that goodwill and collaboration are as much part of the human condition a ill-will and competition and what is involved in evolution is a constant struggle between selfishness and altruism, a struggle that neither can win.

[88] C. Gearty 2006 at p. 43.

> something with ourselves. Remembering Darwin we must note . . . that this is increasingly seen as part of what successful evolution is all about . . .[89]

Gearty concludes that the idea of human rights has at its core two dimensions. There is the absolute side – the moral wrongness of cruelty and humiliation, and there is also the perhaps less clear but essential dedication to human flourishing. The two are said to be linked in that each flows from a commitment to human dignity which is in turn manifested in acts of compassion towards the other. In its prohibitory form, this demands that we do not degrade our fellow humans by depersonalising them by denying their personhood. As we shall see in Part III in particular, this links to Charles Taylor's work on equal recognition and the purpose of human rights in this regard. The positive side – stressing growth and personal success – sees human rights as radically pluralist. "Human rights is an idea that both protects us as persons and enables us to grow at the same time."[90] Human rights is concerned with valuing each of us for what we are, and what we are is a self that is located – in a family, community, nation, an ethnic group. It is precisely through our circle of various belongings that we can flourish as persons lead successful lives and fulfil the promise of human rights.[91]

As already referred to, the so-called second wave of the evolution of human rights concepts took place in the birth of the international human rights movement following the second world war. The first wave is interpreted as having happened in the Enlightenment and the new third wave of rights in the post cold war era happening now.[92] Whilst first wave rights are found in the values of liberty and autonomy, second wave rights are located in ideas of dignity and equality and third wave rights marry these concepts with an awareness of participation and mutuality, which recognises the complex relationships of rights and duties in an internationalised society.[93] Again, the concept of inherent dignity is referred to as illuminat-

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[89] C. Gearty 2006 at pp. 49–50.

[90] C. Gearty 2006 at p. 141.

[91] C. Gearty 2006.

[92] F. Klug 2001.

[93] On the UDHR Klug says that the inhumanity that individuals had shown to their fellow human beings conveyed to the drafters of the UDHR that a neutral concept like freedom was an insufficient basis on which to build the peaceful and tolerant world they sought to achieve. In essence the transition from the first to the second wave of rights is represented by a shift from a preoccupation with the rights and liberties of

ing the fact that the freedom to choose one's own path in life is pretty hollow if in reality few choices are available to you. As we shall see in the next chapter, this has led to the growing jurisprudence at international law, including at the ECtHR, that states must take positive action to secure individual rights in certain circumstances even when this requires interfering with two or more private parties. In this, the third wave, a cross-cultural dialogue on human rights is said to be developing which involves a wider set of participants.[94] Dignity aims to denote a recognition that people have more complex needs than to be free from restraint. Indeed, the concept of human dignity has been described as replacing the idea of God or nature as the foundation of inalienable rights.[95]

Yet equating human dignity with autonomy is problematic. Beyleveld and Brownsword have stated that in recent years the meaning of the concept of human dignity has shifted.[96] Now 'human dignity as empowerment' has become 'human dignity as constraint' because human dignity is being invoked in order to restrict individual's choices by, for example, arguing that some types of action are 'against human nature'. With human dignity as empowerment, the capacity to make unforced choices, personal autonomy, equates to human dignity and from here constructs a regime of human rights centred on the promotion of such autonomy. Using Beyleveld and Brownsword's language, with the concept of human dignity as empowerment, life is not free of tragic choices but it is for the person to make the choice, tragic or otherwise. In human dignity as constraint, free action is distinctively limited by reference to the duty not to compromise one's own dignity. Dignity is the property by virtue of which human beings have moral rights or moral standing.[97] In talking about human

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individual citizens within particular nation states to a preoccupation with creating a better world for everyone. In the earlier era the main target was to set people free, in the later period it was to create a sense of moral purpose for all humankind (364). So these were not just driven by the ideals of liberty, autonomy and justice but also by such concepts as dignity, equality and community: Klug 2001 all at p. 364.

94 F. Klug 2001 at p. 366.

95 F. Klug 2001 at p. 365.

96 Beyleveld and Brownsword 2001. See E. Jackson 2006.

97 Beyleveld and Brownsword 2001: Of their work, R. Ashcroft states: "while committed moral rights theorists they are liberals…who see rights theory as bringing together moral philosophy, political philosophy and legal theory. Most bioethicists are less ambitious and usually argue separately about the moral permissibility of some biomedical practice and the appropriate political or legal approach to that practice." Ashcroft is of

dignity as a legal value, David Feldman states that it operates on three levels – firstly, the dignity attaching to the whole human species; secondly, the dignity of groups within the human species and thirdly, the dignity of human individuals.[98] He explains that recourse to human dignity means that if a state takes a particular view on what is required for people to live dignified lives, it may introduce regulations to *restrict* the freedom and choices people can make: choices which in the *state's* view interfere with the dignity of the individual, a social group or the human race as a whole.[99] Like the version of 'human dignity as constraint', Feldman argues that the quest for human dignity may *subvert* rather than *enhance* choice, and in some circumstances limit rather than extend the scope of traditional human rights and fundamental freedoms. As Feldman accurately points out, once it becomes a tool in the hands of law-makers and judges, the concept of human dignity is a two-edged sword. Further, at the level of social group and the individual, human dignity is said to have two aspects, subjective and objective.[100] The subjective aspect is concerned with one's sense of self worth which is usually associated with forms of behaviour which communicate that sense to others. The objective aspect is concerned with the state's and other people's attitudes to an individual or group, usually in the light of social norms or expectations. So,

> [t]he nature of dignity, culturally and contextually specific as it is, and dependent as much on the viewpoint of the observer as on the aspirations of the protagonists, may sometimes need to be treated with cautious awareness of its limitations, as well as its strengths.[101]

Feldman therefore concludes that it is superficially appealing yet ultimately unconvincing that the notion of human dignity can itself be a fundamental right.[102] Instead, he describes human dignity as "a desirable state, an aspiration, which some people manage to achieve some of the

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the view that Beyleveld and Brownsword's theory is the most promising approach for a reunification of bioethics and human rights theory. Ashcroft notes that Article 7 of the International Covenant on Civil and Political Rights 1966 on torture seems to elide the two conceptions of dignity: see R. Ashcroft 2007b at p. 7.

98 D. Feldman 2002 at p. 125 and 1999 at p. 684.

99 As we shall see in chapter nine, restrictions on assisted suicide fall into this category.

100 D. Feldman 1999.

101 D. Feldman 2002 at p. 133.

102 D. Feldman 1999 at p. 682.

time, rather than a right" and human rights, when adequately protected, can improve the chances of this aspiration being fulfilled.[103] In respect of classic liberal rights, Feldman notes that the dignity of the species and the dignity of the individual tend to work together. In relation to the subjective aspect of human dignity, human rights law will be typically concerned to prevent treatment which damages a person's self-respect and physical or moral integrity. In terms of the objective aspect, the law will usually go further, imposing positive duties on people to act in ways which optimise the conditions for social respect and dignity. Thus dignity is not an end in itself, it is an expression of an attitude to life which humans should value when it is seen in others as an expression of something which, in Feldman's words, gives particular point and poignancy to the human condition: by its nature, dignity can be neither pursued nor used, only lived, fostered, enhanced and admired.[104] This issue of human dignity connects with ideas of moral, rather than necessarily personal, autonomy which will be discussed more fully in Part II. Suffice to say here that the notion of human dignity can bolster individual freedom if one wants to make choices that most others understand as dignified or a 'good' way to live and accord with beliefs about what is involved in living a good life. There is another link between the ideas of dignity, respect and moral integrity which the ECtHR has developed in Articles 3 and 8 jurisprudence and while it is noted that human dignity and respect are not the same, at their best they can feed one another and personal autonomy, self-respect and equal respect are important in providing circumstances in which dignity can flourish.[105] Whilst there is a danger therefore that human dignity can force certain conceptions of the good life on people who may not agree with them or want them, in, what will be more fully explained in Part III, a self-realisation form of personal freedom, it can be part of the moral background of social matrix of context in which choices are made.

It is true that people now talk of their dignity as a person in an egalitarian and universal sense and of equal recognition of each person in a universally acknowledged form of some sort.[106] Equal recognition is not

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[103] D. Feldman 1999 at p. 682.

[104] D. Feldman 1999 at p. 687.

[105] See D. Feldman 1999 and also S. Wheatley 2001.

[106] See C. Taylor 1989 and 1991, more in depth discussion of which can be found in Parts II and III below.

just necessary for a healthy democratic society, its refusal can inflict damage on those who are denied it. The connection between these notions and anti-discrimination and equality law have been highlighted.[107] Two commonly propounded tests for the recognition of improper grounds of discrimination are immutable characteristics and fundamental choices and are both justified by the liberal ideal of an autonomous life. Gardner describes this as "the ideal of a life substantially lived through the successive valuable choices of the person who lives it, where valuable choices are choices from among an adequate range of valuable options."[108]

International Human Rights Legal Protection of a Right to Personhood?

A legally protected right to individual self-determination or personal freedom or autonomy is not explicitly included as such in any catalogue of human rights documents. However, it is explicitly referred to in the 1948 UDHR – referred to in summary form in this chapter's introduction – in the following terms:

> [e]veryone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality. (Article 22).

Further:

> [e]veryone has duties to the community in which alone the free and full development of his personality is possible.

The UDHR begins by stating that:

> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.[109]

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[107] See, for example, J. Gardner 1998 and O. Doyle 2007: discrimination law enables people to make their own choices.

[108] See J. Gardner 1998 at p. 170.

[109] The UN Charter has binding character on all signatories and possibly all of the provisions of the UDHR rise to the level of customary international law.

It further provides that:

> no one should be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks on his honour or reputation. Everyone has the right to the protection of the law against such interference or attacks (Article 12)

Article 17 of the ICCPR[110] provides a right to privacy in the same terms as the UDHR, as do regional human rights documents like the American Convention on Human Rights (1969) at Article 11. The American Declaration of the Rights and Duties of Man states that:

> It is the duty of the individual so to conduct himself in relation to others that each and every one may fully form and develop his personality. (Article 29)

African regional human rights protection stresses less a right to privacy in the terms expressed in Article 17 of the ICCPR and more the communal context of the formation of one's identity. For example, human beings are stated to be inviolable, entitled to respect for their lives and integrity of their person.[111] The right to dignity is explicitly stated as being inherent in the human being.[112] Article 20 of the same Charter provides a right to peoples' existence while Article 22 provides a right to economic, social and cultural development with due regard to peoples' freedom and identity. The Charter also explicitly lists duties expected of individuals covered by the Charter.

At a minimum, the explicitly provided human rights protection includes rights of the inviolability of the home and to privacy and may include more recently specific rights to access and control one's personal information. Both the Commission of the Council of Europe, discussed in chapter three, and the ECtHR have "consistently viewed Article 8's protections expansively and interpreted the restrictions narrowly", so that now there is a right to personal autonomy, identity and integrity even if not explicitly stated as such in the Convention's text but interpreted by the ECtHR from "the right to respect one's private life" as we will see in detail in Parts II, III and IV.[113]

At national level, it is worth noting that the Basic law in German constitutional law sets out at Article 1 that:

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[110] International Covenant on Civil and Political Rights 16 Dec 1966 999 UNTS 171.
[111] Article 4 of the African Charter on Human and Peoples Rights 1981.
[112] Ibid. at Article 5.
[113] See Privacy International website reference at p. 4 of 14.

> [t]he dignity of human beings is inviolable. All public authorities have a duty to respect and protect it.

While Article 2 states that:

> Everyone shall have the right to the free development of their personality provided that they do not interfere with the rights of others or violate the constitutional order or moral law.

These provisions are sometimes referred to by the Court in their Article 8 judgments as we shall see later.

Conclusions

The interconnection between personal freedom and human rights law shown here philosophically and in international human rights protection sets the scene for the European regional human rights protection. A brief introduction to the ECHR will be provided in the next chapter before examining in depth the main subject matter of this book.

Chapter 3

The European Convention on Human Rights and Personhood

> *. . . the achievement of effective protection of freedom of the person requires legal recognition and safeguarding of the individuality of man [sic], i.e. of the qualities, abilities and characteristics that distinguish and individualize a particular person; all those attributes that give to every human being his special and original signification in society; in other words, his personality.*[114]

Introduction

Not only was the protection of human rights being dealt with at an international level by the UN at the end of the second world war, steps were also being taken at the European level to establish human rights protection for the region. In May 1948, the International Committee of the Movements for European Unity organised a "Congress of Europe" in The Hague which led to the foundation of the Council of Europe in 1949. Van Dijk et al. report that at the Congress, a resolution was adopted resolving that a Commission be set up to undertake the task of drafting a Charter of Human Rights and of laying down standards to which a State must conform if it to deserve the name of democracy.[115] The Convention was signed in 1950 and entered into force in September 1953. The ECtHR in Strasbourg is the dispute resolution mechanism set up pursuant to the ECHR. The Council of Europe is the continent's oldest political organisation, founded in 1949, grouping together 47 countries. Its aims include the defence of human rights, parliamentary democracy and the rule of law. The ECHR seeks to pursue the aims of the Council

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[114] L. Loucaides 1990 at p. 175.

[115] See generally P. van Dijk et al. 2006.

through the maintenance and further realisation of human rights and fundamental freedoms.

This chapter sets out some basic information about the ECHR as a human rights document and the principles of interpretation used by the Court to aid the understanding of the analysis of the case law in the rest of the book. George Letsas has recently stated that:

> [t]he ruling of a violation of the ECHR is . . . a mixture of two kinds of claims: a claim about the moral rights that individuals are entitled to by virtue of being human and a claim about the nature of obligations that states have undertaken by joining the ECHR. These two claims need not be identical.[116]

If the ECHR enshrines liberal egalitarian principles that impose conditions on the legitimate use of coercion by contracting states against persons within their jurisdictions, and these rights are both legal and liberal, one of the requirements that are said to be imposed by the ECHR rights is that they should give effect to people's responsibility for choosing and pursuing their own conception of the good and protect them against moralistic and paternalistic restrictions on freedom.[117] However, this can be problematic if the underlying conditions and national laws restrict, for example, certain conceptions of the good and as, we shall see, in many cases they do. The interaction between these issues will be investigated in more detail by reference to the specific case law developing a right to personal autonomy, identity and integrity at the ECtHR.

The preamble to the ECHR refers to the UDHR as inspiration, so, as just shown in the previous chapter, any rights to enhance the development of human personality are already clearly of importance. Not all rights under the ECHR have the same legal character. Some rights are absolute, that is, no derogation is permitted from them. An example of such a right is the right to be free from torture, inhuman and degrading treatment and punishment. Other rights do permit some degree of interference, most significantly for this analysis, Articles 8 to 10. These are the so-called "qualified rights". The right can be interfered with by the national state concerned if the interference is in accordance with law, if there is a legitimate aim pursued, is necessary in a democratic society

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[116] G. Letsas 2006 at p. 708.

[117] G. Letsas 2007 at p. 5.

and is proportionate. The legitimate aims are listed for each article and include such criteria as national security, public safety, or the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others.[118] In applying these criteria, the ECtHR generally employs the method of "balancing" usually involving the weighing of the individual right with community interests or the individual rights of other persons in some way.

The ECHR does not contain an express reference to a right to a personality or to develop one's personality. But its protection was intended to cover significant aspects of human personality.[119] As has been pointed out, its preamble refers to the UDHR as a source of inspiration and it was drafted in the aftermath of the Second World War and Nazism. It has been noted that at the time of drafting the ECHR the spectre of communism was as much in the mind of delegates as the horrors of fascism.[120] As such, it may seem natural to assume that the enhancement of the protection of the individual as a person must have been one of the primary aims of the Convention.[121] Some theorists have mentioned the developing jurisprudence of the ECtHR, particularly through Article 8, as playing a decisive role, through a "constant widening", liberal interpretation of its provisions, which is "vigorous" and "dynamic", thus granting substantial recognition and protection of the personality of the individual.[122] As Loucaides explains, the "personalised inclination of the system" is indicated by the particular human rights expressly recognised and protected and which constitute aspects of the personality of the individual in a democratic and pluralistic society. Examples given of such protection are said to be contained in the right to respect of private and family life, home and correspondence, freedom of thought, of expression and of association, the right to education and the right to marry. As I have said, in my analysis of the protection of personal autonomy, identity and integrity, the most relevant provision of the ECHR is Article

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[118] See Article 8(2) ECHR, the full text of Article 8 is quoted in the Introduction to this book.

[119] See L. Loucaides 1990 at p. 176.

[120] F. Klug 2001 at p. 368.

[121] L. Loucaides 1990 at p. 176.

[122] See particularly D. Feldman 2000b at p. 307 and L. Loucaides 1990.

8's protection of respect for private life. However, Articles 2, 3, 10, 12 and 14 are also touched upon and Article 9 is specifically covered in the analysis that follows.

Originally, claims could be brought to the Commission first then, if found admissible, onto the Court. The system changed in 1999 with the abolition of the Commission and the introduction of the Grand Chamber of the Court. The Grand Chamber is now the highest judicial body in the Convention system. It is a plenary court, composed of all the elected judges.[123] Cases can be relinquished by the Chambers onto the Grand Chamber or after hearing at chambers, can be referred to the Grand Chambers. [124] Mowbray notes that during the 2002–5 period, twenty one cases were relinquished by Chambers to the Grand Chambers and leading examples include the case of *Goodwin v the UK*[125] which will be examined in detail in chapter seven.[126] It depends on the national legal order to what extent Court decisions can be invoked and can affect the outcome of national proceedings with judgments being of a declaratory character.[127] As Greer has recently stated: "with one judge per member state…, the Court's capacity is limited to about 1,000 judgments a year. Currently about 98 per cent of the 40,000 or so who apply every year are turned away at the door without judgment on the merits, although about 94 per cent of those lucky enough to have their case adjudicated on the merits receive a judgment in their favour."[128]

Interpretative Principles

Pursuant to Article 1 of the ECHR, contracting states are bound to secure to everyone within their jurisdiction the rights and freedoms set forth in it.

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[123] See A. Mowbray 2007. See Article 26 ECHR for a definition of the functions of the plenary court.

[124] Article 43 ECHR sets out the referral process from Chambers to Grand Chambers. Once a Chamber has delivered its judgment on the merits, any party to the proceedings may, within 3 months 'exceptionally' request that the case be referred to the Grand Chamber.

[125] *Goodwin* v *the UK* 2001.

[126] A. Mowbray 2007 at p. 509.

[127] See A. Mowbray 2007 at p. 21.

[128] Greer 2006 at p. 318.

In general, how the ECHR is interpreted by the ECtHR is one of the most disputed issues in the Court's practice. Such interpretations have resulted in extensive jurisprudential debate. Van Dijk and van Hoof have expressed the view that the emphasis placed on the object and purpose of the Convention, a treaty for the protection of human rights, has led the Court on many occasions "to adopt a fairly progressive or activist approach."[129] Principles that play a key role in constructing the Convention include evolutive interpretation; the proportionality principle and the margin of appreciation. The general problems underlying the interpretative principles of the ECHR, such as the margin of appreciation, with related ideas to the philosophical concepts of universality and relativism,[130] autonomous concepts,[131] the tests of balancing of interests between an individual and the community as whole, and between different rights still remain largely unresolved. In this connection, the Court has stated that:

> in interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms . . . Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective . . . In addition, any interpretation of the rights and freedoms guaranteed must be consistent with the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society.[132]

Reference has been made to the ethical and moral principles preoccupying the drafters of the UDHR as the origin of this purposive approach adopted by the ECtHR. Judgments should take account of present day conditions within the Contracting states to the Convention based on a doctrine of evolutionary law in which the most recent case law is usually the most persuasive. This method of broadening fundamental rights by judicial interpretation, guided by the totality of the provisions and aims of the Convention which safeguards them, and at the same time taking account of current human and social values, has been described as a well

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[129] See P. van Dijk et al. 2006.

[130] See, for example, R.St.J. Macdonald, 1993; E. Benevisti 1999; P. Mahoney 1990 and 1999.

[131] See G. Letsas 2004.

[132] *Soering* 7 July 1989 A.161 p. 34. referring to *Kjeldsen, Busk Madsen and Pedersen* judgment of 7 Dec 1976, Series A no. 23 p. 27 para. 53.

established practice.[133] The Convention has been regularly described in the judgments of the Court as a 'living instrument.'[134] The first case to do this was in 1979, *Tyrer v the UK*,[135] a case concerning the validity of using the birch or cane as a punishment of the court on a young offender. The Court stated that the Convention:

> is a living instrument which . . . must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member states of the Council of Europe in this field.[136]

And in 2000, in *Selmouni v France*, the court stated that:

> having regard to the fact that the Convention is a 'living instrument which must be interpreted in the light of present day conditions', the court considers that certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in the future. It takes the view that the increasingly high standard being required in the area of protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.[137]

Proportionality and Balancing

Of course a major issue in the Court's jurisprudence is delimiting the right of one's personality by reference to the corresponding rights of others. Approaching this from the perspective of the competition between two individuals, each entitled to legally equivalent rights to personality, it seems that the Court has to balance the rights of each and decide who has the best claim to their rights being upheld. Often however the reasoning reflects a balance between the individual applicant's rights and the rights of the majority or the community as a group and the calculus takes on utilitarian dimensions. As I have said, any interference with an applicant's personality right may be justified if, having firstly determine whether or

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[133] L. Loucaides 1990 at p. 190.
[134] *Tyrer v UK* (1979–1980) 2 EHRR 1.
[135] *Tyrer v the UK* (1979–1980) 2 EHRR 1.
[136] *Tyrer* at paragraph 31.
[137] *Selmouni v France* (2000) 29 EHRR 403, 442.

not there has been an interference with the right contained in Article 8(1) and answering in the affirmative, it will be determined whether this interference is justified under Article 8(2). It is worth repeating that the interference with the right may be justified if it is in (i) accordance with law; (ii) necessary in a democratic society; and (iii) in furtherance of a legitimate aim identified in Article 8 (2) and listed above.

Lord Hoffman in a recent UK House of Lords environmental case states that:

> Respect for human rights requires that certain basic rights of individuals should not be capable in any circumstances of being overridden by the majority, even if they think that the public interest so requires. Other rights should be capable of being overridden only in very restricted circumstances. These are rights which belong to individuals simply by virtue of their humanity, independently of any utilitarian calculation. The protection of these basic rights from majority decision requires that independent and impartial tribunals should have the power to decide whether legislation infringes them and . . . to declare that it is incompatible with the governing human rights instrument. But outside these basic rights, there are many decisions which have to be made every day (for example, about the allocation of resources) in which the only fair method of decision is by some person or body accountable to the electorate.[138]

The issues raised by this balancing and the potential conflict between individual rights and the rights of the majority, move the arguments under investigation in this book into other avenues of research such as the interrelationship between democracy and rights discourse and deontological and teleological debates which are beyond the scope of this book. To the extent that arguments about the common good and grounding of a moral framework impact on this issues however, they do impact on my arguments raised here and will be analysed in the context of the individual cases discussed in the following chapters. Closely connected to this balancing is the doctrine of proportionality, described as probably the most significant principle of interpretation of the ECHR.[139] The doctrine means that restrictions that are necessary for the common good should not be used if there is an approach which is less severe but is likely to have similar consequences.

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[138] *Marcic v Thames Water Utilities* UKHL 4 December 2003 at para. 70.

[139] F. Klug 2001 at p. 369.

As Lord Hoffman's quote indicates, some are of the view that these matters are best dealt with by national courts or legislatures who may seem best placed to weigh the interests of the individual's rights with the common good or one of the legitimate aims listed in Article 8(2) like public morality. The definition of the limits of the rights are calculated then on the basis of the concrete situation and the values at stake.[140] Concerns have been raised about these express restrictions. For example, general terms like 'public safety' cannot be invoked for the imposition of restrictions on individual rights in an absolute and uncontrolled manner. So Loucaides[141] has argued that inherent in the concepts of democracy and social interest is the achievement of personal freedom, and Nowlin[142] has put forward the view that the firm commitment to values of the ECHR such as "pluralism, tolerance and broad-mindedness" prevent the imposition of majority moral standards to restrict individual freedom of choice. More analysis of specific points arising from these ideas is discussed shortly in my section on the margin of appreciation. As well as balancing indicating a procedure for working out whose rights should be trumps,[143] it can involve decisions as to how to balance in some way different rights against other rights, for example, the right to privacy against the right to freedom of expression. Commonly the right to freedom of expression is represented as clashing or competing with freedom of religion.

In the context of the ECtHR's jurisprudence, issues of balancing and of public interest and individual rights have been debated by reference to the theories of German scholars Jurgen Habermas and Robert Alexy in particular in Steven Greer's analysis of case law from the ECtHR.[144] "Balancing" in general has been the subject of a deeper critique, questioning its adequacy to address the operation of human rights claims which are by nature regarded as constraints on public actions.[145] Greer argues that the current level of interpretation at the ECtHR is deficient, suggesting a re-arrangement of the principles of interpretation into three constitutional principles in the following order: the rights principle, the

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[140] L. Loucaides 1990 p. 194.
[141] L. Loucaides 1990.
[142] C. Nowlin 2002 at p. 265.
[143] R. Dworkin 1977.
[144] See, for example, A. McHarg 1999, S. Greer 2003, 2004 and 2006, G. Letsas 2007.
[145] See B. Cali 2007.

democracy principle and the priority to rights principle.[146] The idea of proportionality to a pressing social need implies a presumption that the right should be upheld unless there are compelling grounds for interfering with it in pursuit of a legitimate and specific public interest worth pursuing by the most effective and least intrusive means given the costs involved. For Greer, this is a more demanding test than that of proof on a balance of probabilities yet lower than the strict or absolute necessity tests in the stronger version of the priority principle.[147] This has caused him to argue that the case law on the relationship between Convention rights and collective goods in Articles 8 to 11[148] ECHR is unprincipled and confused largely because the Strasbourg institutions have not fully appreciated the need to give priority to rights and have too often sought refuge in the margin of appreciation and balancing as a substitute.[149] Thus the problem with the balance metaphor is not the notion that ECHR rights and competing social interests have to be weighed, but the implication that each has equal value.[150]

Such arguments have relevance to any right a person is supposed to have to autonomy, identity and integrity. If the balancing exercise gives equal weight to the views of the majority or the legitimate aims listed in Article 8(2), there appears to be a devaluation of the individual rights claimed by the applicant. It seems the Court is saying, yes, you have a right to autonomy and identity, which is fundamental to you as a person. However, your right is less important than the rights of the others in your society so will have to be restricted. You will therefore not be permitted to live in the way you wish. All of these issues will be discussed in more detail in the case law analysis in the chapters which follow. Before doing so, I turn to the margin of appreciation and explore its meaning in more detail.

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[146] S. Greer 2003 at p. 417.

[147] See S. Greer 2003. See further analysis in M. Fitzmaurice and J. Marshall 2007.

[148] Article 11 provides a right to freedom of assembly.

[149] S. Greer 2004 at p. 433 and 2006 at p. 277.

[150] Greer 2006 at p. 259.

Margin of Appreciation

A margin of appreciation is given to contracting states to allow variation amongst them in terms of interpretation of the rights guaranteed. This doctrine has been heavily criticised by scholars. It has been said for example that the idea that in the absence of a uniform conception of public morals in Europe, contracting states are 'better placed' to assess local values and their application to particular cases lends weight to the idea of moral relativism and compromising the universality of human rights.[151] In general, the complaint concerns a lack of uniform or coherent application of the doctrine in the court's case law. It has been argued in the ECtHR case law that the nature of the aim of the restriction and also the nature of the activities involved will affect the scope of the margin of appreciation. The Court, for example, has stated that the margin of appreciation will be narrow or greatly reduced when an intimate area of one's sexual life is involved[152] or when it falls within the inner core of the right to respect one's private life.[153] The evaluation undertaken has been said to consist in a balancing act, weighing the objective pursued by the restrictive legislation against the burden experienced by the right-holder.[154] On this view, defining the restriction as serious or not depends on whether it is perceived to interfere with a core or a marginal aspect of human self-determination and this classification affects the outcome of the balancing exercise. Yet the margin of appreciation is said to be more extensive where the protection of morals is in issue and in the realm of religious beliefs where a variety of diverse practices is said to exist. The margin of appreciation could be said to be a doctrine of judicial self-restraint, which comes into play to prevent judges at the ECtHR from substituting their ideas of the correct response to an interference with Article 8 rights for those of the government of the respondent state, so long as the state is taking some steps to remedy the interference. Yet, the margin cannot be invoked to deflect the Court's criticism from a state which has refused to take any action to remedy a serious and apparently unjustifiable violation of rights.

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[151] See E. Benevisti 1999.
[152] *Dudgeon* v *the UK* (1982) 4 EHRR 149.
[153] See the dissenting opinion in *Odievre v France* 2003.
[154] A. Pedain 2003.

In terms of morality, in *Handyside v the UK*,[155] the Court stated that the conception of morals changes from time to time and from place to place: there is no uniform European conception of morals. As such, the Court considered that the state authorities of each country were in a better position than an international judge to give an opinion as to the prevailing standards of morals in their country. Such decisions have been expressed as problematic as despite the lack of consensus, the Court has restricted citizens' right to privacy under the ECHR in the name of protecting morality and they are said to "rely logically upon an undefined, ill-defined, or simply contentious notion of morals."[156]

In Otto-Preminger-Institut v Austria,[157] the ECtHR considered an application by an association that had been prevented from showing a satirical film purporting to be set in heaven due to concerns about offending Roman Catholics. The applicable Austrian legal provisions required a balancing exercise between freedom of artistic expression and the rights of others including respect for religious beliefs. The ECtHR found that it was primarily for national authorities to interpret and apply national law and could find no grounds for holding that the law had been wrongly applied. It noted that those holding religious beliefs cannot reasonably be expected to be exempt from all criticism but that the manner in which such beliefs are opposed or denied is a matter that may engage the responsibility of the state to ensure the peaceful enjoyment of the right contained in Article 9, saying at paragraph 48:

> As in the case of 'morals' it is not possible to discern throughout Europe a uniform conception of the significance of religion in society . . . even within a single country such conceptions may vary. For that reason, it is not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others. A certain margin of appreciation is therefore to be left to the national authorities in assessing the existence and extent of the necessity of such interference.

In *Johnston v Ireland*, the Court held that a wide margin of appreciation applies to divorce because of the diversity of practices followed in

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[155] *Handyside v the UK* 1 Eur. Ct. H.R. 737 para. 49 (1976); see also *Muller v Switzerland* 13 Eur.Ct.H.R. 212 para. 35 (1988).

[156] C. Nowlin 2002 at p. 265 with the last quote from *Handyside* paragraph 49.

[157] *Otto-Preminger-Institute v Austria* (1994) 19 EHRR 34.

contracting states.[158] Again, this margin of appreciation is criticised as illustrating the court adopting a cultural relativist position.[159] Letsas claims that the court's confused handling of the margin of appreciation doctrine rests on the court failing to distinguish between two ideas or uses of the doctrine in its case law.[160] The first is its use as a substantive concept to address the relationship between individual freedoms and collective goals. The second is a structural concept to address the limits or intensity of the review of the Court in view of its status as an international tribunal: the idea being that the Court should often defer to the judgement of national authorities on the basis that the ECHR is an international convention, not a national bill of rights. It therefore needs to be remembered that "[t]he purpose of human rights treaties, unlike that of many other international treaties, is to protect the autonomy of individuals against the majoritarian will of their state, rather than give effect to that will."[161]

Positive Obligations

Under general International law and specific human rights' covenants, there has been a "gradual acceptance"[162] that states are responsible for their inactions as well as their actions.[163] In addition, states are responsible for ensuring equality and anti-discrimination protections to citizens within its

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[158] *Johnston and others v Ireland* 18 December (1987) 9 EHRR 203.

[159] M. Dembour 2006 at p. 168.

[160] G. Letsas 2006 and 2007.

[161] G. Letsas 2007 at p. 74.

[162] See K. Roth 1994 at p. 329. The Inter-American Court of Human Rights makes clear that states can be responsible for acts of private individuals: see the *Velasquez Rodriguez Case (Honduras)* 4 Inter. Am. Ct. H. R. Ser. C No. 4 1988.

[163] This coincides with feminist critiques of 'public' and 'private' spheres in international human rights law. The traditional domain of human rights is therefore the public sphere with the focus on what states are doing in terms of violating their citizens' human rights. As such, women are disadvantaged because many violations of their rights, particularly those that only, or usually only, happen to women, are invisible. Violations which happen to women are more commonly perpetrated by non-state actors and are thus in the private sphere beyond the traditional remit of international human rights protection. As this arena is not traditionally one in which human rights law operates, it prevents the abuses that occur there from even being described as human rights issues, never mind violations or abuses of human rights. See however,

territories. Thus any human rights protections and provisions need to be interpreted in the light of these values. It is in the context of Article 8 that the Court has been particularly active in imposing such 'positive obligations' on contracting states to protect individuals against interferences with their rights by other individuals. The reason for this is said to originate in the wording of Article 8: it protects "respect for" private life etc.[164] As the European Commission and the Court have explained in many cases, the obligation to secure the effective exercise of Convention rights imposed by Article 1 of the Convention may impose positive obligations on a State which may "involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves."[165] It is continually stated by the ECtHR that "although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the state to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life."[166]

In assessing how far a positive obligation is being imposed, the court will look for a direct and immediate link between the measures sought by the applicant and the individual's private life. For example, the authorities must have actual or constructive knowledge "of a real and immediate risk to the life of an identified individual"[167] and the Court has rejected claims to a positive obligation where "the right asserted . . . concerns interpersonal relations of such broad and indeterminate scope that there can be no conceivable direct link between the measure the State was urged to take . . . and the applicant's private life."[168] The notion of respect

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J. Marshall "Positive Obligations and Gender-based Violence: Judicial Developments" 2008.

[164] See, for example, R. Gordon, T. Ward and T. Eicke 2001 at p. 781.

[165] *X and Y v The Netherlands* at paragraph 23; *Spencer v the UK* (1998) 25 EHRR CD 105 (Euro Commission); *Plattform "Artzte fur Das Leben" v Austria* (1992) 13 EHRR 204 paragraph 32 [80]; *Marckx v Belgium* 13 June 1979 2 E.H.R.R.330; *Airey v Ireland* (1979) 2 EHRR 305.

[166] *Airey v Ireland* (1979) 2 EHRR 305 at paragraph 32; see also *Gaskin v the UK* (1990) 12 EHRR 36 at paragraph 38; *Johnston v Ireland* [(1987) 9 EHRR 203; *Tysiac v Poland* 2007 at paragraph 109.

[167] *Osman v the UK* (2000) 29 EHRR 245, 305.

[168] *Botta v Italy* (1996) 26 EHRR 241 [796].

in Article 8 has been expressed by the Court as not clear-cut, especially as far as the positive obligations are concerned.[169] In terms of balancing and positive obligations, Stephanie Palmer has recently stated that the boundary between the state's positive and negative obligations under this provision does not lend itself to precise definition.[170] The applicable principles are similar: in both, regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole; and in both contexts the state enjoys a certain margin of appreciation.[171] Yet Pedain has argued that in case of failure to fulfil positive obligations, there can be no question of justifying the violation on the basis of Article 8(2) for such provisions apply only to interferences and not to omissions.[172] Instead, the fixing of the scope of a positive obligation for the purposes of that article presupposes that the limitations in it have already been taken into account. The Court has stated that paragraph 2 refers in terms only to interferences with the right protected by paragraph 1 – in other words is concerned with the negative obligations flowing therefrom.[173]

Conclusions

The European regional protection of human rights in the ECHR as interpreted by the Court is dynamic and ever evolving, with the purpose of protecting the human rights and fundamental freedoms of persons, yet maintaining and promoting the ideals of democracy. This interpretation will now be evaluated in the context of the meaning of private life and personal autonomy.

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[169] *Abdulaziz, Cabales and Balkandali* (1985) 7 EHRR 471.
[170] S. Palmer 2007.
[171] See *Keegan v Ireland* (1994) 18 EHRR 342 at paragraphs 33 and 57.
[172] A. Pedain 2003 at p. 181.
[173] *Rees v the UK* (1986) 9 EHRR 56 and see also *Marckx v Belgium* (1979) 2 EHRR 330.

Part II

Privacy and Personal Autonomy at the European Court of Human Rights

Chapter 4

From Privacy to Personal Autonomy

> *There is more one can do to help another person have an autonomous life than stand off and refrain from coercing or manipulating him…further categories of autonomy-based duties towards another person [include]…help in creating the inner capacities required for the conduct of an autonomous life. Some of these concern cognitive capacities, such as the power to absorb, remember and use information, reasoning abilities and the like. Others concern one's emotional and imaginative make-up. Still others concern health, and physical abilities and skills. Finally, there are character traits essential or helpful for a life of autonomy. They include stability, loyalty and the ability to form personal attachments and to maintain intimate relationships.*[174]

Introduction

Other Council of Europe organs have reiterated the importance of personal autonomy as a human rights principle. For example, in a Recommendation of the Committee of Ministers on a coherent policy for people with disabilities, provision is sought to be made for the disabled, inter alia, "[i]n order to avoid or at least alleviate difficult situations…and to develop personal autonomy…"[175] As the ECHR does not contain an explicit right to such personal autonomy, the Court has developed its jurisprudence by interpreting a right to private life to include it. This chapter analyses definitions of privacy philosophically and at the Council of Europe before examining the concept of personal autonomy and its critiques. The legal right upon which the right to autonomy, identity and integrity of the person rests is the right to respect one's private life. Privacy is often described as a fundamental human right, a basic right of

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[174] J. Raz 1986 at p. 407.

[175] Recommendation No. R (92) 6 adopted 9 April 1992.

every human being, yet it is notoriously difficult to define and there is little consistency in the usage of the word.[176]

Definitions of Privacy

Definitions of privacy vary widely according to context and environment. In many countries the concept has been fused with data protection, which interprets privacy in terms of management of personal information. Despite this, it has become one of the most important human rights of the modern age.[177]

Often a right to private life and a right to privacy are fused. The right to privacy has been described as controversial, giving control over the boundaries of the spheres of social existence, a matter of being able to choose where, when, and with whom to co-operate or to withhold co-operation.[178] While Raymond Wacks speaks of the 'poverty of privacy'[179] because of its malleability. One aspect of privacy is said to be intimacy and while it "must keep company with liberty in order to have special value, it is also in tension with it."[180] Westin has defined it as "the claim of individuals . . . to determine for themselves when, how and to what extent information about them is communicated to others . . . privacy is the voluntary and temporary withdrawal of a person from the general society through physical and psychological means . . ."[181] This sense of withdrawal from society is perhaps a common perception of privacy, entailing an element of a right to be left alone and linking to the traditional Rawlsian liberal view. A contrast is made between the individual's private life and his or her public life as if they are completely separate.[182] One of the most famous definitions comes from Warren and Brandeis who describe it as "the right to be let alone".[183]

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[176] E. Shorts and C. de Than 1998 at p. 360.
[177] Privacy International: www.privacyinternational.org.
[178] D. Feldman 1994 at 41–71 at p. 51.
[179] R. Wacks 1980.
[180] T. Macklem 2006 at p. 34.
[181] Westin 1967 at p. 7.
[182] On this, see J. Velu 1973 at pp. 28–30.
[183] Warren and Brandeis cited by Judge Walsh in *Dudgeon v the UK* 1982.

Privacy has been described as an interest of the human personality: privacy rights protect the inviolate personality, the individual's independence, dignity and integrity.[184] Henkin notes that this is really not a right to privacy but a right to autonomy.[185] The Calcutt Committee in the UK could not find a wholly satisfactory statutory definition of privacy but said it was possible to define it legally and adopted the following definition: "[t]he right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information."[186] The Preamble to the Australian Privacy Charter provides "[a] free and democratic society requires respect for the autonomy of individuals and limits on the power of both state and private organisations to intrude on that autonomy…"[187]

It is common to divide privacy into different concepts. For example, informational privacy; bodily privacy; privacy of communications; territorial privacy.[188] The last concerns the setting of limits on intrusion into the domestic and other environments such as the workplace or public space. Westin defined privacy as the desire of people to choose freely under what circumstances and to what extent they will expose themselves, their attitudes and their behaviour to others,[189] while Gavison focuses on secrecy, anonymity, solitude.[190] Privacy is thus concerned with individual freedom and individual dignity and is said to affect an individual's relations not only with the media but also the state and fellow citizens as well as with companies or other entities which may wish to gain information about him or her to further their business interests.[191]

In Germany, as mentioned in chapter two and as we will see in the context of the *von Hannover* case in chapter five, there is a legal right to a personality but this has been described as "too imprecise and intangible an idea to appeal to English lawyers."[192] In the United States, Mr Justice

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[184] E. Bloustein 1964.
[185] L. Henkin 1974.
[186] Report of the Committee on Privacy and Related Matters, Chairman David Calcutt QC, 1990, Cmnd. 1102 London HMSO at 7.
[187] The Australian Privacy Charter 1994.
[188] See Privacy International website at www.privacyinternational.org
[189] Westin at p. 7.
[190] R. Gavison 1980.
[191] See B. Neill 1999 at p. 22.
[192] See B. Neill 1999.

Goldberg concurring in *Griswold v Connecticut*[193] stated that: "the right of privacy is a fundamental personal right, emanating from the totality of the Constitutional scheme under which we live… The Makers of our Constitution recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things…."[194]

Recently it has been argued that there seem to be two contradictory rationales to privacy.[195] The first entails privacy as seclusion or intimacy which is often spatially defined. The second privacy is freedom of action, self-determination and autonomy.[196] It is argued that the two strands can be united in perceiving privacy as protecting the free development of one's personality. Both freedom of action and communication in social or public contexts and the right to be let alone and to be able to withdraw into a space of retreat are necessary for the development of one's personality. As David Feldman has pointed out this gets as close as one can to the essence of liberty itself.[197] As already mentioned, the distinction between negative and positive liberty translates into a transatlantic divide, a distinction between Anglo-American ideas of privacy and autonomy and continental European ones. These have been described by Whitman as libertarian and 'dignitarian' approaches to privacy respectively reflecting underlying (neo)liberal and social democratic theories of human rights.[198] Their alleged antagonism is said however to be exaggerated, with autonomy identified as the overarching principle and common denominator of various privacy rights. As we will see, this can be said to reflect the interpretation of the ECtHR on Article 8.

Perhaps representing a shift in British attitudes to freedom having arguably more in common now with European ones, in a recent UK House of Lords judgment, Lord Hoffman has said:

> What human rights law has done is to identify private information as something worth protecting as an aspect of human autonomy and dignity… the

[193] 381 US 479 (1965).
[194] At p. 494.
[195] K. Ziegler 2007.
[196] See also J. Wadham and Taylor 2003.
[197] D. Feldman 1994.
[198] See H. Nieuwenhuis 2007.

> new approach . . . focuses upon the right to control the dissemination of information about one's private life.[199]

In the same case, Baroness Hale referred to what has been termed "the protection of the individual's informational autonomy."[200]

All of these mean that the concept of privacy can be seen as "quite remarkable" with "rather uncomfortable flexibility".[201] Barber categorises three interconnected groups of arguments about the worth and nature of privacy. First, James Rachels has argued that privacy is valuable as allowing people to limit the information that others know about them: they are empowered to edit their character and to maintain various types of relationships with different people.[202] Different levels of intimacy are involved in these different relationships entailing varying amounts of information about any given individual to be known to others. All of these different presentations of people are aspects of who they are. Privacy is a state of affairs in which this editing can be undertaken. A privacy right can protect this state of affairs – the edited character that the individual has chosen to present. Second, Charles Fried argues that privacy serves to protect "moral capital": private information that is then divulged to those trusted in order to foster relationships.[203] Disclosing the information to a particular person or group of people means that he or she or they are trusted but the risk of betrayal is inherent within such trust. The disclosure is thus an expression of confidence in the other person and also a test of their feelings towards the person doing the trusting. If all information about every person was public, this 'capital' would be devalued. Fried makes the strong claim that the existence of privacy is a necessary precondition for the existence of fundamental relationships.[204] Third, privacy may serve to permit activities to be undertaken which persons would not feel comfortable pursuing in public. While Barber notes this appears a weak argument if the conduct is immoral, public criticism might also be directed against virtuous or morally neutral conduct. In such situations, privacy provides protection from the judgement of the

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[199] *Campbell v MGN Ltd* [2004] UKHL 22 per Lord Hoffman paras 50, 51.
[200] Ibid. at paragraph 134.
[201] See N.W. Barber 2007 at p. 70.
[202] Citing J. Rachels 1975 and R. Gavison 1980.
[203] C. Fried 1968.
[204] C. Fried 1968 at 477.

mob. Such authors have explicitly linked this justification with J.S. Mill's writings on liberty: privacy allows people to engage in "experiments in living". All of these ideas present privacy as concerned with the revelation of truthful information about a person. The right to be let/left alone has been referred to as a right to intimacy while the more positive freedom element of the right to self-determination now also clearly encapsulated under Article 8 has been equated to the right to autonomy. The weight and significance of privacy is linked to, and derived from, its ability to facilitate the conditions for diverse forms of human flourishing. Privacy is thus seen as primarily a value rather than a right which spawns privacy-related rights which protect the conditions necessary for valuable personal and social activity.[205]

Privacy and the ECHR: An Introduction

The text of Article 8 states the right is one to respect private and family life, home and correspondence. A 1970 Resolution of the Consultative Assembly (now the Parliamentary Assembly) of the Council of Europe[206] contains the Declaration concerning the Mass Media and Human Rights. There the right to privacy is defined as consisting:

> . . . essentially in the right to live one's own life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorised publication of private photographs, protection from disclosure of information given or received by the individual confidentially.[207]

As van Dijk and van Hoof report, in the final conclusions of the Nordic Conference of Jurists on the Right to Respect for Privacy of 1967, the following additional elements of the right to privacy are listed: the prohibition to use a person's name, identity or photograph without their consent; the prohibition to spy on a person; respect for correspondence; and the prohibition to disclose official information. Jacques Velu says that

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[205] D. Feldman 2002 at p. 16.

[206] Resolution 428 (1970) declaration on mass communication.

[207] Council of Europe, Conc. Ass., Twenty-first Ordinary Session (Third Part), Texts Adopted (1970). See van Dijk, van Hoof, van Rijn and Zwaak (eds) 2006.

the protection of Article 8 protects the individual against attacks on his physical or mental integrity or his moral and intellectual freedom; attacks on his honour and reputation and similar torts; the use of his name, identity or likeness; being spied upon, watched or harassed; the disclosure of information protected by the duty of professional secrecy.[208]

In 1998, in the wake of Princess Diana's death, the Parliamentary Assembly issued a further Resolution[209] on the right to privacy. A list of guidelines is provided to be accommodated within the national legislation of contracting states. The full text of this Resolution was adopted by the Parliamentary Assembly on 26 June 1998, including the following:

> 4. The right to privacy . . . has already been defined by the Assembly in the declaration on mass communication media and human rights, contained within Resolution 428 (1970), as 'the right to live one's own life with the minimum of interference'.
> 5. In view of the new communication technologies which make it possible to store and use personal data, the right to control one's own data should be added to this definition.
> 6. The Assembly is aware that personal privacy is often invaded . . . as people's lives have become a highly lucrative commodity for certain sectors of the media. The victims are essentially public figures . . . [these] figures must recognise that the special position they occupy in society . . . entails increased pressure on their privacy.
> 10. It is . . . necessary to find a way of balancing the exercise of two fundamental rights . . . the right to respect for one's private life and the right to freedom of expression.
> 12. . . . The Assembly points out that the right to privacy . . . should not only protect an individual against interference by public authorities, but also against interference by private persons or institutions, including the mass media.

This somewhat negative conception of privacy may put one's right to privacy in conflict with the public interest. Yet to freely exercise one's rights, a person needs enabling conditions – including the resources to make free choices in a fully informed way and being able to live without unwanted intrusions is part of that. Additionally, a person will need to have, for example, control over their own body and health, his or her sexual identity and sex life, and some would say, full knowledge of one's

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[208] J. Velu 1973 at p 92. See also *PG and JH v the UK* 44787/98 [2001] ECHR 546 at paragraph 56.

[209] Resolution 1165 (1998).

origins and access to information about one's childhood development. It is this "more radical and controversial"[210] view of privacy which has arguably now been developed by the ECtHR, together with respecting the need for unwanted intrusions which may be said to fit the negative conception more neatly.

Loucaides states that "the right to privacy has become a functional equivalent of a right to personality, potentially embracing all those constituent parts of the personality of the individual that are not expressly safeguarded by the European Convention.[211] The Commission has explicitly recognised that a narrow conception of privacy is not reflected in the case law:

> for numerous Anglo-Saxon and French authors the right to respect for 'private life' is – the right to live as far as one wishes, protected from publicity . . . the right to respect for private life does not end there [it includes the right to] . . . the development and fulfilment of one's own personality.[212]

Feldman notes that the debate on the diversity of interpretations of privacy centres around the question whether control over information on the one hand or notions of personal autonomy, dignity or moral integrity central to liberalism on the other lie at its heart.[213] He observes that "the idea of private life must not stretch to the point at which it subsumes other autonomy-related rights and loses its rationale. The interest in private life . . . is related to, but is not the same as, autonomy, moral integrity, dignity, or intimacy."[214] Yet, to a large extent, such conflation seems to have happened in the ECtHR's jurisprudence. From its early days, the ECtHR was expressing respect for private life as comprising the right to establish and to develop relationships with other human beings, especially in the emotional field, for the development and fulfilment of one's own personality.[215] As we will see in more detail in the next chapter, this has been explicitly stated by the court to have been developed into a real right

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[210] E. Shorts and C. de Than 1998.
[211] L. Loucaides 1990 at p. 196.
[212] Application No. 6825/74, DR 5, 87 *X v Iceland* 1976.
[213] D. Feldman 1997 at pp. 265–6.
[214] D. Feldman 1997 at p. 273.
[215] For example, as expressed in *Bruggeman and Scheuten v Germany* (1981) EHRR 244.

to personal autonomy.[216] Before this is examined, what exactly personal autonomy means needs to be explored.

Personal Autonomy and Critiques

It has been noted that the concept of autonomy within the liberal tradition does not have one single unitary meaning but has its roots in the idea that provided others are not harmed, each individual should be entitled to follow their own life plan in the light of their beliefs and convictions.[217] "The respect that individuals claim for their preferences, commitments, goals, projects, desires, aspirations, and so on is ultimately to be grounded in their being the person's own." It is therefore *because* those preferences etc are a person's own that disregarding them amounts to disregarding him or her qua that distinctive individual.[218] Autonomy has variously been described as "acting and living according to one's own choices, values, and identity within the constraints of what one regards as morally permissible";[219] as a "capacity . . . to reflect critically upon . . . preferences, desires, wishes";[220] involving "self-discovery, self-definition, and self-direction",[221] and 'living life from the inside'.[222] Taken literally, autonomy means self-legislation or obeying only one's own rules or acting according to one's own will.[223] It has been defined further as the capacity to reflect on and within the limits of one's circumstances either to endorse or change the way one acts or lives – thus in some significant sense to make your actions and choices your own.[224] As J.S. Mill puts it, the sphere of personal freedom requires "liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow creatures, so long as what

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[216] *Pretty v the UK* 2002 and *Sahin v Turkey* 2005.
[217] E. Jackson 2001, citing W. Kymlicka 1989 pp. 9–19.
[218] E. Jackson 2001 at p. 9.
[219] M. Friedman 2005.
[220] G. Dworkin 1988 at p. 20.
[221] D. Meyers 1989 at p. 96.
[222] E. Gill 2001 at p. 29.
[223] See I. Carter et al. 2007; L. Fastrich 2007; G. Dworkin 1999.
[224] A. Phillips 2007 at p. 101.

we do does not harm them, even though they should think our conduct foolish, perverse, or wrong."[225]

Distinctions have been made between different kinds of autonomy including the distinction between moral and personal autonomy.[226] Moral autonomy refers to the capacity to subject oneself to objective moral principles. Following Kant, giving the law to oneself represents the fundamental organising principle of all morality. So a person is capable of rational choice through exercising his or her own moral judgments governed by moral law.[227] By contrast personal autonomy has been described as meaning an (allegedly) morally neutral trait that individuals can exhibit relative to any aspects of their lives not limited to questions of moral obligation.[228] The relationship between the quality of choices preferred or permitted in a social matrix of community values is important as we shall see. Although these distinctions are important, the notion of autonomy "still finds its core meaning in the idea of being one's own person, directed by considerations, desires, conditions, and characteristics that are not simply imposed externally on one, but are part of what can somehow be considered one's authentic self."[229] This idea of 'authenticity' will be evaluated further in the context of the version of personal freedom I call self-realisation. As Jeremy Waldron puts it in the same volume, "[t]alk of personal autonomy evokes the image of a person in charge of his life, not just following his desires but choosing which of his desires to follow. It is not an immoral idea, but it has relatively little to do with morality."[230] Yet he says moral and personal autonomy are interrelated in that morality attempts to reconcile one person's autonomous pursuit of his ends with others' such pursuits. Also individuals' exercises of their personal autonomy must be amenable to the demands of morality. Their personal autonomy must be capable of being integrated with the exercise of their moral autonomy normally understood as equally indispensable to their individual being.[231] This distinction between moral and personal autonomy relates to the quality and permissibility of the choices people

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[225] J.S. Mill 1991.
[226] See further on this J. Christman and J. Anderson 2005 at p. 2.
[227] G. Dworkin 1989; J. Christman 1989.
[228] J. Christman and J. Anderson 2005 at p. 2.
[229] J. Christman and J. Anderson 2005 at p. 3.
[230] J. Waldron 2005 at p. 307.
[231] J. Waldron 2005 at p. 325.

make which has a bearing on whether they could be seen as really *their* choices and also whether other people or the community will allow them to make such choices. Any given person's 'will' may be strange, wrong, emotional, subjective, imprudent. It might not be in accordance with the values of the ECHR.[232] These issues are developed further in my self-determination and self-realisation section developed in Part III. For many liberal theorists, liberalism is fundamentally the belief that discovering and pursuing one's own conception of the Good is the highest purpose in life. It is argued therefore that respecting individuals' conceptions of the Good maximises each individual's moral autonomy.[233]

Carter, Kramer and Steiner have recently reiterated that one common way of conceiving of the self is as a bundle of beliefs and desires. As already discussed in chapter two, if these are formed in, or caused by, something not of one's own making, how can anything ever be said to be "autonomous", of one's own making, 'freely formed'? A much canvassed solution to this problem is thinking of autonomous behaviour as behaviour caused by beliefs and desires of a *certain sort.* For example, it is plausible to say that one is autonomous to the extent that one's beliefs and desires have been formed in certain ways – as a result of rational and informed reflection, without coercion, deception, manipulation and so on.[234] The opposite of autonomy is heteronomy – meaning obedience to the rules of others. This links to my discussion of personal freedom in chapter two. Many feminists, and Marxists, have identified the heteronomy of women and workers respectively in the present world and propose political and social changes to make the situation better. Feminists often claim that women's roles in society involve heteronomy because they are chosen involuntarily and because the roles themselves involve subjection. Such claims are of course disputed, including amongst feminists themselves, with some feminists claiming that female roles are not any less chosen than many unobjectionable social roles and the social roles are themselves essential for rational deliberation and choice.[235] Although there are of course many varieties of feminist legal theory, the concept

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[232] As recently noted by L. Fastrich 2007.

[233] See D. Feldman 2002 at p. 7.

[234] See analysis in I. Carter et al. 2007; J. Christman 1989; S. Benn 1988 and G. Dworkin 1989.

[235] See I. Carter et al. at p. 324.

of negative freedom is problematic to feminists who are of the view that patriarchal embedded practices cause injustice, making women "choose" adaptive preferences in oppressive conditions, albeit varying in degree given individual and social circumstances.[236] It is also of course in this private sphere where many injustices and violations happen to women. It may be all very well to talk about a private space for men to think, imagine, recoup, but what about those, generally women, who cook, clean and prepare this space?[237] The extensive feminist literature on the public/private divide attests to the importance of this issue.[238] Recently it has been claimed that most freedom theories do not address the deeper more important issue of how the choosing subject is herself constructed by such contexts.[239] This involves more than adaptive preferences or even oppressive socialization. It involves the more complex and subtle process of social construction. Choices, and the selves that make them, are constituted by context, discourse, and language; such contexts make meaning, selfhood and choices possible. Yet feminists have shown that some contexts are better than others at providing people – women in particular – with genuine alternatives from which they can choose. So, for instance, the construction of social behaviour comes to constitute not only what women are allowed to *do* but what they are allowed to *be*: how women are able to think and conceive of themselves, what they can and should desire, what their preferences are. By suggesting that people are *produced* through social formations, and not simply limited by them, the idea of social construction thereby calls into question the assumption of what is genuine or true to the self and what is false. This is difficult and problematic. If social construction characterizes our entire social identity and being, if everyone is always and unavoidably socially constructed, then not only our restrictions but our powers must have been produced

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[236] See, for example, C.A. MacKinnon 1989 and M.C. Nussbaum 1999.

[237] See, for example, F. Olsen 1995.

[238] C. Pateman 1988; R. Gavison 1992; J.B. Landes (ed) 1998; N. Lacey 1998; C. Pateman 1987. D. Sullivan 1995; H. Charlesworth and C. Chinkin 2000; H.J. Steiner and P. Alston 2000 at pp. 211–224. C. Romany 1994.

[239] N. Hirschmann 2003 at ix.

by this very same process.[240] In recent debates on this issue, the context of ethnic minority cultures and religion has taken prominence.[241]

Accepting that social conditions and one's environment have a bearing on autonomy *formation* has been stated to not necessarily lead to a more sympathetic view of minority cultural practices and customs.[242] Examples are often given of female genital mutilation, veiling of Muslim women and arranged marriages. Whilst the feminist perspectives on these are rich and varied, there has been a tendency for some feminists to categorise ethnic practices as "bad for women" in an all or nothing type of way which is counterproductive.[243] It has been expressed that a restricted or an 'oppressive cultural imaginary' may limit a person's capacities for imaginative projection and in so doing impair his or her capacities for self-definition, self-transformation and autonomy.[244] Such issues are discussed in detail in the context of the jurisprudence of the ECtHR on religious identity in chapter nine.

One variant of this social constructionist work can be seen in postmodernist work with its heavy criticisms of the assumption of a stable and transparent self whose rational choices guided by objective moral principles of morality define autonomous agency.[245] But in the end, this could be criticised as leaving an agent – with his or her doubts about the category of the self – with a sense of fragmentation, and in a personal state of loss and weakness. Alternatively, at the opposite end of such analysis, the result can be a view of the self as possessing untrammelled power and freedom before a world that imposes no standards.[246] These ideas of personal freedom and autonomy representing the person or the self as an autonomous, self-determining and independent agent have therefore come under fire from Marxists, many feminists, postmodernists, and also defenders of identity politics and communitarians. Overall, these critics, although often deeply disagreeing amongst each other, claim that liberal

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[240] N. Hirschmann 2003 at p. 12.

[241] See S.M. Okin 1999 and responses in J. Cohen et al. (eds) 1999; L. Volpp 2001; A. Phillips 2007; Benhabib 2002a and 2002b; A. Rao 1995; Deveaux 2006.

[242] See M. Deveaux's discussion of this in Deveaux 2006 at p. 158ff. See also I. Gunning 1991.

[243] See discussion in S.M. Okin 1999.

[244] C. MacKenzie 2000 at p. 143.

[245] See M. Foucault 1976; J. Butler 1990; see discussion in J. Marshall 2006a.

[246] See C. Taylor 1989 at p. 61.

political philosophy rests on an unacceptably individualist understanding of human value and choice.[247] Communitarians and certain ethic of care feminists in particular critically point to the emphasis on individualism and the way the autonomous person is seen as existing prior to the formulation of ends and identities that constitute his or her values and identity. Communitarians note the inability of such a view to make full sense of the social embeddedness of persons.[248] It has been asked whether one can act freely on the basis of inescapable components of one's identity.[249] Having autonomy is often represented as a way of being that is somehow independent of the context in which the individuals who exercise it are living. Accordingly, it has been presented as a quality of an independent, isolated, 'atomistic', 'unencumbered' individual. These debates set up the interdependence of persons and individual autonomy as binary opposites.[250] On the one hand, views on interdependence often lead to a social constructionist account which can create a deterministic account of preferences and a denial of agency. On the other hand, concepts of autonomy which are said to assume a pre-existing freedom may not exist at all, for *anyone.*

And yet, at the same time as critiquing concepts of autonomy, retaining some notion of individual freedom is central to most of these critics concerned with individual agency and ideas of people having, at least some, control over their own lives. As Nedelsky expresses it: "the problem, of course is how to combine the claim of the constitutiveness of social relations with the value of self-determination."[251] A "room of one's own"[252] is fundamental to many people – men and women, of all colours and creeds – and any form of agency necessarily involves reflection, choice and action from the person concerned regardless of their personal circumstances. Emily Jackson argues that acknowledging the significance of the social, economic and emotional context people find themselves in

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[247] See J. Christman and J. Anderson 2005 at p. 8.

[248] See, for example, C. Taylor 1992; S. Avineri and A. De-Shalit (ed) 1992; M. Sandel 1998; A. McIntyre 1981; C. Gilligan 1982; R. West 1988. See also analysis by H. Reece 2003 at Chapter 2.

[249] M. Oshana 2005.

[250] See analysis by E. Jackson 2001 at p. 3.

[251] J. Nedelsky 1989.

[252] Virginia Woolf *A Room of One's Own* (1967); see also L.M. Antony and C.E. Witt (eds) 2002.

should not lead to a jettisoning of the whole concept of autonomy.[253] Instead, we should think how it can be reconfigured in a way that is not predicated on isolation of the self-directed and self-sufficient self. Setting up interdependence and autonomy as opposites creates unnecessary problems, assuming that the priority to the autonomous choosing self will only happen if we completely disregard the web of connections that have moulded his or her identity. Working conversely to this is the opinion that the project of respecting an individual's choices necessarily disintegrates if we acknowledge human beings' social embeddedness.[254] Instead of setting autonomy and social context in conflict, we can see that many theorists, when discussing autonomy, including mainstream liberal philosophers as Jackson aptly points out, acknowledge the importance of the social and our connections with others in our concept of ourselves and in making our own decisions in life, acknowledging the web of obligations that we acquire by virtue of our multiple connections with others.[255] This may contrast with how liberalism is traditionally understood to rest on the value of personal autonomy, autonomy conceived in a morally neutral manner without specific reference to substantive values.[256] However, Bernard Williams, Kymlicka, Raz, Rawls and Dworkin all illustrate that commitments, duties and relationships and our cultural traditions all play roles in giving our lives meaning and character within which individuals learn to interact with each other and to develop their sense of self.[257] So, for example, Raz argues that the freedom of autonomous moral actors to make their own decisions is valuable partly because it advances social ends. The identification of basic liberties therefore depends in part at least on governmental notions of the public good.[258] The set of beliefs that serves to justify rights and liberties encompasses freedom of will and a capacity for self-directed action within a social environment as the most important of human characteristics.[259] In order to respect each other's capacity for autonomous decision-making, where one's will is not overborne by coercion but operates within a set of social relationships, we must be given room

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[253] See particularly E. Jackson 2001 at pp. 3–7.
[254] Ibid. at p. 4.
[255] Ibid.: citing Feinberg, Dworkin and Bernard Williams.
[256] See discussion by G. Gaus 2005 who disputes this.
[257] See discussion in E. Jackson 2001.
[258] J. Raz 1986 at p. 8.
[259] J. Raz 1986; D. Feldman 2002.

to experiment with different ideas and aims, to select our favoured goals and to decide on the best way of achieving them and to give effect to that decision.[260] If autonomy involves acting from reasons that are most fully one's own, it would seem that conceptions of autonomy must not rule out attachments and commitments, for it is often precisely those that it is unthinkable for us to give up that are most centrally constitutive of who we are.[261]

The criticisms of communitarians and certain ethic of care theorists link to the distinction already mentioned between moral and personal autonomy. Moral autonomy takes up the Kantian mantle of defining the self-governing person as having the capacity to grasp certain objective moral norms. However, insofar as liberalism requires that interferences be justified on the basis of 'reasons that all accept,' and the standard for acceptance displays a modest internalism by claiming that such reasons must appeal to considerations operative in or accessible by the motivational system of the person accepting the reason, then liberalism cannot rest simply on the protection of *personal* autonomy.[262] For unless the autonomy of citizens is understood as containing commitments to *shared moral norms*, then no such general justifications can be successful and the overall legitimacy of coercive political principles all of which involve interferences with freedom of action, would be lost.[263]

On this basis, a concern for autonomy is a concern to enable people to have a good life in a social setting. More perfectionist liberal ideas express the view that preserving, providing or protecting bad options does not enable one to enjoy valuable autonomy.[264] Yet what exactly are bad options may not always be easily agreed upon as will be explored in my section on self-determination and self-realisation. So "…without socialisation within a strong network of relationships, an individual's right to self-determination would be both meaningless and irrelevant."[265] As Jackson expresses it, acknowledging that our preferences do not spring unbidden from the inner depths of our self-constituting minds need not lead to the refusal

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[260] Ibid. and E. Jackson 2001.
[261] M. Oshana 2005; J. Raz 1986 and 2001.
[262] G. Gaus 2005.
[263] In J. Christman and J. Anderson 2005 at p. 17.
[264] See J. Raz 1986 at pp. 407–12.
[265] E. Jackson 2001 p. 5.

to *respect* those preferences on the grounds that they are inevitably socially constructed. We cannot sustain a view that all of our preferences are not ours without our sense of self effectively collapsing.[266]

These critiques, yet reconstructions or reconceptualisations of autonomy, demonstrate that 'atomism' and isolation of the person are unnecessary in talking about autonomy. In these versions, theorists have sought to reconceive autonomy, aiming to retain the indispensable notion that people should be free to make their own choices, while acknowledging the socially constructed quality of the choices people make. Autonomy is therefore seen as a *capacity* that has to be developed – it can flourish through human relationships or lie undeveloped.[267] It is therefore not concerned with isolation but depends upon the existence of relationships that provide support and guidance: relatedness is not the antithesis of autonomy but its precondition.[268] It has been argued that if there is any proof that these capacities can only develop in society or in a society of a certain kind, then that society or kind of society ought to be sustained.[269] The experience of care and caring is important in social relationships and in sustaining such a society.[270] People's inherent interconnection with each other needs to be acknowledged. A moral sense cannot be developed in individuals who are isolated from each other. An ethic of care with its emphasis on moral capacities and dispositions provides an account of the origins of moral motivation and an insight into the social conditions necessary to develop these motivational forces.[271] Empathy, love and care and a sense of responsibility are necessary for moral motivation – to want to act morally. Individuals are motivated to act with care and concern because of their social experiences of relationships and ties to other people. What might be seen by many as a natural tendency of human beings to share the feelings of others as a natural fact of human psychology, is also part of individuals' social existence which depends on people's relationships to facilitate sympathetic identification. Affirming certain human capacities like choice has normative consequences. That is, the belief exists that such

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[266] Ibid. at p. 7 and Benhabib 2002a.

[267] J. Nedelsky 1989.

[268] J. Nedelsky 1989; MacKenzie and Stoljar 2000; E. Jackson 2001.

[269] C. Taylor 1992. Additionally, want and preference formation need to be freely allowed for both men and women: see M.C. Nussbaum 1999.

[270] See J. Marshall 2005.

[271] C. Gilligan 1982.

capacities *ought to be* fostered and nurtured. This ability to make choices as intricately linked to, even dependent on, an individual's connectedness with, rather than its isolation from, other autonomous beings connects to ideas of respect and equality which find expression in human rights law as we saw in chapter two. It also forms a part of the Court's reasoning in case law that will be analysed shortly. So

> . . . autonomy is not something an individual either has or does not have. It is not a static or innate quality, rather a person's capacity to make meaningful choices about their lives may fluctuate according to a complex matrix of social, economic and psychological factors.[272]

Social conditions and a social matrix are prerequisites to autonomy and allowing it to flourish or not. These capacities do not simply belong to individuals just by being alive but require proper conditions for their development.[273] Individuals' ability to exercise choice in the basic issues of life, regarding identity and a way of understanding themselves is an ability that is acquired. This developed sense of freedom requires a certain understanding of self: one in which the aspirations to autonomy, self-direction and self-determination become conceivable and this self-understanding is not something sustainable in isolation. Timothy Macklem has recently argued that each fundamental political freedom plays its distinctive part "not merely in securing our general freedom to be ourselves . . . but more fundamentally, in securing the conditions under which we can become ourselves. These are the conditions necessary to our becoming the particular kind of people we are."[274] Each of the freedoms play a significant role "in enabling each one of us to develop and secure a more or less distinctive perspective on life and how it should be lived." For example, "freedom of expression is not simply the freedom to communicate one's voice to others, but is more fundamentally the freedom to develop a distinctive voice of one's own."[275] "As participants in a liberal culture we are familiar with the idea that our freedom is not confined to what is good." Yet the point of freedom is surely meaningless, Macklem continues, unless it consists in some idea that we want to make our lives better which it can only do by connecting them more closely to what is good. "Our

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[272] E. Jackson 2001 at p. 6.
[273] See C. Taylor 1989.
[274] T. Macklem 2006 at p. vii.
[275] T. Macklem 2006 at p. ix.

pursuit of freedom is sometimes irrational and often misguided, but on the whole not so much so as to make our lives worse."[276] So a negative conception of freedom expressed in a right to freedom from interference will be unlikely to guarantee the conditions necessary for individuals to exercise this conception of autonomy. These ideas are important because for some people choices are made that others find unpalatable. The role of law is crucial in preventing or permitting or even encouraging certain ways of being, living and existing. In the topics analysed from the ECtHR's jurisprudence, perhaps the most obvious examples are sexual orientation and gender reassignment and cultural practices like veiling. It is sometimes problematic to see choices made as autonomous as defined here and it is therefore questioned by some whether such choices should be at least restricted. Such matters will be explored in detail in the relevant chapters. Yet choices are made in a social context, the social mores and value systems within which one finds oneself will play a fundamental part in the choices made and allowed. This connects personal autonomy with identity which will be analysed further in Part III.

Conclusions

Linking together positive freedom, the social formation of the individual and the interconnection between the individual and the community, shows there is no need to have a negative conceptualisation of rights, constraining state action or preventing interference. Instead, rights can entitle an individual to some form of assistance or intervention. The right to be left alone and Robin West's description of the "*neurotic understanding*" of individuals on which this right rests already referred to, has been called a late nineteenth and early twentieth century invention which is not required to be central to liberalism. Rights could as readily be grounded in a view of humanity that respects individuality while fully recognising the social nature of the human.[277] So personal autonomy is a capacity that can flourish or not interpersonally, through our relations with others. This

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[276] T. Macklem 2006 at p. 180.

[277] R. West 2003 at pp. xix–xxi. West additionally makes the point that disowning rights distances the possibility of humanity being able to universally share and focus on universally held utopian aspirations while nihilistic critiques prevent exploration of positive rights' talk.

therefore has a much wider application than simply to be left or let alone, on which privacy rights have sometimes been said to be based as discussed earlier in this chapter. In this regard, Feldman has noted: "[l]inking privacy with philosophical notions of autonomy, self-fulfilment, and self-expression has made privacy interests relevant to freedom of action and life-style not merely to freedom from interference. This expansion has been fostered, in the context of the ECHR, by the fact that Article 8(1) is drafted in terms of respect for private life, rather than privacy.[278]

[278] D. Feldman 2002 at p. 532.

Chapter 5

The ECtHR's Development of Respect for Private Life into a Real Right to Personal Autonomy

> *Liberty does not exist at the origin of human development, but comes into being as it proceeds.... We... are profoundly convinced that men are not born free but become free. This is the difference between the 18th century notion of liberty as a natural fact and what we may now call our own notion, which treats it as a development, a becoming.*[279]

Introduction

This chapter shows how the Court has developed the right to respect one's private life into a "real right to personal autonomy" in the reconceived interpersonal sense discussed in the previous chapter. It seeks to set out the case law in a chronological way. Article 8's guarantees to a right to personal autonomy or self-determination have been said to not only be a component of the right to private life but also a component of the right to family life, one's home and correspondence, also protected under Article 8(1).[280] The Court does not use the concept of privacy as a synonym for private life in its case law. The concept of privacy is used in the sense of something *personal* – as in *Halford v the UK*.[281] The rights protected include the right to intimacy, the right to be left alone, or as I put it, a right to be free from unwanted intrusions, and the right to personal autonomy (the

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[279] G. De Ruggiero 1925 extracted in I. Carter et al. 2007 at p. 36.
[280] See H.J. Snijders 2007 at 107.
[281] Application no. 20605/92, (1997) 24 EHRR 523.

right to self-determination).[282] The point of Article 8 has been described as involving not simply protecting people from the embarrassment of external scrutiny of their personal situations but also as respecting their dignity and sense of being valued.[283] The ECtHR has developed its jurisprudence in the direction of a reconceived autonomy. So, it seems that the right to respect for one's private life, including freedom from unwanted intrusion and a right to autonomy, now means the right to develop one's personality in connection with others, the freedom to live the life of one's own choosing. We have seen the different interpretations of what personal freedom can mean. Analysis of the Court's jurisprudence shows how a reconceived view of autonomy – illustrating the importance of social conditions and relationships between human beings as creating and developing one's human personality – has emerged as a right. Issues pertaining to reconceived ideas of autonomy, made prominent through critiques, particularly from feminists, of the purported abstract nature of freedom or autonomy, have bearing on the use of human rights law as set out in the ECHR and interpreted by the ECtHR, and are pertinent in the jurisprudence of Article 8.

In always stating first that the object of Article 8 "is essentially that of protecting the individual against arbitrary interference by the public authorities", the Court moves on to state that positive obligations are also placed on contracting parties to the ECHR. This underlying negative conception of freedom and its corresponding negative rights is stated clearly in Sir Gerald Fitzmaurice's dissenting judgment in *Marckx v Belgium*[284] a case concerning the legal treatment of a child born of an unmarried woman. The motivation behind Article 8 stems, he says, from "the whole gamut of fascist and communist inquisitorial practices . . . it was for the avoidance of those horrors, tyrannies and vexations that 'private and family life . . . home and . . . correspondence' were to be respected and . . . to ensure that individuals were no longer to be subjected to the four o'clock in the morning rat-a-tat on the door; to domestic intrusions, searches and questionings." The Article's purpose is not, he adds, for "the

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[282] In the context of contract law, Snijders makes the point that intimacy can be concretised as the right to confidentiality of certain contracts. Personal autonomy can be concretised as the right to freely enter into certain contracts: Snijders 2007 at p. 108.

[283] D. Feldman 2002 at p. 702.

[284] *Marckx v Belgium* June 13 1979 Series A no. 31.

regulation of the civil status of babies." Yet the majority did find a violation of Article 8 in this case and the right to personality has developed in a much more positive freedom and reconceived autonomy based way as we shall now see.[285]

Relationships with Other Human Beings

In what has been described as the first authoritative analysis of the right to a private life, the applicant was an owner of a dog in Iceland.[286] The applicant in this case, *X v Iceland*, claimed that legislation in Iceland prohibiting the keeping of dogs violated his right to respect for his private life. In dismissing the application the Commission observed:

> For numerous Anglo-Saxon and French authors the right to respect for 'private life' is the right to privacy, the right to live, as far as one wishes, protected from publicity . . . In the opinion of the Commission, however, the right to respect for private life does not end there. It comprises also, to a certain degree, the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one's own personality.[287]

However, in considering the applicant's contention that his relationship with his dog was constitutive of his personality, the Commission, while importantly accepting the principle of Article 8 covering personality formation, dismissed his claim on the basis that the relationship was beyond a relationship with other human beings. As such, the judgment is unnecessarily anthropocentric and restrictive and, it is contended, most likely not to be decided in the same way today. The judgment has been described as "quite conservative".[288] The Commission's observations are worth quoting in some detail. After stating the above, it continued:

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[285] The Court held that the right to respect for private life included a right that the law of the family and inheritance should respect de facto relationships and should not discriminate against a child on the basis of the married or unmarried status of his or her parents. *Marckx v Belgium* June 13, 1979 Series A no. 31.

[286] Commission Application no 6825/74 (Decisions and Reports of the ECHR Vol. 5 p. 86 *X v Iceland* 5 Eur Comm'n HR 86.87 (1976). See analysis of the case by L. Loucaides 1990 at 178–9.

[287] *X v Iceland* 1976. Ibid.

[288] L. Loucaides 1990 at pp. 178–9.

> The Commission cannot, however, accept that the protection afforded by Article 8 . . . extends to relationships of the individual with his entire immediate surroundings, insofar as they do not involve human relationships and notwithstanding the desire of the individual to keep such within the private sphere.
>
> No doubt the dog has had close ties with man since time immemorial. However, given the above considerations, this element alone is not sufficient to bring the keeping of a dog into the sphere of private life of the owner. It can further be mentioned that the keeping of dogs is by the very nature of that animal necessarily associated with certain interferences with the life of others and even with the public life.

As we shall see in the *Tysiac* definition of Article 8's protection, relationships wider than those with other humans are now covered by that article. Indeed, there seems no reason why relationships with other humans are the only external influence on personality formation. In particular, owners of guide dogs have a particularly clear case of showing how fundamental the dog is to one's personality. Also, of course, the court would have to ensure it complies with all the relevant anti-discrimination provisions. The relationships with the "outside world" will be subjected to further analysis later in this chapter.

The Commission subsequently confirmed the court's interpretation of *X v Iceland* defining privacy as constituting personality fulfilment and concluded that 'this element in the concept of privacy extends to the sphere of imprisonment'.[289] However on the facts of the case, which involved complaints of Article 8 violation on the basis of prisoners having to wear prison uniforms and in separating prisoners, it was considered that the interference was justified under Article 8(2) for the prevention of disorder or crime and for public safety. Similarly when a prisoner was refused permission to attend his mother's funeral, there was a violation of Article 8(1) but it was justified under Article 8(2) on the grounds of public safety.[290] Although in these cases security limited the applicants' success, it has been noted that the jurisprudence is significant especially in so far as it determines in effect the scope and the application of the right of private life on the basis of the requirements of the personality of the individual.[291] Whilst stressing the need for the availability of measures and

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[289] *McFeeley v the UK*, Decisions and Reports vol. 20 p. 44 at 82.
[290] Applic. no. 5229/71.
[291] L. Loucaides 1990.

precautions to prevent prisoners self-harming, the case law also emphasises the importance of not infringing the personal autonomy of prisoners – this is what they want to do.[292] In a case concerning a prisoner's rights to correspondence, the Commission stated that "there is a basic human need to express thoughts and feelings, including complaints about real and imagined hardships. This need is particularly acute in prison…"[293]

This "right to establish and to develop relationships with other human beings, especially in the emotional field, for the development and fulfilment of one's own personality" was reiterated in *Bruggeman and Scheuten v the Federal Republic of Germany.*[294] However, the Court added that:

> the claim to respect for private life is automatically reduced to the extent that the individual himself brings his private life into contact with public life or into close connection with other protected interests.[295]

In this case, concerning the prohibition of abortions, the majority of the Commission dismissed the application on the ground that pregnancy "cannot be said to pertain uniquely to the sphere of private life. Whenever a woman is pregnant, her private life becomes closely connected with the developing foetus."[296] In terms of what this means to personal integrity, this case will be discussed in further detail in chapter ten. However, it should be highlighted here that bringing one's private conduct into the public sphere is focused upon by the court as a justification for reducing the right to respect one's private life. As we shall see, this has changed in the Court's developing jurisprudence.

In 1981, it was argued that there was interference with the applicant's private life as a result of the refusal of the German authorities to allow him to have his ashes scattered in his garden on his death.[297] The Commission considered that just because arrangements are made for a time after life has come to an end:

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[292] See *Keenan v UK* Application no. 27229/95 Judgment 3 April 2001, as followed in *Bulut v Turkey* Application no. 51480/99 Judgment 2 March 2006 para. 34; *Trubnikov v Russia* Application no. 49790/99 Judgment 5 July 2005 para. 70.

[293] Para. 322 of Application no. 5947/72 EHRR vol. 3, p. 475.

[294] *Bruggeman and Scheuten v Germany* (1981) EHRR 244.

[295] Ibid.

[296] *Bruggeman* at paragraph 59.

[297] Application No. 8741/79. Dec and Reports vol. 24, p. 137.

> this does not mean that no issue concerning such arrangements may arise under Article 8, since persons may feel the need to express their personality by the way they arrange how they are buried. The Commission, therefore, accepts that the refusal of the German authorities to allow the applicant to have his ashes scattered in his garden on his death is so closely related to private life that it comes within the sphere of Article 8…[298]

As we will see, the right to decide how to die also engages Article 8(1) although prohibitions on euthanasia have been held to be justifiable under Article 8(2).[299]

The Court has made clear that the concept of private life extends to aspects important to one's ability to make choices in life, one's autonomy, in the context of choosing one's name and controlling the use of a person's picture or photographs. A broad margin of appreciation is generally said to exist in the area relating to names, given the diversity of practice amongst contracting parties to the ECHR.[300] However, a name is stated by the Court to be "a means of personal identification and a link to a family."[301] In *Stjerna*, the court found that neither the inconvenience caused to the applicant in requiring him to use his old name, nor his partiality to the chosen new name, were substantial enough to conclude that there was a lack of respect for his private life. This approach was later confirmed in *Guillot* where a child's first name chosen by her parents was refused by the Registrar of Births, Deaths and Marriages.[302] The Court found that the parents preferred name could be used socially and a very similar name was permitted legally. However, the Court has taken an alternative approach where there is different regulation of names between men and women. For example, the Court has held that where married couples could use either spouse's surname but allowed hyphenated names only for use by the wife, there was a violation of Article 14 in conjunction with Article 8.[303] Similarly, the court held that a law requiring married women to take their husband's surname – either by itself – or in hyphenated form – violated Article 14 in conjunction with Article 8.[304] As regards photographs, the

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[298] Para. 2 of this judgment.
[299] See *Pretty v the UK* 2002 analysed more fully in chapter ten.
[300] *Stjerna v Finland* 25 November 1994 (1994) 4 EHRR 195.
[301] Ibid. at paragraph 37.
[302] *Guillot v France* 24 October 1996.
[303] *Burghartz v Switzerland* 22 February 1994 18 EHRR 101.
[304] *Unal Tekeli v Turkey* 16 November 2004 42 EHRR 53.

Commission has considered it important to ask whether the photographs relate to private or public matters and whether material was envisaged for a limited use or was likely to be made available to the general public.[305] Further analysis of this issue will be analysed later by reference to the *von Hannover* case.

In contrast to the *Bruggeman* definition, by 1992, in *Niemietz* the court was stating that:[306]

> . . . it would be too restrictive to limit the notion [of private life] to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree, the right to establish and develop relationships with human beings.

Surveillance

According to Harris, O'Boyle and Warbrick, *Niemetz* ". . . extends the concept of private life beyond the narrower confines of the Anglo-American idea of privacy, with its emphasis on the secrecy of personal information and seclusion."[307] Yet, it can be contrasted to the Court's definition in *Halford v the UK*.[308] In this case, the applicant complained that following her sex discrimination complaint against her employer, the police, her office phone had been bugged. While the British government asserted that this was an entirely lawful and proper activity, the ECtHR agreed with the applicant that it breached her right of privacy and ruled that the action had been improper. On the facts, the Court stated that the applicant had a "reasonable expectation of privacy" derived from the designation of a particular telephone as being for her private use.[309] When an applicant was prevented from obtaining permanent employment and the authorities refused to disclose information when the information was derived

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[305] See *Schussel v Austria* Application No. 42409/98 Judgment 21 February 2002; *Friedl v Austria* 31 January 1995 and *PG and JH* [2001] ECHR 546; *Peck* 2003. See *von Hannover v Germany* 2004 at paragraph 52.

[306] (1992) 16 EHRR 97 at para. 29.

[307] D. Harris et al. 1995 p. 304.

[308] *Halford v the UK* 1997.

[309] See discussion by M. Freedland 2007 at pp. 45–6; *von Hannover* paragraph 51.

from a secret police register, there was said to be an interference but with the wide margin of appreciation on such issues, it was held not to be a disproportionate response to the legitimate aim pursued.[310] However, applicants were successful when they complained of secret surveillance of their private lives by British secret service (MI5), including interception of communications and maintaining records on them.[311] The ECtHR reiterated that the storage of information concerning a person's private life in a secret police register interferes with Article 8(1). However, the relevant directive under which this occurred did not constitute legally enforced rules and was therefore not in accordance with law and so was in violation of Article 8. Surveillance operations, overt or covert, are intrusions which have been said to have potential to significantly damage one's dignity, especially where the surveillance, either human or mechanical, extends into spheres of personal intimacy.[312] Article 8 will only allow such infringements if a state can demonstrate that they fall within Article 8(2). Furthermore the interference must not be so extensive that it defeats the very core of the right.[313] The different approaches of the ECtHR evidenced in *Niemietz* and *Halford* have been mentioned by several scholars.[314]

By 2002, the Court was describing the notion of personal autonomy, not described as privacy, as an important principle underlying the inter-

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[310] *Leander* Judgment 26 March 1987 A.116 At p. 22.

[311] In *Hewitt and Harman v the UK* (1992) 14 EHRR 657.

[312] See D. Feldman 1999 at p. 694.

[313] D. Feldman 1999 at p. 694. See also the European Telecommunications Directive. It has been argued that currently there appears to be little more than an obligation on bosses in the workplace to notify workers that they should have no expectation of privacy on the phone. As such, it is alleged that most businesses are moving to routine monitoring of phone calls: see Privacy and Human Rights: An International Survey of Privacy Laws and Practice available at www.gilc.org/privacy/survey/intro.html.

[314] See M. Freedland 2007 and Ford 2002. One approach sees the difference as based on employers' contractual and proprietary claims, while another sees it based on the way in which claims to privacy are played off against competing claims to non-privacy: Ford and Freedland respectively. In terms of employment situations, it has been noted that they are, by their nature and the interests involved, sensitive to privacy invasions: see Ziegler 2007 at pp. 7–8. An employee usually spends a significant portion of his or her life in work and is prone to acts relevant to privacy like harassment, surveillance, questions asked at job interviews. Further, an employee's privacy rights may conflict with what has been described as an employer's 'privacy as autonomy rights' to pursue its economic interests (ibid.).

pretation of its guarantees.[315] This is despite the fact that there had been no previous Strasbourg case law which explicitly recognised a right to self-determination described as autonomy as being contained in Article 8.[316] Although dissenting in *Cossey v the UK*, Judge Martens stated that:

> the principle which is basic in human rights and which underlies the various specific rights spelled out in the Convention is respect for human dignity and human freedom. Human dignity and human freedom imply that a man should be free to shape himself and his fate in the way that he deems best fits his personality.[317]

And by 2004, in *Von Hannover v Germany*, in keeping with a reconceived conception of autonomy, the position as regards these others has very much shifted somewhat from the *Bruggeman* description and reflects a reconceived conception of autonomy with the Court stating that:

> . . . the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life'.[318]

In this well-known case, Princess Caroline of Monaco was successful in her Article 8 claim and Germany was found to have violated that provision of the Convention by allowing photographs to be published of the Princess showing her in her private everyday activities including shots of her and male companions, leaving a restaurant, engaged in sport, on holiday. The Court stated that "there is no doubt that the publication by various German magazines of photos of the applicant in her daily life either on her own or with other people falls within the scope of her private life."[319] The case did not concern intrinsic acts by the state but the lack of adequate state protection of her private life and her image which was said to place on the state positive obligations to protect a person's picture against abuse by others. In the case, balancing took place between the protection of

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[315] *Pretty v United Kingdom* (2002) 35 EHRR. 1 at para. 61.

[316] See para. 61 of the judgment and Pedain at p. 189.

[317] Dissenting opinion in *Cossey* Series A No. 184, 24–25.

[318] *Von Hannover v Germany* Application no. 59320/00 Judgment 24 June 2004 at para. 50.

[319] Ibid. at paragraph 53.

private life and freedom of expression guaranteed by Article 10 said to be "one of the essential foundations of a democratic society."[320]

Because the images contained very personal or even intimate 'information' about an individual, in balancing the protection of private life against freedom of expression, the contribution made by photographs or articles in the press to a debate of general interest is stressed in the Court's jurisprudence. Taking account of the facts: that intimate everyday activities were involved and that, although a member of the royal family, the applicant was described as not exercising any function within or on behalf of the state of Monaco. The Court decided that this situation was not within the sphere of any political or public debate and did not contribute to any debate of general interest to society despite the applicant being known to the public.[321] The Court reiterated the fundamental importance of protecting private life from the point of view of the development of every human being's personality. It emphasised that such protection extends beyond the private family circle and also includes a social dimension. The Court considered that anyone, even if they are known to the general public, must be able to enjoy a 'legitimate expectation' of protection and respect for their private life. Not all judges were in agreement. Concurring Judge Zupancic states that "the absolute incognito existence is the privilege of Robinson; the rest of us all attract to a greater or smaller degree the interest of other people."

It has been noted that the ECtHR raises the standard of protection of private life through this judgment to a level higher than in Germany and to a level similar to that in France.[322] By emphasising that the decisive factor in this balancing of private life and freedom of the press is the contribution of the delivered information to a debate of general interest, it has been stated by the same author that the ECtHR demonstrated that the value of the information provided by the press plays a central role.[323] This gives rise to a paradox in the judgment in that the more potentially damaging the delivered material is for a person, the more likely it is that the newly promulgated standard would favour the freedom of the press

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[320] Ibid. at paragraph 58.
[321] Ibid. at paragraph 65.
[322] See N. Nohlen 2006 at p. 198.
[323] Ibid. at p. 199.

when balancing it against the person's right to private life.[324] This puts an unsatisfactorily problematic spin on the value of one's personal autonomy if the public interest can trump it. The judgment can be seen to be counter-productive to the protection of personality rights and privacy.[325] Ziegler notes that the scope of private sphere while in publicly accessible places is difficult to determine.[326] Finding and developing substantive criteria when balancing privacy and speech rights in public-private situations has been described as sensitive and difficult but essential and "to that extent the *von Hannover* judgment is a missed opportunity."[327]

Any determination of the content of the right to respect private life depends on the facts of the case especially the degree of severity of the consequences of the particular situation to which the complaint refers. The case law may very well be the result of applying the principle that some invasions of privacy which are seen as socially adequate, that is, recognised as reasonable and inevitable within the community concerned do not give rise to any liability.[328] It has been stated that the activity wished to be pursued must be something of a serious nature the forbidding or regulation of which clearly has an adverse effect on the applicant's development of his personality or recognition thereof.[329] Yet it is the question of what exactly is this serious nature and according to whose standards that is the key question. Any restriction can only be justified to the extent that it secures the personality of individuals in an organised society by protecting its members from concrete or real dangers applicable at that time and place and does not on any particular occasion take the form of measures which are disproportionate and exceed what is necessary.[330] Something trivial to one person may be important to another.

The final quote I wish to paraphrase in this chronological development of a right to a reconceived autonomy is from *Tysiac v Poland*, quoted at the outset of this book and examined in chapter ten. Private life is expressly

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[324] Ibid. and M.A. Sanderson 2004.
[325] Ibid. at p. 207.
[326] Ziegler 2007 at p. 197.
[327] Ibid. at p. 206.
[328] See Stromholm 1967 at pp. 56–7.
[329] See Doswald-Beck 1983. On hate speech bans, see E. Heinze – "We should have no illusions that hate speech bans make the slightest contribution either to democracy or to human rights." E. Heinze 2007 at p. 309.
[330] L. Loucaides 1990 at pp. 195–6.

stated to be a broad term emcompassing, amongst other things, the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world.[331]

This is clearly wider than in *X v Iceland* and beyond its anthropocentric slant. I will now explore the extent to which this captures relationships with one's environment including people's alternative modes of living.

Relationships with the "Outside World"

People experience different traditions, cultures and modes of living from each other and these are important to many people's autonomy. In this context, cases concerning the Roma community and some environmental cases provide illustrations of how these are seen as part of the formation of one's autonomy in the Court's jurisprudence. In *Buckley v the UK*,[332] Article 8 and Article 14 rights were argued to be violated by the applicant being legally prevented from living with her family in a caravan which she placed on a piece of land she owned. The court accepted that an issue of her home protection applied and therefore so did Article 8. However, this was said to be an area for a margin of appreciation and the Court voted by 6–3 that there was no violation of Article 8. In *Chapman v the UK*,[333] the applicant was again a Roma woman. Her application for planning permission to place her mobile home on a piece of land she owned for her to live with her four children had been refused. Interestingly, the ECtHR, sitting as a Grand Chamber, explicitly found that the issue was her ability to maintain her identity as a 'gypsy' and to lead her life in accordance with that tradition, rather than her right to respect for her home. Yet, the Court then relied on a static concept of tradition with the result that she was only protected if she stuck to the tradition of itinerancy. Because the applicant had been resident on the site for nine years, the Court said that her case did not concern as such the traditional itinerant gypsy lifestyle. Further, the Court said that the national decisions had been reached by the appropriate authorities after weighing in the balance the competing interests. By a narrow majority

[331] *Tysiac* at paragraph 107.
[332] *Buckley v the UK* (1997) 23 EHRR 101.
[333] *Chapman v the UK* (2001) 33 EHRR 18.

of 10 to 8 votes, they found no violation of Article 8. This case has been explained as recognising the right to live according to one's minority cultural traditions and as such there is a positive state obligation under ECHR law to facilitate the gypsy way of life and a procedural obligation to take into account specificities of minority situation in policy making and individual decisions.[334] The Court has subsequently condemned the segregated education of Roma children.[335]

"Article 8 does not . . . give a right to be provided with a home"[336] and the Court has stated that "while it is clearly desirable that every human being has a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the Contracting States many persons who have no home. Whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision."[337] The Court has however developed environmental claims to the extent that it is legally possible to bring them. The most commonly used article for such cases is Article 8.

Yet in areas such as the regulation of noise pollution, the Court decided in *Powell and Raynor* that it can only fulfil a subsidiary role given the wide margin of appreciation in this area.[338] Such a judgment was a disappointment for many. However, in 1994, the ECtHR gave judgment in the *Lopez-Ostra* case,[339] which at the time appeared to be of a groundbreaking character. In light of the further practice of the Court, such optimism was, perhaps, premature. The applicant in this case claimed unlawful interference with her abode and impairment of her and her family's physical and mental health and safety through the erection of a treatment plant for liquid and solid wastes twelve meters from her home.[340] Courts of all instances in Spain, including the Constitutional Court, found the

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[334] E. Brems 2007.

[335] See *DH v Czech Republic* Applic 57325/00 Judgment GC 14 November 2007. See also *Connors v the UK* where the court again ruled on gypsy lifestyles this time concerning the summary eviction of a gypsy family from a public site where they were legally resident (2005) 40 EHRR 9.

[336] *Chapman v the UK* at paragraph 99.

[337] Ibid.

[338] *Powell and Raynor v. United Kingdom*, Judgment 21 February 1990, ECtHR, Ser. A, No. 172 at paragraph 44.

[339] *Lopez-Ostra*, 20 Eur.H.R.Rep. (Ser.A), 277, 277 (1994).

[340] *Lopez-Ostra*, at p. 280.

applicant's claim manifestly ill-founded and dismissed it. Having exhausted all local remedies, the applicant bought her claim before the ECtHR, on the basis of Articles 3 and 8 of the ECHR.[341] The European Commission, considered the claim admissible under Article 8, but not under Article 3. The Commission found a causal link between the emissions from the plant and an illness suffered by the applicant's daughter. The ECtHR stated that environmental pollution, even without causing serious damage to health, could affect the well-being of individuals and impede enjoyment of their private and family life.[342] The Court applied the balancing of competing interests test and stated that the payment of the rent for the applicant's substitute apartment did not completely compensate for the nuisance suffered by the family for three years. It considered the State not to have struck the proper balance between the individual and public interests.[343]

The pollution concerned does not have to cause serious damage to human health, but rather must be "severe". Subsequently, the Court developed this in a case also concerning pollution relating to the operation of a chemical factory – this time in Italy. It stated that environmental pollution, without being severe might affect individuals' well-being, private and family life.[344] The Court stated that "[t]he direct effect of toxic emissions on the applicants' right for their private and family life means that Article 8 is applicable".[345] The respondent state was also held to have violated the rights of servicemen who had been made to witness tests of nuclear devices without adequate protection when it refused to disclose information about the levels of radioactivity which had affected them.[346]

The ECtHR's jurisprudence concerning the formation of personal autonomy allowing it to flourish or not by reference to the environment one lives in was further importantly developed in the two Hatton cases in 2001 and 2003.[347] The Chamber found that despite the margin of

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[341] *Lopez-Ostra*, at p. 286.

[342] *Lopez-Ostra*, at p. 295.

[343] *Lopez-Ostra*, at pp. 295–299.

[344] *Guerra and Others v. Italy* Application no. 1467/89 Judgment 18 February 1998 at paragraph 60.

[345] *Guerra and Others*, at paragraph 75.

[346] See *McGinley and Egan v the UK* (1999) 27 EHRR 1.

[347] *Hatton and Others v the UK* Application no. 36022/97 Judgment of the Chamber 2 October 2001; *Hatton and Others v the UK* Judgment of the Grand Chamber 8 July 2003.

appreciation left to States, the UK Government, in the implementation of the relevant Scheme, failed to strike a fair balance between the country's economic well-being and the applicants' effective enjoyment of their right to respect for their homes and family lives. It therefore violated Article 8 of the ECHR.[348] The Grand Chamber stated that "there is no explicit right under the Convention to a clean and quiet environment" and that only when the individual is directly and seriously affected by noise or other pollution may an issue arise under Article 8".[349] The Grand Chamber reiterated its fundamentally subsidiary role in such cases. National authorities have direct democratic legitimacy and are, according to the Grand Chamber, better placed than an international tribunal to assess local needs and conditions. In matters of general policy, which may involve different opinions contained within democratic society, the role of domestic policy-makers should be given special weight. In particular, this is so in matters relating to the implementation of social and economic policies, where the margin of appreciation should be wide.[350] A minority of judges appended a powerful Joint Dissenting Opinion.[351] These dissenting judges argued that the application of the "evolutive" interpretation of the Convention leads to the construction of a human right to a clean environment based on Article 8 of the Convention, "[i]n the field of environmental human rights, which was practically unknown in 1950, the Commission and the Court have increasingly taken the view that Article 8 embraces the right to a healthy environment, and therefore to protection against nuisance caused by harmful chemicals, offensive smells, agents which precipitate respiratory ailments, noise and so on".[352] They further claimed that the Court has confirmed on several occasions, prior to the second *Hatton* case, such as the *Lopez-Ostra* case, that Article 8 guarantees the right to a healthy environment and that unfortunately the judgment of the majority in the second *Hatton* case appears to deviate from these developments and "even takes [a] step backwards"[353] The jurisprudence of the Court in this

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[348] First *Hatton* case at paragraph 107.
[349] Second *Hatton* case at paragraph 96.
[350] Second *Hatton* case at paragraph 98.
[351] Joint dissenting opinion of Judges Costa, Ress, Türmen, Zupančič and Steiner.
[352] Para. 2 of the Joint Opinion.
[353] Para. 5 of the Joint Opinion.

area was further developed in the 2005 case of *Fadeyeva* v. *Russia*.[354] This case was brought by an applicant who lived close to a steel-plant built in Soviet times, now owned privately. The plant was responsible for more than 95 percent of industrial emissions into the town's air. The applicant sought resettlement outside these emissions and obtained a Court order to do so. However, there was no priority waiting list and she was a long way down the general waiting list. Her case being dismissed in the local and national courts, the applicant based her case before the ECtHR on Article 8, asserting that the pollution seriously affected her private life and health. Russia argued that the degree of harm suffered by her did not constitute an issue under Article 8.

The ECtHR observed that Article 8 has formed a ground in several cases involving environmental concern: however, it is not breached every time that environmental deterioration occurs. The Court again noted that no right to nature preservation is as such included among the rights and freedoms guaranteed by the Convention. Thus, in order to raise an issue under Article 8, firstly, the interference must directly affect the applicant's home, family or private life, and, secondly, the adverse effects of environmental pollution must attain a certain minimum level. The Court further clarified that the assessment of that minimum is not general but relative: it depends on all the circumstances of the case, such as the intensity and duration of the nuisance, its physical or mental effects. The general environmental context should also be taken into account. For example, there would be no claim under Article 8 if the harm complained of was negligible in comparison to the environmental hazards inherent to life in every modern city. Therefore, in conclusion the Court said that, "in order to fall under Article 8, complaints relating to environmental nuisances have to show, first, that there was an actual interference with the Applicant's private sphere, and, second, that a level of severity was attained".[355]

The ECtHR noted that the State recognised many times that the environmental situation in the relevant geographical area caused an increase in the morbidity rate for the city's residents.[356] The Court stressed that the

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[354] *Case of Fadeyeva* v. *Russia* text on the website: <http://worldlii.org/eu/cases/ECHR/2005/376.html>.

[355] *Fadeyeva* at paragraph 70.

[356] *Fadeyeva* at paragraph 85.

domestic courts recognised the applicant's right to be resettled and that the domestic legislation itself defined the zone in which the applicant's house was situated as unfit for habitation. "[t]herefore, it can be said that the existence of interference with the applicant's private sphere was taken for granted at the domestic level".[357] The Court accepted that the actual detriment to the applicant's health and well-being reached a level sufficient to bring it within the scope of Article 8 of the Convention.[358] The Court, having interpreted and analysed the implementation of Article 8, found that the Russian Federation, despite the wide margin of appreciation, had failed to strike a fair balance between the interests of the community and the applicant's effective enjoyment of her right to respect for her home and her private life. There was accordingly a violation of Article 8.[359] Although, in this case, the applicant won, the Court adhered to a wide margin of appreciation and emphasised that the catalogue of rights contained in the ECHR does not include a human right to a clean environment, and, environmental issues in so far as they relate to human rights, are relevant only in the context of their effect on home, private and family life. The link to personal autonomy is not strongly made.

Conclusions

The development of human personality is made in a context and the individual's identity is intricately linked to, even dependent on, individuals' relationships with, other autonomous beings and the wider environment in which they are situated. The right to personal autonomy now developed in Article 8 jurisprudence can thus be conceived of as a quality that develops and flourishes *because of* the interdependency of persons and encouragement of supportive others and is deeply contextual.[360] The way the Court's jurisprudence has developed stresses the importance of other people to one's personal autonomy formation but is more disappointing when it comes to other animals and one's environment. The Court also

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[357] *Fadeyeva* at paragraph 86.
[358] *Fadeyeva* at paragraph 88.
[359] *Fadeyeva* at paragraph 134.
[360] See J. Nedelsky 1989; E. Jackson 2001.

seems to find it difficult to consider how alternative ways of living in community can be covered. While certain cultures may be finding it difficult to have their rights accepted as important to their autonomy, other ways of living have been to a large extent more successful before the ECtHR as we shall now soon see in the context of sexual identity.

Part III

Personal Identity and the European Court of Human Rights

Chapter 6

Personal Identity Definitions

Introduction

In the Court's jurisprudence, the broadness of the concept of private life in Article 8 encompasses physical and social identity. Whilst sometimes the Court uses the term interchangeably with personal autonomy or sees personal autonomy as a sub-category of personal identity, philosophically the phrases differ. In this chapter, definitions of personal identity are investigated and related to variants of personal freedom: self-determination and self-realisation.

Personal Identity

People live in society, most of what they are and do affects, and is affected by, what others are and do. Individuals' material life depends upon interaction with others and their identity is largely created by social forces. In addition, some, perhaps all, of an individual's ideas about themselves, in particular a sense of their own moral and social identity, are intelligible only in terms of the social network in which they are an element. It has recently been said that

> [w]e could say that what makes each of us free is not only our belonging to our society as such but also the fact that this society to which we belong is one that is rooted in the mutual celebration of different cultures and traditions. Seen like this, respect for difference becomes part of our sense of individual freedom and not something in opposition to it…[361]

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[361] C. Gearty 2007 at p. 23.

So, human beings wish to avoid being ignored, patronised, despised, taken too much for granted or not being treated as a person, having their uniqueness insufficiently recognised, being classed as a statistical unit without identifiable specifically human features and purposes of their own.[362] The status accorded to individuals as human beings and the recognition they receive from others is paramount in thinking about personal identity. But what exactly does it mean to talk about one's personal identity?

Personal identity is intricately connected to ideas of moral, personal and reconceived autonomy but is not easily defined. One's capacity for autonomy may be best considered as part of one's identity which may or may not come to fruition or be developed. Indeed, it has been stated that there is no single problem to personal identity, but rather a wide range of loosely connected questions.[363] The characteristics that make up one's identity – who one has been, is and will become, are largely thought to be a mixture of genetics and social conditioning. Such characteristics can be common to the species of humankind and specific to you as you.[364] They develop then like one's capacity for autonomous thought and action, in a social setting and the individual's identity is intricately linked to, even dependent on, this setting.

Whilst most consider there to be a close connection between personal identity and autonomy, for some, identity is not linked to autonomy because what really matters is being able to live as one's conscience dictates and the notion that the good life is the *chosen life* is both mistaken and destructive.[365] Yet Anne Phillips has recently argued that people "who don't know who they are or where they are going are much less able than those with a strong sense of identity to think reflectively, make choices, and plan their lives. We need our cultures in order to become autonomous beings."[366] The elements or characteristics which are generally said to make up one's identity are often described as innate or, at least largely, unchangeable – often dependent on *given* characteristics rather than *chosen*. This is perhaps the crucial distinction for many between personal autonomy and identity. Thus often characteristics like one's

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[362] The language is Berlin's 1969 at p. 155.
[363] See Stanford Encyclopaedia of Philosophy.
[364] See B. Parekh 2000 and B. Williams 1973.
[365] C. Kukathas 2003.
[366] A. Phillips 2007 at p. 105.

race, sometimes one's religion, sex, commitments to one's family, certain attributes like 'natural' intelligence, or physical strength or beauty, certain disabilities could all be seen as within this category. Talking of identity-forming attachments, Raz says:

> All aspects of one's identity become a positive force in one's life only if embraced and accepted as such. They are the sources of meaning in one's life, and sources of responsibilities: my special responsibilities are those of a citizen, a parent, a lover, an academic. They are normative because they engage our integrity. We must be true to who we are, true to it even as we try to change. Thus identity-forming attachments are the organising principles of our life, the real as well as the imaginative. They give it shape as well as meaning. In all that, they are among the determinants of our individuality . . . To deny our past is to be false to ourselves. This is justification enough for our dependence on our past.[367]

Of course, what a person does with their 'innate' characteristics is something they can to differing degrees interpret, bring to fruition, appreciate or hate, all views created interpersonally. The social structures of how these are handled are fundamental. For example, footballers and supermodels were not always paid as handsomely as they are today. Promising brain surgeons, including many female ones, have probably gone undetected amongst the children living in housing estates across the UK and people can now have sex changes, bleach their skin and ignore or disown their family connections. Yet how this affects one's sense of self is highly debatable. A mode of social existence which is linked to this culture of personal freedom is based on the notion of universal right – everyone should have the right and capacity to be themselves.[368] There is a requirement that every person's personal autonomy and identity requires recognition by others. In the modern Western moral outlook, respecting personality has thus been described as a crucial feature respecting a person, in the Millian sense of expanding to give people the freedom to develop their personality in their own way, however repugnant to other people or their moral viewpoint.[369] Each person, as a person, therefore has a central place in an understanding of respect: with the issue of the relationship between

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[367] J. Raz 2001 at p. 33.
[368] C. Taylor 1989 at p. 45ff.
[369] C. Taylor 1989 at p. 12.

the person and the society in which he or she lives being seen as central, particularly to issues of justice, freedom and rights.[370]

Connected to this idea is respect and recognition. Stanley Benn has expressed the respect as being due to all persons alike; grounded in the fact that each speaks from his or her own particular point of view, having perceived interests that no one else can presume to know in advance. Thus "equality of consideration of the interests of persons is the principle that ensures that anyone recognised as a natural person cannot then be consigned automatically to the back of the queue. It amounts to a repudiation of elitist moralities and discriminatory ideologies which, like racism and patriarchalism, assign an inferior status to whole classes of persons."[371] As Benn continues to explain, a person's interests provide the strands of his or her identity over time through which that individual is able to see continuity of meaning and patterns in what he or she is or does:

> his [sic] identity as a person, qualifying for respect not only from others but also from himself, depends on his sense that they are indeed his own [projects], informed by interests which together constitute him an intentional agent with an enduring nature… He cannot be an island, there is little he can do without the collaboration of others. Nor are his enterprises fabricated from nothing; he lives off the accumulated resources of his culture. But for all that, he is conscious of himself as fabricating a life and a self as a kind of overarching enterprise, in which he has the most profound interest.[372]

In our intense and complex contemporary culture, it has been stated that the self becomes increasingly dispersed.[373] Elliot succinctly explains:

> as directors of our own self-narratives, we draw upon psychic frames of memory and desire, as well as wider cultural and social resources, in fashioning the self. Such self-constitution is not only something that happens through our own actions. It is also something that happens to us, through the design of other people…[374]

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[370] See, e.g., T. Hobbes 1651 reprint of original, 1960; J.S. Mill 1991; J. Rawls 1971; R. Dworkin 1977; 2000. While a more continental approach stresses the importance of the collective and the community in forming the individual: see J.J. Rousseau 1968; G.W. Hegel 1977.

[371] S.I. Benn 1988 at pp. 106–107. See also the discussion about Benn and privacy rights in J. Reiman 1976.

[372] S.I. Benn ibid. at p. 120.

[373] A. Elliott 2001 pp. 2–3.

[374] A. Elliot 2001 at p. 5.

There is thus a division between "active, creative self-shaping and passive, social determination…" As such, one characteristic of the self that emerges from all this is that selfhood is personally created, interpretively elaborated and interpersonally constructed.[375] As we have already seen in the context of personal autonomy, "[t]he self…is not only fashioned, as it were, from the inside out. In forging a sense of self, individuals routinely draw from social influences, and maintain their sense of self through cultural resources."[376] In versions of what Helen Reece has coined "post-liberal" identity formation,[377] which have much in common with communitarianism, the personal identity is composed of fragments, a web, or perhaps, a patchwork.[378] This person is depicted as varying according to time and space and although constrained, is an agent capable not only of action, but also of continual reinvention of identity. However, this process takes place not in conditions of its own choosing and decisions taken can be said to be "inauthentic" in the sense that they are out of line with the relevant individual's identity. This approach remains within the social constructionist tradition of identity formation, despite an effort to marry it to autonomous agency. To the extent that such a view concentrates on existence, the development of one's personality and the experiences one is part of, this makes sense. But it could mask state coercion. Some individuals may be divided against themselves because of social experiences and the social conditions of their lives. Does this mean that they cannot make autonomous or authentic decisions? The requirement of a constant effort in seeking authenticity is open to criticism as unattainable. This post-liberal self is a complex creature. In many ways it seeks to become its "true" self, one that fits with what it has been conditioned to be.[379]

We often speak of one's personal identity in the context of examining what makes you *you* and me *me.* One's identity in this sense consists roughly of those properties that make you unique as an individual and different from others, being interpersonal. Not only does this involve the recognition of others' perceptions of you but also the way you see or define yourself. This necessarily invokes a network of values and convictions that

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[375] Ibid. at p. 5.
[376] Ibid. at pp. 5–6.
[377] H. Reece 2003.
[378] M. Griffiths, 1995.
[379] See C. Guignon 2004.

structure one's life. Questions of personal identity also relate to what is necessary and sufficient for someone to count as a person as opposed to a non-person. So it invokes such questions as what have people got that non-people haven't got?[380] Those who say that after a certain sort of adventure you would be a different person or that you would no longer be the person you once were, presumably mean that you would still exist but would have changed in some profound and important way. Those who express matters of identity in this way are usually thinking of one's individual identity in the 'who am I' sense: they are talking about the possibility of your losing some or all of the properties that make up your individual identity and acquiring new ones.[381] Personal identity also involves ideas of continuity and biological, bodily and psychological development – what does being the person that you are, from one day to the next, necessarily consist in – issues which are largely beyond the scope of this book.

In terms of the interpersonal aspects of freedom, autonomy and identity formation, the question "who are you" may only be answered if you have an understanding of what is of crucial importance to you and that means knowing where you stand within a context of questions about what is truly worth pursuing in life.[382] Accordingly, "[m]y identity is defined by the commitments and identifications which provide the frame or horizon within which I try to determine from case to case what is good, or valuable, or what ought to be done, or what I endorse or oppose."[383] What shapes your identity according to this picture is determined by what you identify with: the life-defining ideals and projects that make you who you are.[384] Selfhood and the good, or put another way selfhood and morality, turn out to be inextricably intertwined themes.[385] It is a crucial feature of human agency that people need some orientation to the good. One's sense of their personal identity therefore involves such issues as justice and respect for others and a sense of what underlies their own dignity, or

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[380] More specifically we can ask at what point in one's development from a fertilised egg there comes to be a person and what it would take for a chimpanzee or an electronic computer to become a person, if they could ever be.

[381] Stanford Encyclopedia.

[382] C. Taylor 1991.

[383] C. Taylor 1991 at p. 27.

[384] Ibid. at p. 139.

[385] C. Taylor 1989 at p. 3.

questions about what makes their lives meaningful or fulfilling or worth living. Where personal identity is formed is the background against, and context in which tastes, desires, opinions and aspirations make sense.[386]

Ideas of identity as a unity or continuity in terms of a whole life are not seen as necessary by all. As such, it is perfectly defensible to consider an earlier version of yourself as another person, and to consider what you will go on to be several decades in the future as still another person.[387] Modern identity has been described by Charles Taylor as "what it is to be a human agent, a person, or a self…you can't get very clear about this without some further understanding of how our pictures of the good have evolved."[388]

These issues of values and a conception of the good link to what one may consider to be one's necessary personal characteristics – for example, certain ineliminable beliefs, desires, values, articles of faith, personal relationships and so forth without which the person cannot be what he or she is. Harry Frankfurt calls these characteristics of a person's will. He locates the core of self-identity in the will – that is, in the desires, preferences, and attachments a person wants to be motivated by.[389] Specifically, self-identity is fashioned out of, and delineated by, certain types of higher order desires – namely those that we make ineliminable because of our evaluative commitment to them. Frankfurt's idea is that people cannot help but will certain states of affairs because they care deeply and inextricably about them. To do so or to be otherwise is simply unthinkable.[390]

In the ECtHR's jurisprudence, one's sexuality, particularly in the context of cases on homosexuality and transsexuality, has been classified as a particularly intimate part of one's life, intrinsic to who you are – your identity. It also shows the importance of others' recognition of your identity. Similarly, case law on access to information about one's origins and childhood are considered important aspects of your identity. Yet, as will be argued, certain aspects of one's religion have not been categorised as important to one's identity in the same way.

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[386] C. Taylor 1991 at p. 34.

[387] See C. Taylor 1989 at p. 49; D. Parfit 1984. See also different conceptions of the self from John Locke and David Hume.

[388] C. Taylor 1989 at p. 3.

[389] H. Frankfurt 1988.

[390] See discussion in M. Oshana 2005 at p. 80.

Yet identity, as a way of understanding oneself, can be seen as something which people are not born with, but have to acquire.[391] Thus the *social conditions of freedom* are extremely important in forming this. This developed freedom requires a certain understanding of the human subject or self: one in which the aspirations of autonomy and self-direction become conceivable. Thus a lack of recognition or *misrecognition* by others undermines a person's sense of identity, by projecting a false, inferior or defective image of the self. The typical harm of defective recognition is a split between someone's self-image and the image that social institutions or others project upon that person. These have been described as harms which law commits and tries "to heal through human rights"[392] Acknowledgement of the vital contribution others make to the constitution of self reconciles individuals (or alienates them in case of non-recognition) with the world. But the other's recognition of a person's identity makes the person aware of their specificity and difference from all others on an ongoing dynamic basis thus forging a stronger sense of identity. Having human rights has been described in modernity as synonymous to being a human, but such rights must be claimed.[393] If new rights' claims are to succeed, claimants must assert their similarity and difference with groups already admitted to the dignity of humanity, thus appealing to the universal and the particular, a dilemma which has been subjected to much debate.[394] An important point raised is that a claim to difference without similarity can establish the uniqueness of a particular group and justify its demands for special treatment but it can also rationalise its social or economic inferiority.[395] So here we see how personal identity links to human rights law, a theme discussed in chapter two.

Self-Determination and Self-Realisation

The conceptions of personal autonomy, identity and integrity specifically referred to in the ECtHR's jurisprudence, as emanating from a human

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[391] C. Taylor 1989.
[392] C. Douzinas 2000 at p. 396.
[393] See C. Douzinas 2000; see also C.A. MacKinnon 2006.
[394] See C. Douzinas 2000; S. Benhabib 1992, 2002b; J. Marshall 2005.
[395] C. Douzinas 2000.

right to respect one's private life, overlap and interconnect with each other and into the overarching idea of personal freedom. Yet becoming a free person has taken scholars in different directions. I label these for the sake of clarity as self-determination and self-realisation. However, the labelling used varies amongst commentators and is often used inconsistently.

By self-determination, I mean aiming to become something you are not yet – becoming a person who is different to, more than, or better than, what you are now. This presupposes a distinction between what you currently are and an image of what you can become if you become all you want to be, if you develop your potential and decide your purpose as a human being.[396] This in many ways finds sympathy with liberal and existential work and also strands of Nietzschean postmodernism. In its most extreme versions, self-determining freedom does not recognise any boundaries and it can end up as extreme anthropocentrism.[397] As discussed in the context of critiques of personal autonomy, many are critical of modern preoccupations with personal freedom as free expression: rights and the subjectivity of human thought are perceived as egocentric and devaluing the community, other people and those who provide care for us. Many have written of the loss of purpose people experience through the lack of a broader vision or meaning to life with this new modern focus on one's own individual life. "The dark side of individualism is a centring on the self, which both flattens and narrows our lives, makes them poorer in meaning, and less concerned with others or society."[398]

Yet there is something in this focus on individualism and personal identity that Charles Taylor has described as urging us to resist rejecting it. Taylor shows how self-determination must be conducted against an existing set of rules, or a gridwork of moral measurement, persuading people that self-fulfilment does not or at least should not exclude unconditional relationships and moral demands beyond the self. In fact, it actually requires these in some form. As Taylor puts it, it is hard to find anyone considered as being in the mainstream of Western societies who faced with their own life choices, about a career or relationships, gives

[396] C. Guignon 2004 at p. 3.
[397] C. Taylor at p. 68.
[398] C. Taylor 1989 at p. 4.

no weight at all to something they would identify as fulfilment or self-development or in some similar terms.[399] As we have seen in the context of reconceived versions of autonomy in Part II, a person's freedom is created in their relations with others and in a context and that person makes sense of their freedom and identity in that setting. The very possibility of self-criticism presupposes the reality of a self founded in certain beliefs and relationships.[400] A self-determining view of freedom can grow in a person's life as he or she makes it something better for them, through their commitments and projects.[401] This type of freedom can increase the probability that choices are seen as a person's own because the choices are of some worth to that person and perhaps part of an overall project or purpose to their life. As Taylor describes the source of worry concerning individualism and rights:

> We live in a world where people have a right to choose for themselves their own pattern of life, to decide in conscience what convictions to espouse, to determine the shape of their lives in a whole host of ways that their ancestors couldn't control. And these rights are generally defended by our legal systems....[402]

Taylor does not distinguish between self-determination and self-realisation is the way I am doing but describes that there

> is a certain way of being human that is my way. I am called upon to live my life in this way and not in limitation of anyone else's. This gives a new importance to being true to myself. If I am not, I miss the point of my life, I miss what being human is for me.[403]

This is the background that gives moral force to the culture of 'doing your own thing' or 'finding your own fulfilment'. The person seeking significance in life, trying to define him or herself meaningfully, has to exist in a horizon of important questions. In describing the moral ideal behind self-fulfilment in modern individualism as being 'true to oneself' however, there is an ambiguity in Taylor's work[404] for if being true to

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[399] C. Taylor 1989 at p. 75.
[400] I. Dilman 1991 at p. 262.
[401] I. Dilman 1991 at p. 264.
[402] C. Taylor at p. 2.
[403] C. Taylor 1989 at p. 29.
[404] C. Taylor 1989 at p. 15. See also Diana Meyers who proposes a conception of critical reflexivity in her analysis of personal autonomy which risks a slippage to self-realisa-

yourself means being true to your own originality, something only you can articulate and discover yet in articulating it, you define yourself, this is in keeping with self-determination, being free to change and fashion yourself. However, if it implies there is a 'true' or real you already inside yourself waiting to be discovered or uncovered, there is a risk of slipping towards some version of self-realisation.

This self-realisation idea contrasts with the conception of freedom as self-determination. Self-realisation directs you to realise and to be that which you already are. This has recently been described as the 'modern view of authenticity'.[405] The ideal of the authentic self is one involving a project of becoming the person you are. The aim is self-discovery to recover the lost you.[406] This finds resonance in Aristotelian and communitarian views of the self, and it may be seen in much of the popular personal development industry.[407] As Guignon explains, the basic assumption built into the ideal of authenticity is that, lying within each individual, there is a deep, "true self" the "real me". The ideal of authenticity asks you to get in touch with the real you, achieving genuine self-knowledge and to express your inner traits in your actions in the external world. It is only by expressing your true self that you can achieve self-realisation and self-fulfilment as an authentic human being. But as Guignon asks – what exactly is this inner self, what does it include and exclude? If this true self includes some fairly nasty or banal characteristics or is actually the result of advertising and the media or some other powerful forces, what are the consequences?[408]

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tion. She describes a concept of personal autonomy which consists in "an individual living in harmony with his or her "authentic self" which in turn requires self-discovery, self-definition and what she calls responsibility to self: Meyers 2005.

[405] C. Guignon 2004.

[406] Taylor describes the evolution of this development as modern freedom being won by our breaking loose from older moral horizons. People used to see themselves as part of a larger order. In some cases, this was a cosmic order, a "great chain of Being," in which humans figured in their proper place along with the angels, heavenly bodies, and our fellow earthly creatures. This hierarchical order in the universe was reflected in the hierarchies of human society. People were often locked into a given place, a role and station that was properly theirs and from which it was almost unthinkable to deviate. Modern freedom came about through the discrediting of such orders: Taylor 1989 and see also C. Guignon 2004 at p. 3.

[407] See, for example, P. McGraw 2001.

[408] C. Guignon 2004 at p. 9.

This idea of a true or essential self lying within each person has been subjected to rigorous, diverse and massive critique by a variety of scholars. A detailed analysis of this literature is beyond the scope of this book but links to the critiques of personal autonomy examined in Part II. Many now try to resolve

> the issue of how to understand autonomous agency once one has given up the idea that there is a true self to be discovered. If the self turns out not to be a fixed star to guide one's deliberations but rather a shifting, inchoate, plural and perhaps even illusory point of reference, it becomes much harder to say what it is that makes some desires truly one's own and others not.[409]

On this understanding of personhood, although selves would be seen as narrative inventions, they are nonetheless real, because "we really are the characters whom we invent". Actions are chosen to ensure that there is a pattern into which they will fit to try to make sense of ourselves. In the self-realisation version of personal identity and freedom "we are self-realising agents seeking to discover our true selves"[410] Yet this constant effort of seeking authenticity to be true to oneself can be frustrating and produce a sense of failure for non-achievement. It may also mask conventional or reactionary standards underlying the essential self – similar to that which is said to be 'natural', a theme developed in chapter eight.

Conclusions

In the following chapters of this Part III, different aspects of one's personal identity will be examined: sexual identity which, as one of the most intimate areas of one's life, has been clearly developed by the Court as a protected right through its Article 8 jurisprudence. I then move on to analyse access to information important to one's identity, particularly in relation to one's childhood and origins, and how the court has related this to a right protected under Article 8, it being seen as intrinsic to one's

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[409] J. Velleman 2005. See also C. Battersby 1998 who argues for a construction of identity in terms of living forces and birth, not as a state of matter that is dead or as a characteristic of a soul or a mind that remains fixed and constant, no matter which of its qualities or attributes might change. In this self-determining sense, for example, identities are deconstructed and reconstructed in relational terms.

[410] M. Griffiths 1995.

identity to know information about one's childhood, and potentially, as the Court expresses it, the 'biological truth' of one's origins. Contrasts are highlighted between the development by the Court of sexual identity as *self-determining* freedom while access to information about one's origins seems to reflect a potentially more constrictive and conservative reading of freedom, more in line with some ideas of *self-realisation* linked to certain aspects of moral autonomy and human dignity which can potentially constrain choices and personal freedom. I then turn to an evaluation of the Court's jurisprudence on aspects of religious identity. The Court uses Article 9 when analysing any applications involving religious expression or manifestation and this is critically investigated to show a distinction and potential incoherence in the Court's jurisprudence on identity under Article 8.

Chapter 7

Sexual Identity

> *Almost at the outset of our life, what we are and are to be is determined by the body's sexual configurations.*[411]

Introduction

Sex is generally considered to be determined at birth and indeed this was the legal position in the UK until recently.[412] Feminists and others have highlighted the gendered constitution of our world. It is not easy to overlook one's sex when much of the world's structures categorise us according to it. As many feminists have pointed out, this categorisation is generally to the disadvantage of the female category.[413] Sex is one of any person's most significant characteristics. Socially, sex is one of the factors which defines one's self-image and the expectations of others. It also affects one's legal status and capacity to enter into legal relationships with others. The ability to enter into close, legally protected personal relationships and the freedom to express one's sexual desires are important and, many say, fundamental to their personhood, both in terms of sexual identity as self expression and in terms of one's relations with others. The ECtHR has stated that only particularly serious reasons can enable the state to justify restrictions that concern "a most intimate part of an individual's private life."[414] So the assignment of a sex is fundamental to legal personality.

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[411] P. xi Foreword by A.C. Danto in J. Rosner (ed) 2007.

[412] See *Corbett v Corbett* [1970] 2 All ER 33; *Bellinger v Bellinger* and another [2000] 2 All ER 1639. See now the Gender Recognition Act 2004. See A. Sharpe 2002.

[413] See, for example, C.A. MacKinnon 1989, 2005; C. Littleton 1987; G. Bock and S. James 1992; D. Cornell 1995; N. Lacey 1998.

[414] See, for example, *Smith and Grady* (1999) 29 EHRR 493 at paragraph 89.

"A person's gender is central to his or her personality and aspirations, and to society's expectations."[415]

Case law in the areas of sexual identity illustrates the Court's development of Article 8's right to respect one's private life into a right to personal identity. In this area, the ECtHR's jurisprudence evidences a wide interpretation and a developing jurisprudence in keeping with ideas of an individual being entitled to live a life of their own choosing, in keeping with their own sense of their identity in a self-determining sense.[416] The context for much of the court's jurisprudence on this issue is firstly in case law brought by homosexual men claiming bans on their sexual behaviour – manifested in criminal sanctions in national laws – were contrary to Article 8. The second context is the jurisprudence of the Court on claims made by transsexual persons unable to live in conformity to their new sex in some way because of national laws restrictions or hindrances. In this area, what public morality is and how it interacts with personal identity rights is acute.

Homosexuality

The human rights aspect of homosexuality has been expressed as being encapsulated in the recognition of the right to self-determination of homosexuals.[417] The right to express and practise one's sexual orientation and have homosexuality legally and socially recognised as a way of life can therefore be presented as a question of equality, legal recognition and non-discrimination. As such, the "right to establish and develop relationships with other human beings, especially in the emotional field, for the

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[415] D. Feldman 2002 at p. 687.

[416] *Dudgeon v UK* (1982) 4 E.H.R.R. 149; *Norris v Ireland* [1988] ECHR 22; *Smith and Grady v UK* (1999) 29 EHRR 493; *Lustig-Prean and Beckett v UK* (1999) 29 EHRR 548. On sexuality and sexual orientation and personhood see E Heinze *Sexual Orientation: A Human Right* (Dordrecht and London: Martinus Nijhoff 1995) especially chapters 9 and 10. *Van Oosterwijk* Report of 1 March 1979, B.36 (1983), p. 26 *Rees v UK* Report of 12 December 1984, A.106, p 25; *Cossey v UK* Judgment *B v France* Judgment of 25 March 1992, A.232–C, 51 *Sheffield and Horsham*(1997) 27 EHRR 163; *Goodwin v United Kingdom* (2002) 35 E.H.R.R. 18; *I v United Kingdom* Application 25680/94 Judgment 11 July 2002.

[417] See P. Van Dijk 1993 at p. 183.

development and fulfilment of one's own personality"[418] shown in chapter five to have developed in the Court's Article 8 case law, would logically need to apply to all regardless of one's sexual orientation. If certain sexual practices are prevented, restricted or hindered in some way by national laws, then this could violate one's establishment and development of relationships with others in forming one's conception of the good life and living as one wishes. Of course, problems arise morally and socially when it comes to certain sexual practices which are taboo like paedophilia and incest. In the context of discussing permissible choices, John Keown has argued that the right to make a choice is essentially meaningless, giving examples like the right to choose paedophilia.[419] He asks whether the mere fact that someone wants to choose to have sex with children carries any moral weight. This clearly illustrates the value of what Taylor analyses, evaluated in my previous chapter, concerning the right to choose only arguably making any moral sense in the context of a moral framework which enables people to discern what it is right to choose and what choices will in fact promote human flourishing, both of yourself and of others. It is now established case-law of the Commission and the Court that the prohibition by law of homosexuality constitutes an interference with the exercise of the right to respect for private life guaranteed by Article 8(1) as will be shown in this chapter. However, this was not always the case and for those in the military it took significantly longer for rights to be seen to be violated by banning homosexuals from employment there and it is still the position that certain practices, notably sadomasochism, can be justifiably restricted under Article 8(2).

To begin with, a general prohibition of male homosexual practices was accepted as justified by the Commission but with no arguments in an early decision on the basis of the protection of health and morals relied on by the Federal Republic of Germany.[420] Later, in a similar complaint from another applicant from the FRG prosecuted for homosexual acts, the Commission were prepared to undertake an inquiry into the justification of the restriction and to take into account developments in the country

[418] As set out in another context in *Bruggeman* at p. 414.
[419] J. Keown 2002 p. 54.
[420] In *X v FRG* Yearbook I (1955–1957) p. 228 Appl no. 104/55.

and generally.[421] In 1978 and 1979, a couple of complaints against the UK were declared admissible and examined on their merits.[422] In one, *X v UK*, complaints concerned the age of consent being higher for homosexual male sex than for heterosexual sex in Great Britain. The Commission, followed by the Committee of Ministers, found that prosecution and punishment of such acts were justified on the ground of the protection of the rights and freedoms of others. The second case was the leading case of *Dudgeon v the UK.*

In *Dudgeon v the UK*, a male adult who was homosexual brought an application to the ECtHR claiming that Northern Irish law violated the ECHR. The relevant laws made it an offence in Northern Ireland to commit or attempt an act of buggery, and an act or attempt of gross indecency with another man, even for those over the age of 21. The court decided by a majority of 15 votes to 4 that Article 8 was breached by these laws for men over 21. However, the court accepted that some degree of regulation of all forms of sexual conduct by the criminal law is justified as necessary in a democratic society and that this control may extend to some consensual acts committed in private. The Court considered the moral perspective of a large number of responsible members of Northern Ireland to be relevant to the constitutionality of such a criminal law prohibiting private, consensual sex among adult gay men. This constituency generally felt that decriminalising such behaviour would be seriously damaging to the moral fabric of Northern Irish society. The court found on the evidence however that decriminalisation would not actually weaken existing moral standards. The fact in this case – that there was a failure to prosecute these acts – makes it impossible to maintain that such regulation was a pressing social need here. The Court expressed the view that there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of Article 8.[423] However, the Court said it was relevant for the purposes of Article 8(2) to look at the social mores of the community in question. Despite this,

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[421] *X v FRG* Yearbook XIX (1976) p. 277 Appl no. 5935/72.

[422] Appl no. 7215/75 *X v the UK* Yearbook XXI (1978) p. 354 and Appl no. 7525/76 *X v the UK* Yearbook XXII (1979) p. 156. Report of 12 October 1978, *X v the UK* D&R 19(1980) and report of 13 March 1980, *Dudgeon* B. 40(1984) pp. 32–43.

[423] *Dudgeon* at paragraph 52. The court decided that it was not necessary to examine Art. 14 as well – at paragraph 70.

any justifications for the prohibitions are outweighed by the effects which they can have on the life of homosexuals: sexual activity constituting a particularly intimate area of one's private life while any shock or disturbance caused to others by the commission of the acts in private cannot warrant the application of penal sanctions when only consenting adults are involved. As the Court puts it:

> [a]lthough members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.[424]

Accordingly, the Court decided that the prohibitions were disproportionate to the aims sought to be achieved and not necessary in a democratic society.[425] Here there was a grave detrimental interference with the applicant's private life and on the other hand there was little evidence of damage to morals.[426]

Fenwick notes that the case demonstrates the Court is prepared to uphold the right of the individual to choose to indulge in homosexual practices and suggests that the term 'private life' in Article 8 may be used to cover a wide range of situations where bodily or sexual privacy is in question.[427] The majority decision has been described as an illustration of the Court being interested in the evolutive interpretation towards a moral truth of the ECHR rights, as contrasted to an evolution towards some commonly accepted standard, regardless of its content.[428] This suggestion of some objective substance or value to the protected right and evolution is important only because and insofar as it gets this value right: an idea of consensus seems a more hypothetical one. So the criticism is made that the ECtHR makes moralistic preferences of the majority synonymous with 'public morals', the latter being a legitimate aim under Article 8(2).[429]

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[424] *Dudgeon* at paragraph 60.

[425] *Dudgeon* at paragraphs 49, 60, 61.

[426] In *Norris v Ireland*, the court referred to the *Dudgeon* case and held there was no pressing social need to make such acts criminal, finding for the applicant: Judgment 26 October 1988. In *Modinas v Cyprus* (1993) 16 EHRR 485, the court ruled that a prohibition of homosexual relations in private between consenting adults constituted an interference of Article 8 on the basis of *Dudgeon* and *Norris*.

[427] H. Fenwick 2002 at p. 739.

[428] See G. Letsas 2006 at p. 79.

[429] G. Letsas 2006 at p. 79.

While accepting that the constitutional question was ultimately one of weighing the harmfulness of the proscribed behaviour to society against the harmfulness of preventing people from engaging in that behaviour, the Court implicitly confirmed the importance of increased understanding and tolerance in human rights thinking and expressly rejected the kind of legal moralism in conservative communitarian views like those articulated by Lord Devlin which are referred to in the judgment.[430] Yet, the majority do seem to accept the idea of personal freedom as self-determination, one which is for the individual decide what he or she chooses to do with their life and how they choose to live it. Consideration is given to the moral framework in the sense of the moral majority's sensibilities but also in the sense of living in a society where sexual activity in private constitutes a particularly intimate area of one's private life deserving protection under Article 8.

The dissenting opinions in the case show distinctions between different types of freedom and the relationship of public morals to those. Judge Matscher states that the applicant is seeking the express and formal repeal of the laws in force and a declaration that homosexuality be an alternative equivalent to heterosexuality, with all the consequences that that would entail. This, in his view, "is in no way required by Article 8 of the Convention." He expressed doubts as to whether there was in existence the fear, suffering and psychological distress that the applicant complains of, if he was open in his activities and led an organisation to change the law on this issue. Further, he notes that there had been no prosecutions under the relevant law in Northern Ireland for 10 years.[431]

It is perhaps most clearly in the dissenting judgment of Judge Walsh that we see indications of an understanding of a right to personal freedom as self-realisation tied to morality and human dignity: not only in relation to Article 8(2) but to the coverage of Article 8(1) itself. In his judgment, the question is whether under Article 8(1) the right to respect for one's private life is to be construed as being an absolute right *irrespective of* the *nature of the activity* which is carried on as part of the private life and

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[430] See P. Devlin 1965. See analysis and critique by C. Nowlin 2002.

[431] Other dissenting opinions were given by Judge Zekia, the Cypriot judge: there was a similar law in Cyprus. He stressed the immorality he saw involved. The dissenting opinion of Judges Evrigenis and Garcia De Enterria expressed the view that the case should also be examined under Art. 14.

no interference with this right under any circumstances is permitted save within the terms of Article 8(2). As he expresses it, this appears to be the interpretation put upon it by the Court in its judgment. Judge Walsh states that this is not essentially any different to describing the private life protected by Article 8(1) as being confined to the private manifestation of the human personality. In any given case *the human personality in question may in private life manifest dangerous or evil tendencies calculated to produce ill-effects upon himself or on others*. He notes that the court does not appear to consider as a material factor that the manifestation in question may involve more than one person or participation by more than one person provided the manifestation can be characterised as an act of private life. If, for the purposes of the case, the assumption of coverage by Article 8(1) is to be accepted, one proceeds to the question of whether or not it is justified under Article 8(2). This in turn begs the question that under Article 8 the inseparable social dimensions of private life or private morality are limited to the confines of Article 8(2). On the question of legitimate aims, the judge raises public morals and health which leads to the question of the *purpose of law*. He refers to the Hart/Devlin debate and J.S. Mill. Devlin is quoted expressing the view that the law exists for the protection of society and "must protect also the institutions and the community of ideas, political and moral, without which people cannot live together. Society cannot ignore the morality of the individual any more than it can his loyalty; it flourishes on both and without either it dies."[432] The Wolfenden Committee in the UK which investigated and recommended decriminalising homosexuality in the 1960's and J.S. Mill's harm principle is quoted. Reference is made to the alternative purpose of law, to enable personal freedom and not interfere with it unless harm rather than offense is being caused. Judge Walsh states that sexual morality is only one part of the total area of morality and a question which cannot be avoided is whether sexual morality is only private morality or whether it has an inseparable social dimension. Interestingly for the purposes of my arguments concerning personal freedom, he expresses the view that sexual behaviour is determined more by cultural influences than by instinctive needs with cultural trends and expectations creating drives *mistakenly thought to be intrinsic instinctual urges*. Legal arrangements and prescriptions set up to regulate sexual behaviour are therefore

[432] Quoted in the dissenting opinion of Judge Walsh at paragraph 9.

on this view very important formative factors in the shaping of cultural and social institutions.[433]

The age limit for consensual male homosexual sex was later successfully challenged under Article 8 in conjunction with Article 14 on the basis that it discriminated between male and female homosexuals since the age of consent was 16 for female homosexual intercourse. Voting by 14 to 4, the Commission found that many other states have equalised the ages of consent for homosexual and heterosexual acts and found that the interference could not be justified on grounds including that of public morality.[434]

Group Homosexual Sex

It has been contended that the Strasbourg institutions should scrutinise national legislation and not accept the justifications advanced by them uncritically. Van Dijk uses as an example a case scrutinising legislation prohibiting homosexual acts in private between consenting males of 21 and older in England and Wales when two or more persons take part or are present.[435] The applicant was arrested when organising a gay party at this flat and he complained that the mere existence of the legislation continuously and directly affected his private life but the Commission did not accept that there was any evidence showing he wanted to have consensual group sex himself and so concluded his private life was not affected. This decision has been criticised on the ground that a police raid and arrest on suspicion of having violated the provision concerned surely indicates an interference in the applicant's private life and home.[436] It is precisely the actual practice, one which could lead to police action on the basis of an anonymous phone caller and could result in the arrest on the mere fact that the persons gathered appear to be gay, that should have led the Commission to the conclusion that the legislation concerned constituted a continuous threat of interference with any homosexual person's quality of life. Van Dijk is of the opinion that the Commission evaded the real

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[433] Ibid. at paragraph 15.
[434] *Sutherland v the UK* Application no. 25186/94, 1 July 1997.
[435] Application no. 10389/83.
[436] P. van Dijk 1993.

issues and upheld legislation which amounted to a clear interference with any homosexual's private life without even examining the justification of this interference under Article 8(2).[437]

In *ADT v the UK*, the Court purported to follow *Dudgeon* to the effect that moral disapproval of the majority to consensual, non-injurious sexual activity conducted privately cannot in and of itself justify criminal prohibition of such activity.[438] It ruled that prosecution for engaging in private and non-violent sexual behaviour with more than one other adult male simultaneously, unduly restricted that person's right to privacy under Article 8. Fenwick views these cases as illustrating that "[b]y these incremental steps, legal acceptance of the sexual autonomy of homosexuals has almost been brought about, in the sense of achieving equality with heterosexuals…"[439] However, Nowlin is critical of the Court's acceptance in these cases of the legitimacy of the putative aims of the laws in question in terms of the protection of morals and the rights and freedoms of others. The decision is described by Nowlin as troublesome because, as the Court observed, English criminal law prohibits group sex performed privately among male homosexuals but not group sex performed privately among heterosexuals: so it is difficult to understand how a discriminatory law rooted in sexual orientation can be justified in the name of protecting morals.[440] It cannot therefore be seen as part of a morality that pays due regard to the constitutional values of individual self worth, equality, and human dignity. Nowlin continues that ultimately reference in the Convention to protecting the rights of others must be construed to mean respect for the moral rights of others and proper judicial attention to those rights should always render moral majoritarianism or legal majoritarianism suspect in civil and human rights analyses. The only moral question at stake in cases such as *Dudgeon* and *ADT* should be the critical moral question why should the state be entitled to restrict a socially accepted civil right or freedom, and for Nowlin this question needs to be answered as J.S. Mill proposed, that is, in terms of harmfulness to human dignity, equality, and autonomy.[441]

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[437] P. van Dijk 1993 at p. 189.
[438] *ADT v the UK* 2000.
[439] H. Fenwick 2002 at p. 741.
[440] C. Nowlin 2002 p. 284.
[441] Ibid. at p. 285.

The applicants in *Laskey v the UK*[442] were unsuccessful in arguing that there had been a violation of their Article 8 rights. Instead, the case provides an example of the Court deciding that there was a justified interference with private life under Article 8(2). In terms of justification, the state was entitled to have regard in particular to the fact that there was a significant degree of injury or wounding and to highlight the seriousness of the harm caused by the activities in question. The facts are probably familiar to most readers. The applicants had been criminally convicted for consensual group male homosexual sex involving sadomasochistic activities which had been recorded on videotape. The UK House of Lords confirmed that consent was not a defence to offences of assault occasioning actual bodily harm and unlawful wounding and the applicants' convictions were therefore upheld. When the case reached the ECtHR, the Court began by saying that not every sexual activity carried out in private necessarily falls within the scope of Article 8. However, there can be no doubt that sexual orientation and activity concern an intimate aspect of private life. The court pointed out that the activities involved a considerable number of people, recruiting new members, provision of specially equipped 'chambers' for the activities and the shooting of many videotapes distributed to members. "It may thus be open to question whether the sexual activities of the applicants fell entirely within the notion of "private life" in the particular circumstances of the case". So the Court cast doubt on whether they may have found this to be covered at all by Article 8(1), but as this was not in dispute by the parties and the Court assumed that the prosecution and conviction amounted to interferences with the applicants' private life, the facts were covered by Article 8(1).[443] Under Article 8(2), in deciding whether the restrictions were necessary in a democratic society, the Court noted that one of the roles of the state is to regulate activities, sexual or otherwise, which involve the infliction of physical harm. The determination of the level of harm is a matter for the state in the first instance since what is at stake is a balancing act between public health considerations and the deterrent effect of the criminal law and the personal autonomy of the individual. The applicants' activities involved a significant degree of injury or wounding which could not be regarded as trifling or transient: this is the distinguishing feature from

[442] *Laskey and others v the UK* (1997) 24 EHRR 39.
[443] At paragraph 36.

other homosexual cases involving private activities.[444] National authorities were entitled to consider the prosecution and conviction of the applicants necessary in a democratic society for the protection of health. It was therefore not necessary to determine whether the interference could also be justified on the ground of protection of morals.[445]

The present and potential perceived gravity of the acts was sufficient for the court to distinguish *Laskey* from the earlier decisions concerning consensual homosexual behaviour in private between adults. Judge Pettiti's partly dissenting judgment in *Laskey* has been criticised.[446] That judge reasoned that *Laskey* did not fall within Article 8 at all since that article provides protection for persons' intimacy and dignity not for a person's baseness or criminal immorality. The wording is described by Fenwick as allowing distaste and lack of sympathy for the activities in question to have some bearing on judicial reasoning.[447] Further, Pettiti in his concurring judgment suggests that the margin is wide in relation to questions of morals or problems of civil society and above all where the concern of the state was to afford better protection to others.[448] The *Laskey* decision has been said to support the majority decision in the UK House of Lords that the criminalisation of consensual acts of giving and receiving of pain for sexual pleasure is not a matter of privacy in particular or in general a violation of human rights of all of the parties to those acts.[449] It has been argued that the court's decision appears to suggest that in matters of particular complexity specifically when concerned with morality or presented in terms of the protection of the vulnerable, the court will be reluctant to intervene, "thereby giving a state's paternalistic policy decisions considerable latitude and the gloss of legitimacy associated with human rights",[450] leading to analysis that human rights may be about the violence of exclusion and the denial of human rights.[451]

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[444] At paragraphs 43 ff.
[445] At paragraphs 50–51.
[446] See for example, H. Fenwick 2002 at p. 743.
[447] Ibid. at p. 743.
[448] Citing *Muller and Others v Switzerland* (1991) 13 EHRR 212.
[449] L.J. Moran 1998 p. 81.
[450] L.J. Moran 1998 at p. 82.
[451] L.J. Moran 1998. Moran argues that the court in *Laskey* denied the humanity of those who act in ways to derive pleasure from the consensual giving and receiving of pain: Moran 1998 at p. 83.

Although in *Laskey* the Court found the behaviour to be dangerous as a matter of physical health and did not determine whether it presented a real risk to morals under Article 8(2), it has been argued that the only acceptable interpretation of the notion of protecting morals for the purposes of the Convention and in light of the Court's well-established commitment to the values of liberal pluralism is a construction rooted in J.S. Mill's analysis of moral rights. So the use of force to protect or preserve morality is defensible only where such coercion is applied to protect what Mill calls the moral rights of others, preventing harm.[452] Sexual activity is said to be good if it serves some desirable purpose, to make people happy or reproduce the human species for example. It is considered bad if it appears to undermine desirable social goals or is exploitative or causes pain. Nowlin sees this interpretation in the Court's judgment in *Laskey* where it made clear that the seriousness of the physical injuries from various sadomasochistic activities not the sexual proclivities of the participants was the cause for legal concern.[453] Although the court has stated it is not possible to find a uniform conception of morals, Nowlin states that litigation involving the notion suggests that the court has two notions in mind. One construes the protection of morals as the safeguarding of the moral ethos or moral standards of a society as a whole (*Dudgeon*), and evokes, says Nowlin, Devlin's concern that the common or established morality of a society not be endangered internally or externally. The other is more specific and clearly resembles J.S. Mill's restricted meaning or what Nowlin calls the constitutional meaning. On this basis, one aspect of the protection of morals is the "protection of the rights and freedoms of others" especially those who, owing to some state of immaturity, disability, or dependency, require "special" protection.[454] This twofold picture of morality has been described as highly problematic because any attempt by a government or court to protect a common or established set of moral principles will be likely to undermine its commitment to a liberal, pluralistic, constitutional morality unless this latter morality is in fact the positive or common morality of the society or state in question. In arguing that the acts where of torture, the government in *Laskey* invoked the critical or constitutional thinking articulated in Canada on a case concerning

[452] C. Nowlin 2002 p. 265.
[453] *Laskey* at paragraphs 20 and 47.
[454] *Dudgeon* at paragraph 47.

hard core pornography.[455] It argued that acts of torture could be banned or criminalised for the broader moral reason that they "undermine the respect which human beings should confer upon each other" and invokes the concept of human dignity discussed in chapter two.[456] This argument implies that this is the only way in which the protection of morals under Articles 8(2) and 10(2) should be interpreted. Nowlin points out that a fundamental constitutional value – respect for the inherent dignity of the human being – must not be allowed to be undermined by the exercise of a stipulated constitutional right or freedom. The same logic underlies arguments made in support of proscriptions against hate speech. The argument goes that acts of hatred rooted in indefensible prejudices unjustly demean the dignity and humanity of the human targets of such acts. This thinking has already been applied to debates on pornography.[457] Nowlin notes that the court in *Laskey* came remarkably close to applying Mill's critical morality insofar as it recognised that when drawing an appropriate boundary around the limits of state interference in situations where the victim consents the personal autonomy of the individual is a critical consideration. But then in its final analysis, the Court did not effectively address this consideration. Instead, it focused on the potential and actual seriousness of the injuries inflicted on the participants without connecting this phenomenon to the participants' presumably informed wishes, desires, or aspirations. The approach taken by the Court in *Laskey* has thus been criticised as paternalistic. Yet we see human dignity being employed in terms described by Beyleveld and Brownsword in chapter two in the 'constraint' and 'empowerment' sense.[458]

Family Matters

It has been alleged at the ECtHR that an application for authorisation to adopt had been rejected on the basis of the applicant's homosexuality and that this amounted to discrimination on the ground of sexual orientation,

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[455] *R v Butler* [1992] DLR (4th) 449.

[456] *Laskey* at paragraph 40.

[457] C. Nowlin at p. 283. See in particular, the work of C.A. MacKinnon 1989 and 2005.

[458] See D. Beyleveld and Brownsword 2001 and discussion in chapter two above.

contrary to Article 14.[459] The French government submitted that the reason for the rejection of an application to adopt from a man who was homosexual was not his sexual orientation but the potential harm to the interests of the child to be adopted, if it is brought up by a homosexual and is deprived of a dual maternal and paternal role. The applicant argued that the prejudices of third parties against homosexual parenthood could not justify excluding him from adoption procedures because this would effectively amount to giving a right of veto to those motivated by such prejudices. The Court found that the decision not to allow the applicant to adopt was indeed based on his homosexuality and then examined, as in all cases of alleged discrimination whether the differential treatment complained of was nevertheless based on an objective and reasonable justification. There is no common ground, the Court said, on homosexuals and adoption amongst contracting states. Taking into account the wide margin of appreciation, there was said to be no infringement of the principle of proportionality. Although covered in many respects by Article 8's respect for private life, in *Kerkhoven v the Netherlands*,[460] the Commission decided that a relationship between homosexuals does not qualify as *family* life in the Article 8 sense. The case concerned a lesbian couple who conceived a baby through artificial insemination. The existence of a family being denied, there was no protection of the relevant immigration law concerned. Issues of personal identity or autonomy seem distinctly lacking in these judgments.

The Military

In 1983, in *B v the UK*,[461] the Commission considered there to be an interference with Article 8(1) but such prohibition might properly be considered "necessary in a democratic society for the prevention of disorder" where the prohibiting regulation of homosexuality concerned soldiers. The Commission accepted that homosexual conduct by members of the armed forces may pose a particular risk to order within the forces which would not arise in civilian life. However, in *Smith and Grady v*

[459] *Frette v France* (2004) 38 EHRR 438.
[460] *Kerkhoven v the Netherlands* Application No. 15666/89.
[461] *B v the UK* Application No. 9237/81, D&R 34 (1983).

the UK and *Lustig-Prean and Beckett v the UK*,[462] the Court ruled that discharging homosexuals from the armed forces violated Article 8. The UK government conceded that there had been an interference with Article 8 but argued that it was justified under Article 8(2). It was not argued that the applicants waived their rights under Article 8 when they initially joined the forces under contractual employment law analysis and no argument was made that they were free to resign from the forces and seek alternative employment.[463] The court held without reasoning that in the circumstances of the case the investigations into their sexuality and the subsequent discharges amounted to an interference with Article 8. In finding the interference unjustified, it noted among other matters the unique nature of the military and the difficulty with transferring military skills and qualifications to civilian life, that would reflect the seniority and status that they had achieved in the airforce.[464] Despite the decriminalisation of male homosexuality in Great Britain, the relevant legal provisions made homosexuality a cause for an administrative discharge from the military with specific armed forces regulations dealing with homosexuality there.[465] In the two cases which were decided by the ECtHR on the same day, all four applicants were members of the armed forces of the UK and were under military police investigations into their sexual orientations. The applicants had admitted they were homosexual and had been administratively discharged in accordance with the military policy. They complained that the investigations and the discharges constituted violations of Articles 8 and 14. In *Smith and Grady*, there were also allegations of breach of Articles 3 and 10. As to Article 3, the applicants' claims were based on the argument that "their discriminatory treatment, based on crude stereotyping and prejudice, denied and caused affront to their individuality and dignity."[466]

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[462] *Smith and Grady v the UK* (1999) 29 EHRR 493; *Lustig-Prean and Beckett v the UK* (1999) 29 EHRR 548.

[463] As in other employment cases, as to some of which see chapter nine below. See also S. Knights 2007.

[464] It also noted that the judgment in *Kalac v Turkey* 1997 was to be distinguished on the basis that Mr Kalac was dismissed on grounds of his conduct while the applicants were discharged on grounds of their innate personal characteristics (at paragraph 92–93 of the judgment: see S. Knights pp. 136/7 paragraph 5.30.

[465] See *Lustig* at 563–64.

[466] At paragraph 119, 538.

In terms of the Article 3 arguments in *Smith and Grady*, the Court considered that ill-treatment must attain a minimum level of severity before it could be considered degrading. The assessment of that minimum level depends on the "duration of the treatment and its physical or mental effects."[467] Treatment may therefore be considered degrading if it makes the victim feel fearful or inferior and is capable of breaking their physical or moral resistance. And the court decided that the treatment here did not reach the necessary level of severity. As to Article 10, the applicants argued that a person's sexual identity encapsulates a belief system or a world view that is essential to his or her identity. Because of the military policy, they were forced to lead a dual existence, thereby denying them the right to communicate their own sexual identity openly and freely.[468] Article 14 was given separate consideration. The Court concluded that the freedom of expression protected by Article 10 was a secondary factor to the applicants' right to respect for their private lives. It did not overlook the fact that the silence imposed on the applicants with regard to their homosexuality, together with the constant obligation to be discreet when interacting with colleagues, friends and acquaintances, could amount to an interference with their freedom of expression. However, it stated that the sole basis for the investigation and discharge of the applicants was sexual orientation and not freedom of expression.[469] The Court is demonstrating its understanding of personal identity as interpersonally formed and appreciated. It understands a person's sexual orientation is part of their identity that has to be respected and protected in a communal setting, including in the army or one's employment situation.[470]

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[467] At paragraph 120 at 538.

[468] At paragraph 126 at 539–40.

[469] Judge Loucaides in a partly dissenting opinion in both cases agreed with government arguments that communal accommodation arrangements could prove to be a problem and that this issue is no different from the one concerning the potential problems posed by male and female service members sharing communal accommodation.

[470] See also *Perkins and R v the UK* Application nos. 43208/98 and 449875/98 Judgment 22 October 2002, where *Lustig-Prean* and *Smith and Grady* were accepted and followed.

Transsexualism

The European Commission concluded in *Van Oosterwijk* in 1979 that the refusal of the Belgian authorities to take account of "an essential element of [the applicant's] personality: his sexual identity resulting from his changed physical form, his physical make-up, and his social role" amounted to "a veritable failure to recognise the respect due to his private life within the meaning of Article 8(1)".[471] However, no judgment was given on the merits due to failure of exhaustion of local remedies. In *Rees v the UK*,[472] the Commission made similar expressions regarding the situation in the UK at that time which meant that the applicant – who gender reassigned from female to male – could not alter his birth certificate to show his male sex. Whilst agreeing with the Commission that Article 8 not only protects the individual against arbitrary interference, but also imposes positive obligations on governments, the ECtHR by 12 votes to 3, disagreed with the Commission that such positive obligations required the government to allow annotations to the birth register and to enact detailed legislation regulating the effects of such annotations. Instead it decided that it must for the time being be left to respondent states to determine the extent to which they could meet the demands of transsexual persons: though it was noted that the situation needed to be kept under review. In *Cossey v the UK*, following *Rees*, the individual applicant was unsuccessful before the Court by the narrow margin of 10 to 8 and the differences in the facts of the case – the applicant was gender reassigned from male to female and now wished to marry a man not being sufficient to distinguish it.[473] The Court relied on there being little common ground between states to the ECHR, so that states therefore enjoyed a wide margin of appreciation in how to deal with the cases. The important dissenting opinion of Judge Martens in *Cossey*, already referred to earlier in this book, should not however be forgotten: that is:

> Human dignity and human freedom imply that a man should be free to shape himself and his fate in the way that he deems best fits his personality.[474]

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[471] *Van Oosterwijk* Report of 1 March 1979, B.36 (1983), p. 26.
[472] *Rees v UK* Report of 12 December 1984, A.106, p. 25.
[473] *Cossey v UK* Judgment.
[474] Dissenting opinion in *Cossey* Series A No. 184, 24–25.

In the later case of *B v France* in 1992,[475] the applicant was successful but the Court highlighted what it saw as distinguishing features of the case from *Rees* and *Cossey*, particularly the differences between the British and French law and practice on civil status, change of forenames and use of identity documents. Under French law, a change of forename was refused to the applicant and an indication of her original sex was on identity cards.

In 1998 in the case of *Sheffield and Horsham*, again the applicants from the UK were unsuccessful, but by a narrow margin of 11 votes to 9.[476] Judge van Dijk's dissenting opinion (to which Judge Wildhaber declared agreement) refers to the legal status of post-operative transsexual persons not as an issue of sexual minorities but of privacy, that is, everyone's right to live one's life as one chooses without interference, and everyone's right to act and be treated according to the identity that corresponds best to his or her innermost feelings, provided that by doing so one does not interfere with public interests or the interests of others.[477] Further, he stated that what was at stake here is the fundamental right to self-determination, with people being entitled to legal recognition of the sex that in their conviction best responds to their identity.[478] In 2002, the Court ruled unanimously in favour of the applicants in *Goodwin and I v UK*,[479] finding violations of Article 8 and 12 (the right to marry). These cases express the Court's position on personal identity clearly. It states that:

> . . . the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including their right to establish details of their identity as individual human beings . . . the right of transsexuals to personal develop-

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[475] *B v France* Judgment of 25 March 1992, A.232–C, 51. On different facts, see also *Burghartz* 22 Feb 1994 A.280–B, p. 28 where the female applicant had not been able to change her surname, Article 8 is engaged. *Stjerna* 25 Nov 1994 A 299–B p. 28 confirmed this approach but the court made clear that a broad margin of appreciation exists as to rules to apply in this regard: see chapter five above.

[476] (1997) 27 EHRR 163 but see the dissenting opinion of Judge van Dijk.

[477] Dissenting opinion of Judge van Dijk at para. 2.

[478] Ibid. at para. 5.

[479] *Goodwin v United Kingdom* (2002) 35 E.H.R.R. 18; *I v United Kingdom* Application 25680/94 Judgment 11 July 2002.

> ment and to physical and moral security in the full sense enjoyed by others in society cannot be regarded a matter of controversy…[480]

Van Dijk et al. note that it is interesting that the court emphasise the continuing international trend rather than the already existing fully-fledged consensus on transsexualism. A violation was held to have occurred when a private health insurance company refused to pay up for a transsexual person's treatment in *Van Kuck v Germany*.[481] The Court noted that the civil court proceedings touched upon the applicant's freedom to define herself as a female person, one of the most basic essentials of self determination. The facts were held to have had fundamental repercussions on the applicant's private life, namely her right to gender identity and personal development.[482] In talking of gender reassignment cases, prior to *Goodwin* and *I*, Feldman states that:

> [a] consistent refusal by law to accept a person's commitment to a reassigned sex, involving major surgery and drug therapy over an extended period, and confirmed by doctors, constitutes a serious violation of respect for that person's private life. Such a violation can be justified under Art 8(2) only if it is in accordance with [its provisions]…it is hard to see how an interference of this magnitude can be said to be necessary for any of those purposes or justified by any other compelling public interest which can stand against the fundamental violation of the subject's private life and self-esteem.[483]

As can be seen in the development and shifts in the law in these cases, the ECtHR's jurisprudence can now be said to provide a legal entitlement to personal freedom in the sense of allowing individuals to choose how to live their own lives, including making sure that enabling social conditions are accessible and available to them. Further, the Court's conception of freedom under Article 8 could be interpreted as a form of personal freedom as self-creation or self-determination – the freedom to be and become the person one chooses, while acknowledging that this happens in a societal context and must not harm others. The *Goodwin* judgment led to the UK parliament enacting the Gender Recognition Act

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[480] *Goodwin v United Kingdom* (2002) 35 E.H.R.R. 18 at para. 90 and *I v United Kingdom* Application 25680/94 Judgment 11 July 2002 at para. 70.

[481] *Van Kuck v Germany* Application No. 35968/97 Judgment 12 June 2003.

[482] Ibid. at paragraph 75.

[483] D. Feldman 2002 at p. 699.

2004 which grants legal rights to eligible transsexual persons.[484] A large majority of European countries now allow birth certificates to be altered to indicate the new sex of the registered person. In *Grant v the UK*,[485] the ECtHR Chamber praised the UK for its 'laudable expedition' in securing the passage of the Act.

Conclusions

The development of much of the jurisprudence in the area of sexual identity shows the right to personal identity as a legal entitlement to freedom in the sense of allowing individuals to choose how to live their own lives. This form of freedom as self-determination, allowing new horizons and imaginings and changes, rather than bringing to realisation some essence within, has assisted in allowing freedom to persons to live their lives as they choose "not to be dictated to by others."[486] Although the areas of sexual identity and religion inevitably tie in to these philosophical issues of self-determination and self-realisation, before examining the Court's jurisprudence on religion and identity, I now turn to the topical idea of access to information about one's origins in which a version of identity as potentially restrictive is evinced from the case law.

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[484] Under that Act, an individual – without referring to whether or not they have undergone gender reassignment surgery – may apply to a Gender Recognition Panel for a certificate which is to be granted when there is evidence that the applicant has had gender dysporia and has lived in the acquired gender throughout a period of two years immediately before the application: s.2(1). Such a certificate will result in the applicant being treated as having the acquired gender as a matter of law. A mechanism is provided for the issuance of a new birth certificate with the new gender and to allow marriage as a person of that gender: s.9–17.

[485] *Grant v the UK* (2007) 44 EHRR 1.

[486] I. Berlin 1969.

Chapter 8

Identity and Access to Information Important to One's Identity

> *. . . everyone should be able to establish details of their identity as individual human beings . . .*[487]

Introduction

In 1997, David Feldman, reflecting on the case of *Gaskin v UK*, which will be discussed in this chapter, commented that the case created a right not to be deprived of one's personal history.[488] He forecast that this could lead to the creation of a right to an identity. To a certain extent this has come to fruition, although what exactly this identity right means is uncertain in the context of one's personal history which inevitably affects other people. In this chapter, the Court's case law on matters involving access to information on one's childhood and one's origins is examined. The case law, although deciding in favour of forms of personal freedom as self-determination, veers towards a sense of freedom as self-realisation and ideas of authenticity. Here personal freedom is said to arise when one is reconciled with one's, perhaps pre-determined, core essence, through some sort of process of self-discovery. In particular, in *Odievre*, the dissenting opinion highlights a self-realisation version that is potentially restrictive of the formation of personal freedom. This is especially evident when considering the rights and freedoms of others, specifically the woman who gave birth in this case which will be fully explained in this chapter. To the extent that personal identity is linked to what has been described as a 'biological truth', caution should be exercised to prevent the return

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[487] *Gaskin v the UK* at paragraph 39.
[488] D. Feldman 1997.

of constraints on ways of being and living which in many cases the court has been eager to prevent in other jurisprudence.

Access to Information about One's Childhood

As we saw in chapter six, in "post-liberal" identity formation,[489] which have much in common with communitarianism, the personal identity is composed of fragments, a web, or perhaps, a patchwork.[490] The person depicted varies according to time and space and although constrained, is an agent capable not only of action, but also of continual reinvention of identity. This process takes place not in conditions of its own choosing and decisions taken can be said to be "inauthentic" in the sense that they are out of line with the relevant individual's identity. This self-realisation and process of discovering the true or real you could mask state coercion. Some individuals may be divided against themselves because of social experiences and the social conditions of their lives. Does this mean that they cannot make autonomous or authentic decisions? The requirement of a constant effort in seeking authenticity is open to criticism as unattainable. In the sense that a person is not being true to their real, true self, if they do not have full knowledge of their experiences and complete history, then it could be argued that they will not be able to appreciate or be fully aware of their own personal identity. I have interpreted this type of self-realising freedom as, to a certain extent, being engaged with in some ECtHR judgments but not brought to fruition, at least, not yet. In *Gaskin v UK*[491] the ECtHR decided that there had been a violation of Article 8 because the applicant was refused access to his file relating to the whole period in which he had been in care. The applicant had been in the care of the local authority or council throughout his childhood and had been boarded out to various foster parents. Under the relevant regulations, this council was under a duty to keep certain confidential records concerning him and his care. The applicant contended that he was ill-treated in care and, now an adult, wanted to obtain details of the information in his records. The council eventually agreed to provide the

[489] H. Reece 2003.
[490] M. Griffiths, 1995.
[491] *Gaskin v the UK* Judgment 7 July 1989 A.160.

information if the contributors to the file consented. Only certain contributors provided such consent and so it was necessary for the applicant to take the case on the basis of infringement of his Article 8 rights. The Court stated that:

> [the file] no doubt contained information concerning highly personal aspects of the applicant's childhood, development and history and thus could constitute his principal source of information about his past and formative years. Consequently lack of access thereto did raise issues under Article 8.[492]

Citing the Commission's opinion in the case, the Court also stated that:

> 'respect for' private life requires that everyone should be able to establish details of their identity as individual human beings and that in principle they should not be obstructed by the authorities from obtaining such very basic information without specific justification.[493]

Even though this right to establish details of one's identity is obviously important in the Court's opinion, interference with it can be justified if covered by the terms of Article 8(2). In deciding whether the interference is so justified, the Court concentrated on whether a fair balance had been struck between the general interests of the community and the interests of the individual under a system where, as existed here, the contributor's consent is needed to provide access to information contributed by them. The Court was concerned to ensure that a system was in place to secure the interests of the individual seeking access to records relating to his private and family life when a contributor to the records either is not available or improperly refuses consent. In the Court's view, such a system is only in conformity with the principle of proportionality if it provides that an independent authority finally decides whether to grant access or not in such cases. This not being existent in *Gaskin*, Article 8 was breached.[494] In another case concerning access to files while the applicant had been care *M.G. v United Kingdom*,[495] the court also found a violation of Article 8 along similar reasoning.

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[492] *Gaskin* at p. 15.

[493] *Gaskin* at paragraph 39.

[494] Feldman makes the point that this complements due process rights under Article 6 in that child care decisions must be arrived at by procedures which adequately respect the interest in family life: D. Feldman 1997 at p. 269.

[495] *M.G. v the UK* Application no. 39393/98, Judgment 24 September 2002.

Access to Information about One's Origins

This 'right to identity' flowing from Article 8 is developed through the words and phrases used in the case of *Mikulic v Croatia* implying a concept of freedom as self-realisation and authenticity.[496] This case primarily concerns Article 6, which provides a right to a fair trial. However, the applicant claimed that her Article 8 rights had been violated because the domestic courts had been inefficient in deciding her paternity claim and leaving her uncertain as to who her biological father was. Thus, it was argued she was left uncertain as to her personal identity.[497] The Court decided that the facts of her case did fall within the ambit of Article 8. Having already decided in *Gaskin* that everyone should be able to establish details of their identity as human beings and that an individual's entitlement to such information is of importance because of its formative implications for his or her personality, the court noted in *Mikulic* that the applicant intended to determine her legal relationship with, as the court puts it, her 'natural' father to establish 'the biological truth'. Thus there was a direct link between the establishment of paternity and the applicant's private life.[498] Having said this, however, the court examined whether the interference was proportionate. While persons, like the applicant, have a vital interest in receiving information necessary to 'uncover the truth' about an important aspect of their personal identity, the court made clear that the protection of third persons – here the supposed father – may preclude their being compelled to make themselves available for medical testing of any kind, including DNA testing. Like in *Gaskin* however, there was a lack of an independent authority to determine the paternity claim speedily should the alleged father fail to go through with the DNA test. Further, the Croatian system at issue failed to adequately take account of the basic principle of the child's interests. This meant that there was a failure to strike a fair balance between the applicant's rights and the supposed father's in not undergoing DNA tests. As such, the interference was disproportionate. The court stated that the Croatian courts had "left the applicant in a

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[496] *Mikulic v Croatia* Application no. 53176/99, Judgment 4 September 2002.

[497] Ibid., at paragraph 47. The applicant submitted that she had been kept in a state of prolonged uncertainty as to her personal identity because of the length of time taken for the domestic proceedings to reach a conclusion at para. 49.

[498] Ibid., at paragraphs 54 and 55.

state of prolonged uncertainty as to her personal identity" and that they had therefore failed to secure her Article 8 rights.[499] It seems clear from these words and phrases that knowledge of one's biological parentage is considered by the court to be vital to one's identity. This is in line with scholars who have stated that an individual's sense of identity may be confused without knowledge of one's genetic or biological parents.[500] This is in line with what is now considered good practice in bringing children up in the knowledge of their original backgrounds as far as possible, although this was by no means always the case as we shall see.

In *Gaskin*, the applicant knew who had been his genetic parents and who had been responsible for his upbringing. In some cases, this knowledge may be unavailable. This was the position in *Odievre v France*[501] where the idea of 'biological truth' referred to in *Mikulic* was again taken up. The ECtHR in *Odievre*, by a majority of 10 judges to seven, upheld the provisions of the French Civil Code which enable anonymous birthing (the women giving birth are called X- referred to as the X Women).[502]

The ancient tradition of anonymous birthing in France is traced back to the time of St Vincent de Paul, in around 1638, who introduced the use of the *tour*, a sort of revolving crib housed in the wall of a charitable institution. The child would be placed in the crib and a bell rung. The *tour* would then pivot and the child be collected. The aim was said to prevent infanticide, abortion and babies being exposed.[503] The French Revolution introduced reforms making medical care available to mothers who gave birth anonymously. Further changes occurred to the French law, embodied now in the 2002 provisions under review by the ECtHR in *Odievre*. The justification for anonymous birthing is alleviation of mothers' distress when they do not have the means to bring up their children.[504] Three categories of women who choose to give birth anonymously were identified by the French government: young women not yet independent, young women still living with their parents in Muslim families originating from North Africa or sub-Saharan Africa, and isolated women with

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[499] Ibid., at paragraphs 64–66.
[500] See, for example, D. Feldman 2002 at p. 745.
[501] *Odievre* Application no. 42326/98, Judgment 13 February 2003.
[502] Ibid. See K. O'Donovan and J. Marshall 2006.
[503] See *Odievre* paragraph 15.
[504] *Odievre* paragraph 36–39.

financial difficulties. It is said that seeking confidentiality sometimes conceals more serious problems, such as rape and incest, which are not always revealed by those concerned.[505]

As the ECtHR notes, it is relatively rare for mothers to be entitled to give birth anonymously under European domestic legislation.[506] As well as France, Luxembourg and Italy continue an ancient tradition whereby a woman can enter a hospital, give her name as X indicating that she does not wish to reveal her identity, give birth, and leave her child in the hands of the authorities.[507] In these countries, the political justification for anonymous birthing is couched in terms of women's rights. Steiner comments on this as follows: "one has to place the French legislation relating to anonymous birth in the wider context of parenthood, a concept in French family law at the heart of which has always existed an adult-centred individualistic philosophy of freedom of choice".[508] Other jurisdictions, such as Belgium and Hungary provide a way for mothers to give birth *discreetly*. In Hungary, mothers may decide to remain anonymous by abandoning their newborn child in a special, unsupervised room in the hospital. In the face of rising numbers of abandoned newborn infants, some German Lander have instituted baby boxes, where babies can be left anonymously. Once a bell is rung, the birthgiver, or the person who brings the baby, leaves without giving their identity, and legislation allowing anonymous births has been under active consideration.[509] In the case before the ECtHR, the adult applicant alleged that the fact that her birth had been kept a secret, with the result that it was impossible for her to find out her origins, amounted to a violation of her ECHR rights under Article 8 and Article 14.[510]

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[505] See the French government's submissions at para. 36 of *Odievre*.

[506] *Odievre* ibid. at paragraph 19.

[507] K. O'Donovan 2000. See also paragraphs 11–18 of *Odievre* on the relevant French legal position and para. 19 on the situation in other European countries. It is stated there that Norway, the Netherlands, Belgium, Germany, Spain, Denmark, the United Kingdom, Portugal, Slovenia and Switzerland make it obligatory to provide the names of the father and the mother.

[508] E. Steiner 2003 at p. 430.

[509] The language of justification in these jurisdictions is of protection of the life and development of the child: see further on this, Scheiwe 2003 and O'Donovan 2002.

[510] Her Article 14 argument was that the confidentiality protected in France amounted to discrimination on the ground of birth. Article 14 provides that "the enjoyment of the

A distinction is made between maternity and motherhood in France with X women not legally being mothers. The applicant had been adopted when a child and much later, in 1990, when she was 25 years old, consulted a social services file and managed to obtain non-identifying information about, as the ECtHR puts it, her 'natural' family. In 1998, the applicant applied for further information about her birth and to obtain copies of any documents: she had learnt of the existence of three siblings born after her. She was told to apply to the relevant court but that a ruling in her favour would contravene the relevant law.[511]

Because the applicant wanted to discover the circumstances in which she was born and abandoned, including the identity of her biological parents and brothers, the court considered the case to involve private life rather than family life rights under Article 8. This is because the applicant claimed to be entitled, in the name of 'biological truth', to know her personal history, based on her inability to gain access to information about her origins and related identifying data.[512] Noting its already established case law providing that Article 8 protects a right to identity and personal development and the right to establish and develop relationships with other human beings and the outside world, the Court stated that this has taken the form of the preservation of mental stability being an indispensable precondition to the effective enjoyment of the right to respect of private life.[513] Matters of personal development include details of a person's identity as a human being and, what the court described as the vital interest protected by the ECHR in obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents.[514] Birth, and in particular the circumstances in which a child is born, forms part of a child's and subsequently the adult's, private life guaranteed by Article 8 and therefore that Article applied here.[515]

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rights and freedoms set forth in [the ECHR] shall be secured without discrimination on any ground such as . . . social origin, association with . . . birth or other status."

[511] *Odievre* paragraphs 9–14.

[512] *Odievre* at para. 28.

[513] *Bensaid v UK* Application no. 44599/98 paragraph 47, a case discussed further in my chapter ten on integrity.

[514] *Mikulic v Croatia* Application no. 53176/99 Judgment 4 September 2002.

[515] *Odievre* at paragraph 29.

The applicant argued that she had an even more meritorious claim than the applicant in *Gaskin v the UK* and that the validity of her claim was confirmed by *Mikulic*. Meanwhile, the French government argued that their system took into account the mother's and child's health, protecting the mother's life while observing the rights and freedoms of others.[516] A request by a child to be given access to information about his or her identity could come into conflict with the freedom which the French government argued all women enjoyed to 'decline their role as mother' or to assume responsibility for the child. It cited *Gaskin* to support the government's contentions as illustrating the importance of keeping official files confidential if reliable information was to be obtained and third parties protected. The French legislation, according to the French government, was aimed at reconciling these competing interests in three respects: firstly by trying to encourage mothers to assume responsibility for the birth of their children, through psychological and social support, secondly, by affording such children access to certain non-identifying information and thirdly, by providing that the mother could waive confidentiality. These interests were reinforced by the machinery put into place by the recent amendments to the law.[517] Thus, the government argued that a careful balance had been struck between the interests of the woman in not disclosing the birth and the child's interest in gaining access to information about its origins.[518]

The ECtHR's majority analysis agreed that *Gaskin* establishes that people have a vital interest in receiving information necessary to know and understand their childhood and early development, and that *Mikulic* involved the weighing of the vital interest of a person receiving the information necessary to uncover the truth about an important aspect of his or her personal identity against the interest of third parties in refusing to be compelled to make themselves available for medical testing. *Mikulic* is authority for the state having a duty to establish alternative means to enable an independent authority to determine such a dispute speedily. *Gaskin* and *Mikulic* were both distinguished by the majority as the issue of access to information about one's origins and the identity of one's 'natural' parents is not of the same nature as that of access to a case

[516] Ibid., at paragraph 36.
[517] Ibid., at paragraph 39.
[518] Ibid., at paragraph 38.

record concerning a child in care or to evidence of alleged paternity. The applicant here is trying *to trace another person who has expressly requested that information about the birth remain confidential*.[519] In the judgment of the majority of the ECtHR, various interests had to be weighed. The interests of the applicant, now an adult, but a biological child of others, in knowing her origins under Article 8 of the ECHR are therefore placed against the interests of the birthgiver, "in remaining anonymous in order to protect her health by giving birth in appropriate medical conditions".[520] To elaborate, the arguments were presented of those, on the one hand, who have a right to know their origins, and the history of their personal development, these being derived from a wide interpretation of the scope of the notion of private life.[521] On the other hand, not only is there a woman's interest in remaining anonymous in order to protect her health, further considerations are stated to be the general interest of protection of the child's health too, the avoidance of abandonment and illegal abortions, and also the effect on other third parties such as the applicant's siblings, adoptive parents and biological father. The ECtHR observed that the two private interests with which it is confronted are not easily reconciled. Moreover, the court clearly states that the conflicting interests "do not concern an adult and a child, but two adults, each endowed with her own free will."[522] It is noted that the right to respect for life, a higher-ranking value guaranteed by Article 2 of the ECHR is one of the aims of the French anonymous birthing system. As the Court saw it, the full scope of the question for the court to resolve is: *does the right to know imply an obligation to divulge?*[523] Because of the diversity across Europe, the court afforded France a margin of appreciation, and agreed with the French government's arguments as to the right balance being struck. The majority could be interpreted as favouring an approach to identity that places importance on knowledge of one's exact biological

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[519] Ibid., at paragraph 42 and 43.

[520] Ibid., at para. 44.

[521] See paragraph 44 of *Odievre*; citing *Johansen v Norway* 7 August 1996 Reports 1996-III p. 1008 para. 78; *Mikulic v Croatia* Application no. 53176/99 para. 54 and 64 ECHR 2002-I; *Kutzner v Germany* Application no. 46544/99 para. 66.

[522] *Odievre v France* at para. 44. Children also have identity rights pursuant to the United Nations Convention on the Rights of the Child, Articles 7 and 8. This raises issues wider than those covered in this book, including the autonomy of the child.

[523] Ibid., at paragraph 45.

origins but recognises that other people, at least the biological parents, are involved. It rightly resists a claim to full knowledge of one's origins as an essential component of one's identity. In contrast to the seven dissenting judges.

This joint dissenting opinion of seven of the judges highlights the child's identity right.[524] They point to the developing jurisprudence of Article 8 that is said to include the right to personal development and to 'self-fulfilment' as part of the right to respect for family life. They strongly state that the issue of access to information about one's origins concerns 'the essence of a person's identity', and is 'an essential feature of private life protected by Article 8'. Being given such access and 'thereby acquiring the ability to retrace one's personal history is a question of liberty, and therefore, human dignity'. As such, it is stated to lie 'at the heart of the rights guaranteed by the Convention'.[525] Although the mother's right is said to concern her personal autonomy, the dissenters found that the different interests involved had not been balanced but instead 'the mother . . . has a discretionary right to bring a suffering child into the world and to condemn it to lifelong ignorance'.[526] They make clear that, in their opinion, the right to identity – as an essential condition of the right to autonomy and development – is within the inner core of the right to respect of one's private life. As such, any margin of appreciation, is greatly reduced.[527] They disagree over the distinction between *Gaskin*, *Mikulic* and this case, in fact the arguments of the *Odievre* applicant may even be stronger.[528] The dissenters' views chime with ideas of personal freedom as self-realisation or authenticity, with its ideas of needing to know and therefore having a right to know everything about one's origins before one can be free.

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[524] Joint dissenting opinion of Judges Wildhaber, Sir Nicholas Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpaa.

[525] Ibid., at para. 3.

[526] Ibid., at para. 4 and 7.

[527] Ibid., at para. 11, citing as authority for a right to autonomy *Pretty v UK* Application no. 2346/02 para. 61 ECHR 2002-III, and for a right to development, *Bensaid v UK* Application no. 44599/98 para. 47 ECHR 2001-I.

[528] Dissenting opinion at para. 19.

Essence and Existence

As we have seen, the way the Article 8 right to identity has been developed in sexual identity cases shows in legal form that the development of one's personality does not need to entail a belief in an inner *essence* in the sense of an unchanging foundational core that may be prohibitive, in that it can be used to justify placing constraints on new ways of being, focusing on individuals' 'finding out' who they 'truly' are, with ideas of core 'authenticity' or self-realisation. Instead, it can be expressed as the *potential* to form projects and exist in the world in a meaningful way. Human rights law can play an important role in protecting existing choices. However, it can also play a vital part in allowing identity formation, through creating the social conditions to enable an individual to develop their personality and identity as they wish. The right to access information relating to one's childhood existence and development, as in *Gaskin* and *M.G.*, makes sense as part of an idea of freedom to find out information relating to one's existent life and to seek to have knowledge and possibly remember facts that happened to you. When it comes to 'biological truth' the case law could turn towards validating a version of freedom as self-realisation which could prove problematic as we strongly see in *Odievre*'s dissenting opinion. Such a version can be seen in the English case of *Rose and another v Secretary of State for Health and another*,[529] Mr Justice Scott Baker interpreted Article 8 as providing the right to obtain information about a sperm donor (before the system on anonymity was changed in the UK) who will have contributed to the identity of the child. In the judge's interpretation of the ECtHR jurisprudence, the Article 8 right incorporated the concept of personal identity which meant to that judge that the right to obtain information about a biological parent was 'plainly included'. In his view, the information sought went to *the very heart of the claimants' identity and to their make up as human beings*.

With the development of reproductive technologies, the issue of donor anonymity becomes more relevant to the issues of identity discussed here.

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[529] *Rose and another v Secretary of State for Health and another* [2002] E.W.H.C. 1593 (Admin). Changes to the UK law relating to knowledge available to children born after 2005 of sperm donors, that is, that the children have a right to know the identity of the sperm donor, were based on ideas that children had a right to know their parentage at the age of 18 regardless of the wishes of their parents.

Although not viewed from the perspective of the offspring's identity right under Article 8, it is worth mentioning *G v the Netherlands*.[530] In this case, a sperm donor wanted regular access to the child conceived of his donated sperm to a lesbian couple. The national court had rejected the argument that there is always a family life between a biological father and his child. The Commission considered the complaint to be ill-founded. The situation in which a person donates sperm only to enable a woman to become pregnant through artificial insemination does not of itself give the donor a right to respect for family life. Contacts had been limited in time and intensity and there had been no contribution to the upbringing of the child. Reasons for donor anonymity include keeping infertility secret. It could also be intended to protect the privacy and security of the recipient family, and shield the donor from parental obligations, inheritance claims and unwanted contact with his progeny.[531] Indeed, as Emily Jackson explains, it used to be assumed that a donor's willingness to be identified was tantamount to an 'unhealthy' desire to interfere in the family life of their genetic offspring and thus evidence of his unsuitability as a donor.[532] Jackson reports that a 1960 investigation resulting in the Feversham Committee Report into the issue expressed the concern that non-anonymous sperm donation might appeal to 'the abnormal and the unbalanced' and found that to be conceived by donor insemination could only be a handicap and that "in the interests of the child alone… the practice should be discouraged."[533] In 1948 the Archbishop of Canterbury's Commission found that donor insemination "defrauds the child begotten and deceives both his putative kinsmen and society at large."[534] By 1983, in Sweden, a Policy Committee Report was now expressing the view that only sperm donors who do not oppose that their identity may subsequently be disclosed to the child should be used.[535] Jackson states that a flippant response would be that a significant proportion of the population, maybe as many as 10% are in fact biologically unrelated to their presumed fathers. Infidelity may then, she says, be statistically a

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[530] *G v the Netherlands* (1993) 16 EHRR 38.

[531] See E. Jackson 2001 at p. 212. The rest of this paragraph summarises E. Jackson 2001 at pp. 212–4.

[532] Ibid., at p. 212.

[533] See also K. O'Donovan 1989 p. 109; E. Jackson 2001 at p. 212.

[534] Quoted in Haimes 1998 p. 56: see E. Jackson 2001.

[535] Quoted in Haimes 1998 p. 60: ibid.

greater threat to accurate knowledge of a person's biological origins than the small number of donor insemination births.[536] The Glover Report for the European Commission has argued that there might be more dignity for the donor in a system in which openness rather than anonymity was the norm.[537] It stated that "a life where the biological parents are unknown is like a novel with the first chapter missing"[538] and in a similar vein Neil Leighton argues that "bioengineering appears to have gone ahead without due regard to the creation of alien persons separated from the true beginning of their personal narrative, having false relationships with the significant persons with whom they have an important connection in the world."[539]

There is a belief that children have a psychological need to understand something about their genetic origins. For example, it has been suggested that children born following anonymous gamete donation may suffer "genealogical bewilderment"[540] that the "right to identity is a right not to be deceived about one's true origins."[541] A child may be adopted early in life, be born to a surrogate mother, or be conceived by means of artificial insemination using sperm, ovum, or both from a person or people other than those who give birth to the child and or bring up the child. It has been argued that psychologically a child might feel incomplete, forced to make do with only a partial self-image and understanding, if genetic information is withheld. Increased understanding about the importance of family history in determining future health with important practical health benefits in knowing about inherited genetic susceptibilities is also highlighted. Additionally, "the powerful symbolic resonance" of incest and in-breeding leads to demands that children should have sufficient information to avoid sexual contact with their genetic relatives.[542] The Warnock Committee recommended that children should be able on reaching the

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[536] See E. Jackson 2001 at pp. 213–4.

[537] Glover 1989 p. 36 and another argument in favour of knowledge is the presumption of a decrease in donations if not anonymous, although several studies have indicated that a significant proportion of donors would be willing to be identified. E. Jackson 2001 at p. 214.

[538] Glover 1989 p. 37: see E. Jackson 2001.

[539] Leighton 1995 p. 103: ibid.

[540] Wikler 1995 p. 49: ibid.

[541] Freeman 1996 p. 291.

[542] E. Jackson at pp. 214–5.

age of 18 to find out basic details of the ethnic origin and genetic health of the donors of the sperm, egg, embryo but considered that the identity of the donors should never be disclosed in order to protect confidentiality and minimise the extent to which the donor's existence could intrude into the child's family relationships.[543] The statutory scheme, until the recent changes, followed these general principles. Feldman described this scheme as "the worst of all possible worlds."[544] "Applicants are to be told that they are, or might be, the biological offspring of people other than those who have been regarded as their parents up to that time, thus whetting their curiosity, but are disabled from obtaining information which might assuage the curiosity."[545]

In the UK, this provision of anonymity for gamete donation in artificial reproduction techniques was abolished in relation to any donations after 1 April 2005.[546] The rationale behind this change, similar to the dissenters in the ECtHR, and arguments of self-realisation, reflects a seemingly growing need for one to be 'complete' through knowledge of one's biological origins. For example, Baroness Andrews on presenting the relevant legislation in 2004 to the House of Lords for approval, stated that over the time when the previous law was in force, it became apparent that in adulthood some donor-conceived people 'have said . . . very poignantly that not being able to find out about their origins has left them with a gap in the way they see themselves, a gap in their identity, in their ability to tell their own story – and we are, after all, story-telling animals – and an inability to make complete sense of their lives.' She continues: '[w]e feel it is now time . . . to reflect the paramount rights of the child in these provisions as we are seeking to do consistently and in many other aspects of law and practice.' Whilst acknowledging that there are ethical and practical needs to balance the rights of the child with the rights of the donors 'who make such a valuable gift of life', it was felt that the offspring should have the right to access information about their origins 'which will help them, if they so choose, to complete their life history.'

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[543] Report of the Committee of Inquiry into Human Fertilisation and Embryology, Cmnd. 9314, paras 4.21–4.22, 6.6, 7.7.

[544] D. Feldman 2002 at p. 748.

[545] Ibid.

[546] Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004.

Whilst for Lord Patel this is not just an ethical issue, it engages the *right* of children to know their biological identity.[547] In England, the emphasis is placed squarely and firmly with the welfare of the child, which seems to include not only before they are conceived,[548] but also when they become adults, as any information is only available when they reach adulthood, when they are 18 years old.

It has been noted too that attitudes towards anonymity in relation to adoption underwent a complete reversal and although initially characterised by secrecy and concealment, openness about the fact of adoption is now considered to be good practice.[549] Comparatively few adopted children attempt to trace their biological parents and the experiences of those that do "do not necessarily suggest that such quests should be encouraged"[550] In addition, adopted children tend to be much more interested in tracing their mothers than their fathers perhaps as a result of the perception that gestation and childbirth creates a bond which is absent in genetic connection between a father and a child.[551] In *Keegan v Ireland*,[552] the biological father had lived with the mother but they had split up and she put her child up for adoption. The law did not require his knowledge or consent if unmarried. The Court found Article 8 to be violated stating that there exists between the child and its parents a bond amounting to family life even if at the time of the child's birth the parents no longer co-habited or if their relationship had ended. The relationship had lasted more than two years, conception was result of a deliberate decision and the couple had planned to get married. As such, it was decided that the interference was not necessary in a democratic society.

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[547] For all of which, see www.theyworkforyou.com/lords, House of Lords debates 9 June 2004.

[548] As to which see E. Jackson 2002.

[549] See K. O'Donovan 1989. In 1975, in the UK it became possible once they had reached 18 for adopted children to receive their original birth certificate, although this does not reveal very much about one's genetic origins.

[550] K. O'Donovan 1989 at p. 102.

[551] K. O'Donovan 1989 at p. 105.

[552] *Keegan v Ireland* (1994) 18 EHRR 342.

Conclusions

Some of the issues discussed in this chapter will be considered from the perspective of the parents and their rights to moral integrity in chapter ten. The sense of personal freedom as self-determination needs to be retained in the face of this growing support for knowledge of one's genetic or biological origins as a right of the offspring. The contrast to the development of personal autonomy and identity as self-determination under Article 8 can arguably be seen in the jurisprudence concerning Article 9, particularly in the cases involving bans on adult women wearing the Islamic headscarf.[553] This is despite the fact that some of the applicants in the relevant cases pleaded violations of Article 8 as well as Article 9.[554] Once dismissing the cases on the basis of Article 9, balancing the applicant's right to freedom of religious expression with the rights and freedoms of others in secular societies supposedly concerned with gender equality, the ECtHR states that there is no need to examine Article 8 separately. It is with these issues of religious identity and which version of freedom the Court favours in that jurisprudence to which I now turn.

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[553] *Karaduman v Turkey*, Application no. 16278/90, 3 May 1993; *Dahlab v Switzerland*, Application no. 42393/98, 15 February 2001; *Leyla Sahin v Turkey*, European Court of Human Rights Grand Chamber, Application No. 44774/98, 10 November 2005 (hereinafter "*Sahin*"); Chamber judgment 29 June 2004, available at www.echr.coe.int/echr. See also, *Dal and Ozen v Turkey*, Application no. 45378/99, decision 3 October 2002; *Baspinar v Turkey*, Application no. 45631/99, decision 3 October 2002; *Sen and Others v Turkey* Application no. 45824/99, admissibility decision 8 July 2003, although these cases do not directly deal with bans on the wearing of the Islamic headscarf, they deal with the consequences of men's wives wearing them in the Turkish military context. These cases concern the wearing of the Islamic headscarf in the public sphere, although only one, *Dahlab*, concerns an employment situation.

[554] And sometimes Article 14 too.

Chapter 9

Religious Identity

> *If a woman freely chooses to adopt a way of life for herself, it is not for others, including other women who have chosen differently, to criticise or prevent her……the sight of a woman in full purdah may offend some people, and especially those western feminists who believe that it is a symbol of her oppression, but that could not be a good reason for prohibiting her from wearing it.*[555]

Introduction

Michael Ipgrave has recently written sensitively of the importance to many of their religion.[556] He speaks of the importance of manifesting one's religion through symbols, like the cross and the veil. In reference to the cross, he states it is a "reminder of the new life and hope which gives [the believer] meaning and purpose, and thus constitutes their deepest identity." Although in slightly differing ways, both the cross and the veil provide powerful, "but not obligatory, means of visibly manifesting the believer's religious identity in a public context, with regard to the self, addressing other people, and in a hidden relationship with God."[557] What can be interpreted as enacted through their use is a

> threefold relational manifestation of religion. Firstly, the believer is expressing herself as being in a particular spiritual place: the immediate reference of both the veil and cross is in the first place reflexive, embodying a definition of who she understands herself to be at the deepest level of her identity.

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[555] Baronness Hale *R (on the application of Begum) v Denbigh High School Governors* [2006] UKHL 15 at paragraph 96. But Baroness Hale continued that "schools are different", deciding against the individual veil-wearing schoolgirl applicant in this case.

[556] M. Ipgrave 2007.

[557] Ibid., all at p. 172.

> Secondly . . . wearing of the symbol reminds the believer of who God is, and how God interacts with her life. Thirdly, through its outward wearing the symbol serves as a statement to others of this interrelated identity of God and believer as constitutive of the life of faith in a secular and plural world. In essence then, both symbols serve, in ways very different from one another, as multi-dimensional signs of identity of the individual within a theologically and relationally dense matrix.[558]

The importance of beliefs and conscience to one's identity cannot be overstated for these enable a person to live by a set of rules and values of fundamental worth to that person.

It has been claimed that liberal-minded people living in broadly secular societies too often treat religious belief as superstitious nonsense, a collection of weirdly unscientific claims that must surely be swept away over time by the greater powers of reason.[559] I agree with Anne Phillips that, given the number of believers in the world today, there is a strange kind of arrogance in this. Globalisation may sustain and even strengthen religious belief. Greater inequality and heightened environmental damage mean a lot of people will be looking for alternatives to materialism and individualism.[560]

Whilst the state may have a legitimate interest in restraining beliefs with serious anti-social consequences, it has been acknowledged that arbitrary interference with freedom of conscience leads to a devaluation of religious or other groups within society and to their exclusion.[561] It is with these issues that this chapter is concerned. The ECtHR seeks to uphold the right to freedom of religion which is absolute and the freedom to manifest one's religion which is qualified by Article 9(2). Article 9 reads as follows:

> (1) Everyone has the right to freedom of . . . religion; this right includes freedom to . . . manifest his religion or belief, in worship, teaching, practice and observance.
> (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

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[558] Ibid., at p. 179.
[559] A. Phillips 2007 at p. 157.
[560] A. Phillips 2007 at p. 157.
[561] D. Feldman 1999 at p. 696.

The Court has stated that "Article 9 primarily protects the sphere of personal beliefs and religious creeds, i.e. the area that is sometimes called the *forum internum*. In addition, it protects acts which are intimately linked to these attitudes, such as acts of worship or devotion which are aspects of the practice of a religion or belief in a generally recognised form."[562] "[A]cts which are intimately linked to these attitudes" appears to refer to the last part of Article 9(1) the freedom to manifest his religion, while the phrase "the sphere of beliefs and religious creeds" sums up the first part of this provision. The qualified part of Article 9, like Article 10, is perceived as concerned with external public manifestations, hence the more likely availability of a range of intervening public interests, potentially justifying these limitations of rights.

This provision has largely been unsuccessful in upholding individuals' manifestation of their religious beliefs and the Court decisions have little to say about their connection with people's identity, particularly their identity formation. This contrasts with the development of Article 8's real right to personal autonomy, personal identity and integrity. This is even more so when minority religious beliefs are involved. In *Refah*, sharia law was stated to be incompatible with the fundamental principles of democracy and rights as set out in the ECHR.[563] The 'stridency' of the Court's position as expressed in this case has been noted as 'regrettable' by Kevin Boyle.[564] If religion in fundamental to a person's identity, human rights should not be 'trumping' this aspect to impose an 'ideology such as secularism'.[565]

Other Council of Europe organs reiterate the importance of personal autonomy as a human rights principle. For example, in a Recommendation of the Committee of Ministers on a coherent policy for people with disabilities, provision is sought to be made for the disabled, inter alia, "[i]n order to avoid or at least alleviate difficult situations…and to develop personal autonomy…"[566] In addition, the European Commission against Racism and Intolerance's report on its activities highlights a background of a sense of unease in member states of the Council of

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[562] For example, *C v UK* D&R 37 (1984) Appl no 10358/83. See discussion in P. van Dijk and van Hoof 2006 at pp. 542–544.

[563] *Refah Partisi (Welfare Party) v Turkey* 31 July 2001 (35) EHRR 3 and K. Boyle 2005.

[564] K. Boyle 2005.

[565] K. Boyle ibid. at p. 15.

[566] Recommendation No R (92) 6 adopted 9 April 1992.

Europe which has given rise to new and intensified manifestations of racism and intolerance, with Islamophobia continuing to manifest itself in different guises.[567] It states that Muslim communities are the target of negative attitudes, and sometimes violence and harassment: they suffer multiple forms of discrimination. The report seeks to highlight this and prevent its continuance. Yet it is unclear how banning some of its practices, including the wearing of the Islamic headscarf[568] – bans which the ECtHR has upheld – will do so. It is these cases in particular which are subjected to analysis in this chapter.

The Islamic Headscarf Cases at the ECtHR

These cases[569] raise many issues that are subjects of research in their own right, including secularism and religion, democracy and multiculturalism, terrorist threats and the perceived rise of Islamic fundamentalism, European-ness versus particular characteristics of the countries in question, including the concept of the margin of appreciation in European human rights case law.[570] The Islamic headscarf cases involve, so far, *adult* women applicants, feeling strongly enough to go through the not insubstantial effort to litigate in national courts, exhaust national remedies and fight their corners in the Strasbourg court. There is no evidence in any of the cases that the wearing of the headscarf was anything other than the choice of these women. Meanwhile, in each, there is an assumed conflict between the Islamic faith and the rights of women which goes uninvestigated.

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[567] CRI (2005) 36 Annual Report, main trends para. 2.

[568] "Islamic headscarf" is used generically throughout. No distinction is made in the case law to cover different types of Islamic head dress. Unless specifically mentioned in the text, it applies to all types.

[569] *Karaduman v Turkey*, Application no. 16278/90, 3 May 1993; *Dahlab v Switzerland*, Application no. 42393/98, 15 February 2001; *Leyla Sahin v Turkey,* European Court of Human Rights Grand Chamber, Application No. 44774/98, 10 November 2005 (hereinafter "*Sahin*"); Chamber judgment 29 June 2004, available at www.echr.coe.int/echr. See also, *Dal and Ozen v Turkey*, Application no. 45378/99, decision 3 October 2002; *Baspinar v Turkey*, Application no. 45631/99, decision 3 October 2002; *Sen and Others v Turkey* Application no. 45824/99, admissibility decision 8 July 2003.

[570] See I. Ward "Headscarf Stories" 2005–6; D. McGoldrick 2005 and 2006; S. Langlaude 2006; R. Hirschl 2003–4; D.C. Decker and M. Lloyd 2004; J. Marshall 2006b; K. Boyle 2005.

Recent heated debates, mainly from media reports, have arguably changed the landscape of the Islamic headscarf issue in Europe. There never seemed to be a problem or issue with pupils or teachers in most European countries wearing the Islamic headscarf.[571] This changed following recent world political events like September 11th, the wars in Afghanistan and Iraq, and the 7/7 London bombings. Then more prevalence seemed to be given to the issue. In the UK for example, the *Begum* schoolgirl case,[572] the statements of prominent politicians, most notably from the Right Honourable Jack Straw Member of the UK Parliament and Labour party government minister, on his problems with talking to constituents who have veiled faces, and recent media coverage of an employment tribunal case concerning the dismissal of a teaching assistant for wearing the same.[573] In some instances, these debates have used ideas of gender equality to try to bolster their arguments, against headscarves, highlighting alleged threats to gender equality from minority cultural practices. At the same time, this issue has become part of a wider one too involving debates between feminism and multiculturalism.[574] In Turkey and France, there has been a longer history of tension in the wearing of the Islamic headscarf.[575] In those countries, a strict separation exists constitutionally between the public and the private spheres. With the prime importance of state secularism, individuals' private religious beliefs ought not to be overtly displayed in the public sphere, most notably in state schools or while working in public sector employment.[576]

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[571] *Sahin* 2005 at paragraphs 55 to 65 of the Grand Chamber judgment.

[572] *R (Begum)* 2006.

[573] This case was widely reported in the British media. See, for example, http://education.guardian.co.uk/schools/story/0,,2038239,00.html.

[574] See S. Benhabib 2002; S.M. Okin 1999; L. Volpp. 2001 and M.C. Nussbaum's response to Okin in J. Cohen et al 1999. See also findings of research by the LSE Gender Institute and the Nuffield Foundation, M. Dustin 2006.

[575] The former is a member of the Council of Europe but not the European Union.

[576] In France, the debate on this topic largely concerns primary and secondary state schools, involving the banning of all visible religious symbols. The headscarf debate has been raging in France since at least 1989, when three Muslim girls of North African extraction were excluded from their school in northern France for insisting on wearing their Islamic headscarves in class (see analysis of the schoolgirl issue in S. Poulter 1997). However, it is the recent adoption of a new law outlawing any religious sign or garment that overtly manifests the religious affiliation of the wearer in state primary and secondary schools which has provoked most recent comment.

In the cases, the court's analysis in judgments mainly focuses on Article 9, the right to manifest one's religion or religious freedom of expression. This causes immediate problems in an analysis of personal autonomy and identity issues because, as we have seen, the Court's traditional analysis of these concepts has fallen to be investigated under Article 8. Yet the Islamic headscarf bans, it is argued here, prevent the women applicants concerned from exercising their "real right to personal autonomy" in following through the choices they have made but which the Court refuses to allow women to put into practice with misguided references in some instances to gender equality which by implication raise understandings of personal freedom as self-realisation. As we have seen, explanations, and analysis of, ideas of freedom and autonomy are varied, complex and vast.

The ECtHR has acknowledged in the Article 8 jurisprudence the impact that social conditions have on the formation of individual identity, or human personality, developing the potential for autonomy within each person, emphasising the importance to the individual person of their identity. People exercising their own choice to discover for themselves what they want to be and do is the starting point and is crucial to their sense of their own identity.[577] To recap from the previous chapters analysis of Article 8, the development of much of the jurisprudence, and particularly in the area of sexual identity, as we saw in chapter seven, shows the right to personal identity as providing a legal entitlement to freedom in the sense of allowing individuals to choose how to live their own lives, including making sure that the enabling pre-conditions are accessible and available[578] illustrating a form of personal freedom as self-creation or self-

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See Law No 2004–228 of March 15, 2004, JO March 17 2004 p. 5190 JCP 2004, III page 640 – www.legifrance.gouv.fr. See analysis in D. Lyon and D. Spini 2004; B. Gokariksel and K. Mitchell 2005; Beller 2004; C. Laborde 2005; M. Idriss 2005; S. Benhabib 2004 and 2002; J.W. Scott 2007. Scott explains that those supporting the French law understood the issue to be a confrontation between Islamic culture and French individualism. The headscarf could only be an imposition of that culture; its removal a sign that liberty and equality had prevailed: at p. 129.

[577] Gaining a sense of one's own identity enables individuals to become, develop and exist in a meaningful way. This sense of existence may be attained through living in a community practising mutual respect, valuing the aspiration for each person to become an individual: see J. Marshall 2005, particularly Part II.

[578] See *Dudgeon v UK* (1982) 4 E.H.R.R. 149; *Norris v Ireland* [1988] ECHR 22; *Smith and Grady v UK* (1999) 29 EHRR 493; *Lustig-Prean and Beckett v UK* (1999) 29 EHRR 548. *Van Oosterwijk* Report of 1 March 1979, B.36 (1983), p. 26 *Rees v UK* Report of 12 December 1984, A.106, p. 25; *Cossey v UK*; *B v France* Judgment of

determination – the freedom to be and become the person one chooses which happens in and through a social context.[579] Yet it can also take an alternative form as an idea of self-realisation and authenticity. According to this version of personal freedom, one's identity concerns reconciliation with one's, perhaps pre-determined, core essence, through some sort of process of self-discovery. In many ways it can be seen as upholding some form of human dignity or moral standard of the majority, rather than the individual beliefs of the applicant in a self-determining way. As we saw in the previous chapter, there is a danger of this happening in cases concerning access to information about one's origins. The Islamic headscarf judgments are interpreted as not explicitly engaging with personal identity issues for the applicants but the consequences of the decisions reflect an understanding of personal freedom as self-realisation, restricting what can be chosen in accordance with one's inner essence which in fact can turn out to be the moral standard of the majority or the moral standard of the truth of gender equality which apparently is fundamentally important and non-derogable throughout Europe. The problem is, it is just one version of gender equality. These cases demonstrate certain clashes of culture as well as religious beliefs which many find unpalatable. It has been explained that of Bhikhu Parekh's list of twelve practices that most frequently lead to clashes of intercultural evaluation,[580] seven concern the status of women

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25 March 1992, A.232–C, 51 *Sheffield and Horsham* (1997) 27 EHRR 163; *Goodwin v United Kingdom* (2002) 35 E.H.R.R. 18; *I v United Kingdom* Application 25680/94 Judgment 11 July 2002.

[579] See J. Marshall 2005.

[580] S. Benhabib 2002, B. Parekh 2000. At pp. 83–84 Benhabib asks how we can account for the preponderance of cultural practices concerning the status of women, girls, marriage and sexuality that lead to intercultural conflict. In the life of the human individual the private sphere is encountered the earliest, and thus leaves the deepest marks of ambivalence upon the psyche. Because processes in this sphere mark the human psyche during its earliest, formative stages, they also cut closest to core identity issues. Intercultural conflicts, which challenge the symbolic order of these spheres because they delve into the earliest and deepest recesses of the psyche are likely to generate the most intense emotional response. Thus the loss of one's culture, cultural uprooting. And the mixture of cultures are often presented in sexualised terms. One's culture has been raped, cultural intermixture is very often described as mongrelisation. For Benhabib, the use of these metaphors is not accidental: fundamentalist movements know very well the deep recesses of psychic vulnerability they tap when doing so (ibid. at p. 85). These interconnections between psychic identity, the practices of the private sphere, and cultural difference assume a new configuration in modern liberal democracies.

in distinct cultural communities, two bear on dress codes pertaining to both sexes – the wearing of the turban and the Islamic headscarf.

Ideas of reconceived autonomy and self-determination have found favour in legal sanction in European human rights law from the ECtHR. Thus the ability of one's personality to flourish in tune with the identity one chooses for oneself, self-determination, is a right that should be safeguarded by that court. Yet this has not happened in the Islamic headscarf cases or those seeking to live in accordance with one's religion and community values, as it has for homosexual and transsexual persons and for those seeking access to knowledge about their lived identity, in ways to enable them to live a life of their own choosing with their own sense of their identity. This inconsistency can be seen in the case law as we shall now see.

In two decisions as to the admissibility of claims, the Commission and the ECtHR have ruled that bans on the wearing of Islamic headscarves are compatible with Convention rights.[581] In both cases, the applicants alleged violations of Article 9 and 14 rights: the latter prevents discrimination and has to attach to another Convention right. Factually, in the two separate cases, *Karaduman v Turkey* and *Dahlab v Switzerland*, the applicants wished to wear the Islamic headscarf at university as a student and in a state primary school as a teacher respectively. There is little analysis provided in these decisions and what there is largely concerns Article 9 and balancing: the applicants' rights to manifest their religion needed to be balanced with the rights and freedoms of others. The reasoning differs slightly in the two cases and is expanded in the second. It is here that the European Court's view of the Islamic headscarf and of the Islamic faith is unambiguously presented:

> . . . it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by the precept which is laid down in the Koran and which . . . is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of the Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.[582]

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[581] *Karaduman v Turkey; Dahlab v Switzerland*.

[582] *Dahlab* ibid., at page 13.

In neither of these two cases did the applicants allege violations of Article 8. However in cases involving Turkish soldiers discharged from their national Army for alleged fundamentalism, Article 8 was invoked. The applicants alleged that part of the reasoning behind their military discharge was linked to their wives who wore the Islamic headscarf.[583] Their argument was that Article 8's right to respect for their family life had been infringed because the military had improperly taken their wives' way of life and behaviour into account.[584] Regrettably, the Court failed to engage with this framework briefly referring to the Turkish decision to discharge them not being based solely on the wives' behaviour.

In the most well-known case, and certainly that most fully reasoned by the judges, *Sahin v Turkey*, the applicant also sought to rely on Article 8, amongst other articles, including Article 9. This case was sufficiently serious to go to the Grand Chamber as well as the Chamber of the ECtHR. The former in November 2005 confirms the latter's decision of June 2004 upholding bans on the wearing of the Islamic headscarf in Turkish universities by adult women.[585] However, in the Grand Chamber judgment, unlike that of the Chamber, the right to education enshrined in Article 2 of Protocol 1 of the Convention is dealt with as a separate matter and analysis provided of its application as well as Article 9's right to religious expression.[586] Significantly, the lone dissenting Judge Tulkens considered there to have been a violation of Article 9 and Article 2 of Protocol 1.[587] No analysis is provided of Article 8 but Judge Tulkens points out that the majority's decision is inconsistent with Article 8 jurisprudence.

The Grand Chamber proceeded on the assumption that the relevant Turkish regulations constituted an interference with the applicant's right to manifest her religion under Article 9(1). The question was then

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[583] *Dal and Ozen v Turkey; Baspinar v Turkey*; *Sen and Others v Turkey*.

[584] *Sen* ibid., at page 9.

[585] The applicant requested that the case be referred to the Grand Chamber pursuant to Article 43 of the ECHR and her request was accepted. The Grand Chamber found no violation by Turkey by a majority of 16 to 1 of Article 9 (right to religious expression) and Article 2 of Protocol 1 (right to education), and, unanimously, that there was no violation of Articles 8, 10 and 14.

[586] Judges Rozakis and Vadij disagreed with this aspect of the majority judgment: see their concurring opinion.

[587] Her judgment has found support in Baronness Hale's judgment in *R (Begum)*.

whether such an interference was legitimately covered by Article 9(2). In line with the Chamber decision, the Grand Chamber found that the relevant provisions were adequately prescribed by law.[588] Further, the Grand Chamber, again like the Chamber, considered the measures imposed on students to have been adopted pursuant to a legitimate aim, namely the protection of the rights and freedoms of others and protection of public order, having regard to the circumstances of the case and the terms of the domestic courts' decisions. But were such restrictions necessary in a democratic society? In reaching their affirmative answer to this question, the majority of the Grand Chamber, like the Chamber, stressed the ideas of secularism and gender equality.

In analysing secularism, emphasis was placed on it being one of the fundamental principles of the state of Turkey and a paramount consideration underlying their ban on Islamic headscarves. Thus, it was said that in a state like Turkey, where the great majority of the population belong to a particular religion, measures taken at universities to prevent fundamentalist pressure may be justified under Article 9(2). Despite the fact that no evidence of fundamentalist pressure was produced, the court stated that regulations aiming at the peaceful co-existence of students may therefore be permitted.[589] In this regard, the margin of appreciation doctrine was invoked with the Court taking the view that national authorities are best placed to evaluate local needs and conditions, particularly in a situation like this, where religion is an issue. In the Court's majority view, there is no uniform European conception of the requirements of the protection of the rights of others and public order and the wearing of religious symbols, thus making the margin of appreciation particularly important.[590] However, Judge Tulkens in her dissenting judgment coherently explains why the role of the margin of appreciation is drastically reduced here. The argument used by the majority to justify the width of the margin – that is, the diversity of practice on the issue of religious symbols – is misplaced.[591] In Europe, she says, there *is* uniformity on this issue: there are no bans on the wearing of the Islamic headscarf by students in universities. The

[588] Paragraphs 84–98 of the *Sahin* Grand Chamber judgment.
[589] Ibid., at paragraph 116.
[590] Ibid., at paragraph 109.
[591] Ibid., Judge Tulkens dissenting opinion at paragraph 3.

Judge further states that the doctrine is subject to European supervision and this is a topic of importance to all member states. Whilst agreeing that secularism, equality and liberty are important, in her opinion, they ought to be harmonised, not weighed against each other. Contrary to the majority, she found there to be no pressing social need to make bans necessary in a democratic society. Only indisputable facts and reasons rather than mere worries and fears would satisfy this requirement.[592]

With regard to gender equality, the court took the view that women's rights to gender equality were important to the ECtHR and in the Turkish Constitution. Indeed, gender equality is described as one of the key principles underlying the Convention and a goal to be achieved by member states of the Council of Europe. However, when examining the Islamic headscarf in the Turkish context, it was important, in the court's view, to bear in mind the impact that wearing such a symbol may have on those who choose not to wear it. In the circumstances, in the majority's view, it is understandable that the wearing of the Islamic headscarf in secular institutions be considered as *contrary* to values of pluralism and the equality of men and women.[593] However, the dissenting judge accurately points out that the majority fail to connect the ban with sexual or gender equality. Instead, the principle of sexual equality does not provide a justification for prohibiting a woman from following a freely adopted practice. As she expresses it:

> It is not the court's role to make an appraisal . . . of a religion or religious practice, just as it is not its role to determine in a general and abstract way the signification of wearing the headscarf or to impose its viewpoint on the applicant.[594]

The Grand Chamber further assessed this issue by reference to Article 2 of Protocol 1 concerning the right to education. The court first considered the ban to constitute a restriction on the applicant's right to education. However, their analysis for Article 9 was then applied to this provision. Accordingly, the restriction was found to be foreseeable to those concerned and pursued the legitimate aims of protecting the rights and freedoms of others and maintaining public order: the purpose being to preserve the

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[592] Ibid., at paragraphs 4 and 5.
[593] *Sahin* para. 111 and 116.
[594] *Sahin* dissenting judgment of Judge Tulkens at paragraph 12.

secular character of educational institutions.[595] As already stated, having dealt with these provisions, the court found it unnecessary to examine separately Article 8 or any of the other Articles invoked by the applicant. Accordingly, in all of the cases involving the Islamic headscarf before the European Court, the wish to wear the headscarf was not seen to relate to respect for their private life encompassing a right to form and/or exhibit their human personality, autonomy or identity which should have been successful under Article 8.

Gender Equality, Identity and Choices

The distinction between the handling of the cases may rest in the seeming conflict between personal autonomy/identity and gender equality and the types of personal freedom one is allowed to have. Equality of rights between men and women has been expressed by the Council of Europe as "a fundamental principle of democracy, being a factor in the recognition of the legitimacy of women's status in public life".[596] Progress towards equality between the sexes has further been described as self-evidently necessary in a democracy and an imperative of social justice.[597] Member states have been called upon to eradicate all discrimination on the grounds of sex.[598] Recently a campaign "All different all equal" was launched, following up on a previous campaign from 1995. The Council of Europe's website explains that "this campaign aims to highlight diversity – celebrating the richness of our differences, whatever they may be . . . Participation will be the key word, allowing everyone to play a part in building a better Europe, where everyone has the right to be themselves – to be different and equal."[599] This sentiment chimes with developments in equality theory concerning the recognition that there are differences amongst people – including, and in part created by, their freedom to be who they want to be – and that this is not the opposite of equality but is an inevitable component to all

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[595] *Sahin* at paragraph 158.

[596] Recommendation 1229 (1994) of the Parliamentary Assembly of the Council of Europe.

[597] Declaration of the Committee of Ministers of the Council of Europe 1988.

[598] See for example Resolution (78) 37 of 27 Sept 1978; Recommendation R (85) 2 of 5 Feb 1985.

[599] www.coe.int

life.[600] Everyone is different, and identities with shared characteristics can form overlapping communities and interest groups, to be accommodated and celebrated. It seems though that the ECtHR may not be following this mission statement through in its judgments on the Islamic headscarf. It has been argued that when courts disregard the account offered by religious believers of the motives for their decisions they are open to the accusation of undermining the principle of liberal pluralism by denying someone the right to speak in their own voice.[601] Yet, in keeping with versions of positive freedom analysed in chapter two, could it be said that these women's choices are not free? Are these choices made in conditions of oppression or at least in circumstances which are not in their "real" interest? This issue, of course not confined to gender issues, has been a continuous one throughout political and legal theory as we saw in chapter two.[602] In such literature, an individual can be presented as thinking they know what they prefer and want to choose but this may frustrate their deeper purposes, plans and projects: their 'true' happiness or equality with others. Overcoming or at least neutralising, *internal* obstacles or motivational fetters, as well as being free of any *external* ones requires the ability to achieve a critical distance from one's existing social situation. In this version of personal freedom, power structures that already exist would need to be examined to see if they inhibit, and restrict, freedom of the less powerful. As explained in much feminist work, this 'entrenchment' may include accepting the wants and preferences that have developed through living in patriarchal societies, and is commonly expressed in the term 'adaptive preferences'.[603] Yet as we have seen this account can support determinism and a denial of agency:[604] conclusions could be reached that women are powerless, paralysed and far from autonomous, victims of a culture that restricts their 'real' or 'true' freedom which will be realised

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[600] See, for example W. Kymlicka 1995; I.M. Young 1990.

[601] See A. Bradney 2000 at 102–3 and The Archbishop of Canterbury lecture p. 2 of 7.

[602] J.J. Rousseau 1968; I. Kant 1988; G.W. Hegel 1977; L.T. Hobhouse 1964; T.H. Green 1941; S.I. Benn 1988.

[603] See, in particular, the work of C.A. MacKinnon 1989; 2005. M.C. Nussbaum's analysis of MacKinnon's work highlights the adaptive preferences issue – see M. Nussbaum 1999 at chapter 2. See also J. Marshall 2005a.

[604] For a clear analysis of this point, see K. Abrams 1995. In H. Reece 2003, feminists focusing on authenticity are highlighted as potentially leading to this tendency. See further analysis – in a different context – in K. O'Donovan and J. Marshall 2006.

when 'true' gender equality is reached. The stark solution could involve 'forcing women to be free' which will mean the aim is equality according to a uniform standard.

As we have seen, in the context of the Islamic headscarf judgments, gender equality arguments have been used to support bans in ways which have much in common with adaptive preference literature.[605] The symbolic modesty implied in the Islamic headscarf purportedly as an adaptive preference in patriarchy can be compared with 'sexy' clothes which some feminists may argue are worn by women as an adaptive preference – either to please men because of false consciousness or to cope with the fearful consequences of not pleasing them. If it is the case that a choice, even made by an adult woman, is the result of oppression, restrictive conditions and not in her own interest, some might say that such a 'choice' should not be available and is a result of 'false-consciousness.' Yet those in favour of bans often appear to be wary of religious or cultural practices in general and Islam as a culture and religion in particular. There appears to be an assumption that most religions and Islam in particular are patriarchal and against gender equality. For example, it is common to hear ideas that headscarf bans allow women to: compete in public spaces and institutions on purportedly equal terms with men; be emancipated and freed from the private patriarchal restrictions of "fundamentalist" fathers, brothers, husbands etc.[606] The inequality of women to men is purportedly demonstrated by wearing the Islamic headscarf, a view the ECtHR has endorsed. As such, the headscarf is a symbol of opposition to a vision of gender equality whereby women should be accorded equal treatment to men. Many argue that this equality aim has priority over claims concerning freedom in terms of cultural identity. Culture and equality are thereby presented as opposites or at least liable to conflict and if there is a conflict, gender equality should be prioritised. In a recent feminist debate on multiculturalism and feminism, Okin famously represented multiculturalism in many circumstances as "bad for women" in that it can be evoked to justify inequalities between the sexes and justify behaviour towards women unacceptable to liberal equality.[607] Further arguments in support of bans

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[605] See, for example, M.C. Nussbaum's analysis in 1999 at chapter 2.
[606] See analysis in B. Gokariksel and K. Mitchell 2005.
[607] S.M. Okin and L. Volpp. 2001.

state that the veil has no justification in the Koran and that it encourages the seclusion of women.[608] This view of veiling as limiting and enslaving women is explicitly to be found in *Dahlab*, and implicitly to be found in the European institutions' judgments but without adequate analysis and without any reference to the importance to the applicants of wearing the headscarf because it is part of their *identity*.

It has been claimed that many factors that may contribute to the endorsement of a custom by a member of an ethnic or religious minority and the different aspects of that 'choice' which may or may not entail much in the way of visible reflexivity, are not well captured by liberal autonomy conceptions.[609] In overlooking the complexity of individuals' own relationships to tradition, it would appear that the liberal autonomy framework disposes the liberal state towards regulating or even censuring too wide a range of social customs that arguably should be accommodated.[610] Solutions are advocated to take account of the degrees of reflection about one's values and attachments but not requiring an insistence that central aspects of one's identity must be submitted to significant critical scrutiny.[611] Marilyn Friedman has recently defended a procedural content-neutral view of autonomy that she claims is compatible with the choices and lifestyles of women in more traditional communities. She states that "autonomy competency is the effective capacity, or set of capacities, to act under some significant range of circumstances in ways that reflect and issue from deeper concerns that one has considered and reaffirmed."[612] One should be capable of considering and affirming attachments and projects that one finds valuable. Narayan's point that autonomy may be

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[608] See analysis by M. Idriss, 2005 at p. 287ff. The wearing of the Islamic headscarf as a religious requirement arises from contested interpretations of the Koran which appears to state that women should not display their "beauty and ornaments" except to "their husbands, their fathers… their sons… their brothers… or their women" Koran 33:53–59. The relevant passages have been interpreted by many to mean that, other than in the circumstances stated, women must cover their hair. This seeming restriction on women has been interpreted as a mark of women's subordination, and inequality, to men.

[609] M. Deveaux 2006 at p. 163.

[610] M. Deveaux 2006 at p. 163.

[611] M. Deveaux 2006 at p. 173.

[612] M. Friedman 2003 at p. 13.

exercised within the context of very strong social constraints and pressures is insightful and instructive.[613] To count as expressions of agency, actions need only be reflexive to the extent that they reflect or help to secure something that a person has cause to value.[614]

Friedman has stated that when subordinate persons manage to behave according to their own reflective wants and values, they overcome in some small way the moral imbalance involved in their subordination. Thus the personal autonomy of subordinated persons promotes social recognition of and respect for their equal moral competence, and thereby promotes the social realisation of the moral equality of all persons. In this respect, its worth appreciates beyond the simple intrinsic value of autonomy as such.[615]

Views have been expressed that liberals have reason to care about freedom as a concept rather than autonomy. Considerations of freedom provide stronger limits to coercive state regulations than considerations of autonomy because freedom is both a wider and a clearer notion than autonomy. As Narayan points out, leaving individual choices vulnerable to state coercion on the grounds that they are not founded in deep critical reflection or are due to unreflective habits or to the unrecognised manipulation of the person by religious or cultural pressures would protect very few of the actual choices of actual individuals from state coercion. Liberal states must have substantial reasons to restrict individual freedom even where such restrictions might arguably not reduce autonomy or even when such restrictions might potentially enhance 'autonomy' or some people's version of it.[616] Such enhancement of personal freedom means that state policies have to improve people's opportunities to choose, or not, to reflect on, fully accept, modify or reject certain cultural practices by promoting their access to education and employment and by safeguarding their rights. In contrast, coercive state intervention into cultural practices such as compulsory deveiling practices often end up substantially reducing people's actual freedom in the name of enhancing their potential autonomy, in a self-realising, forced to be free sense.

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[613] U. Narayan 2002.
[614] M. Deveaux 2006 at p. 178.
[615] M. Friedman 2005 at p. 169.
[616] See U. Narayan 2002 at pp. 430–431.

Much of the Article 8 human rights law analysed in this book makes clear that a person's identity is protected by the right to respect one's private life contained within that provision. As has been shown, the Court accepts that personal identity comes into existence through social conditions. In developing this identity, and enabling it to flourish, or not, emphasis is placed on the importance of relationships and interdependence. It has been acknowledged that such relationships include relationships with other human beings and the outside world.[617] As such, the context for this development and formation includes one's community and society, including cultural and religious, whether 'voluntarily joined' or born into, in which people find themselves. As such, this can be reconciled and harmonised with notions of gender equality based on equal respect and concern rather than uniformity and sameness. A person's identity is not developed by being left alone but when he or she is considered as equal to others and given the necessary prerequisites to live their own life, of value and meaning to them.[618] Choices are made in those contexts. But choices are still made by the individual people concerned.

People's control over their own lives and the choices they make vary throughout their lives. Yet retention of the idea that some form of agency, reflection and choice is available to people in their present position means that women, and men, can make choices and act in the circumstances they find themselves in, including on matters of religion and cultural identity. This may mean that choices are made which others may not like or agree with. There are several variants of this. Firstly, people may be living in oppressive conditions blatantly *harmful* to them and they need help, assistance and support. In these situations, it is important for the individuals concerned to be part of the decision-making process. Secondly, some may consider themselves to be living in circumstances that are sufficient for them, maybe even agreeable, at least for the time being, but make decisions with which many others would not agreed. In these situations, it is the individual's choice to live as he or she wishes. If autonomy is "rooted in the idea that individuals should be able to pursue their own goals according to their own values, beliefs and desires",[619] then surely individuals need to exercise their choices in the existing conditions

[617] For example, *Tysiac v Poland* 2007.
[618] R. Norman 1982.
[619] E. Jackson 2000 at pp. 468–9.

shaping their values, beliefs and "desires". Ideally, the individual *being part of that process* actually enables changes to those conditions to occur.[620]

The Article 9 Islamic headscarf case law provokes an uncomfortable reaction in its analysis of gender equality and women's freedom or autonomy and identity. As regards gender equality, the jurisprudence fails to see that upholding a form of equality that acknowledges differences amongst people, including their cultural identity and religious beliefs, rather than insisting they somehow be the same, is also a conception of equality: indeed some would say a more meaningful one.[621] This contrasts with analysis in the *Sahin* judgment, where the ban was considered to preserve "the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women".[622] The decisions display a disappointing view of equality, one which is inconsistent with the view of the "all different all equal" variety seemingly favoured by the ECHR institutions and campaigns mentioned above, and one which is inconsistent with the development of a right to identity under Article 8. A recently examination of this issue in the context of the French schoolgirls controversy is pertinent to the ECtHR's analysis too.[623] The French secularism argument – laicete, like the Turkish one, is based on the republican ideal of separation of state from private religion but this is only one model of laicete. Reference is made to the lone dissenting member of the Stasi commission responsible for recommending the change to French law, who argued that some of the definitions in the long history of laicete are at odds with those offered in the headscarf debates. There is a democratic model of laicete, one which entails that children be taught *together* in a place of reflection, criticism and experimentation. The school as the cradle of democracy in which differences are mediated and negotiated and debate is allowed to flourish, which is a preparation for citizenship for all.

Although not concerning schoolgirls who may have to go to separate schools to wear their headscarves, there is no investigation in the ECtHR's Islamic headscarf jurisprudence of the reality of women's experiences. The

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[620] See further on this point, J. Marshall 2005, and 2006b.

[621] There are many works analysing conceptions of sexual or gender equality: see, for example, A. Phillips 1987; C. Littleton 1987; A. Jaggar 1990; G. Bock and S. James 1992.

[622] See paragraph 116 of the *Sahin* Grand Chamber judgment.

[623] J.W. Scott 2007 at 121–123.

judges make assumptions about women who wear the Islamic headscarf. Wearing the veil may not be a symbol of humiliation, subordination or oppression by a patriarchal religion or community. To make such controversial, some may even say insulting, comments about a religious practice, and a woman's choice to partake in it, requires evidence and analysis, acknowledging the problematic nature of adaptive preferences formed under alleged conditions of oppression. Such analysis would need to include a recognition that even if it may be a constraint to wear a headscarf in some instances, answering that with another constraint; for example, in the form of a state imposed obligation – including a prohibition with sanctions – not to wear one, is not the logical answer.[624] In terms of the impact on women's freedom, the consequences and the impact of such a ban on women's lives in practice need to be fully evaluated. For example, will bans prevent women from going to university or being teachers?[625] Depending on context, will this lead to an increasingly isolated, marginalized, ostracised, and potentially indignant and enraged, Muslim community? Will it lead to an even narrower isolation of women and girls within that community who choose to wear headscarves?[626] If analysis involved consideration of these points, the position may be reached that banning means imposing one set of standards and denies these women their right to personal identity: freedom as persons in their own right, ironically in the name of gender equality. To paraphrase, the message seems to be something along the lines that "these women do not know what is good for them. They should be forced not to wear the veil: a symbol of oppression and of women's inequality." The point has been made that countries which have bans where the majority of the population are Islamic are associated with authoritarian regimes seeking to modernise their societies, removing signs of "backwardness". This has included forcefully removing headscarves from women's heads. Given such a context, it has been argued that choosing to wear a veil becomes a symbol of dissent.[627] Islamic feminists who claim justice and equality in the name of Islam are seeking to interpret its religious texts

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[624] D. Lyon and D. Spini 2004.

[625] See the Human Rights Watch Memorandum to the Turkish Government, 29 June 2004, available at www.hrw.org.

[626] See Judge Tulkens dissenting opinion at paragraph 19 in *Sahin*, 2005.

[627] See D. Lyon and D. Spini 2004.

in a way to claim respect, autonomy and civil liberties. These arguments are reminiscent of the sameness/difference debates in feminist theory of the 1980's and 1990's. If women wish for gender differences not to be blurred and instead inscribe the differences into the public space through wearing the veil, then wearing the veil in this context seems far from a submission to male domination.[628] In the increasingly diverse, pluralist societies in Europe, a more complex understanding of equality needs to be acknowledged and continually investigated. Indeed, glimmers of such an understanding appear in Judge Tulkens dissenting opinion when she makes the astute observation that if wearing the headscarf really is contrary to the principle of gender equality, the state would have *a positive obligation to prohibit it in all places, in public and private.* Any tension between gender equality and culture need not be fatal to culture, including religious views.[629]

Religious Symbols and Identity

This issue of religious clothing and symbols obviously is not restricted to the Islamic headscarf but it is this symbol which has received most publicity and in many cases 'demonisation' recently. Many do regard it as a religious duty to wear certain garments such as the turban, the yarmulke and sometimes the Christian cross as well as the Islamic headscarf. Even if not considered a 'duty' as Ipgrave has clearly pointed out as discussed in my introduction to this chapter, many find religious expressions and practices as integrated parts of their identity. The issue of clothing, religious beliefs and symbols in the workplace is particularly pertinent to many people. Work is crucial to many people's identity, but so is their religion. The case law in this area has not been helpful to such applicants. Some employers have prescribed uniforms or a dress code, although these may be capable of adaption to suit individual requirements. Difficulties can arise when employers justify restrictions on the grounds of hygiene,

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[628] See D. Lyon and D. Spini, ibid., at p. 343.

[629] See, for example, M. Nussbaum's response to Okin in J. Cohen et al., 1999 and the findings of research by the LSE Gender Institute and the Nuffield Foundation, M. Dustin 2006.

health or safety or where the employer offers a service to the public and perceives that restrictions are required in order to promote the business, for example on the basis that the public would prefer employees dressed in a particular manner.[630] Applicants in cases concerning allegations of infringements of religious beliefs and expressions have come up against contract of employment versus freedom of identity issues. Emphasis is often placed on a person's ability to leave a job if they wish to continue the religious practice without due regard being given to the problems in obtaining alternative employment or asking why these applicants need to do this when other work colleagues do not. Applicants often come up against arguments too as to the necessity of the expression of their belief or some type of objective standard applicable to the religion in question.[631]

Decisions to remain within, or convert to, or publicly express or not, a particular faith or way of life could all be viewed as exercises of choice by the particular people involved in those decisions. Ethical practices whose authority emanates from divine command can be seen to produce the self: as Mahmood has expressed it, it is not that one turns oneself over to God but that one cannot imagine existing apart from his rules. There is 'cultivated' what Mahmood calls a specific 'architecture of the self'.[632] As Joan Wallach Scott has recently evaluated, for some women the veil is "a means both of being and becoming a certain kind of person". The same can be said of Jewish men who wear yarmulkes, Jewish women putting on wigs and Sikh men wrapping their hair in turbans. Talad Asid, referring to Islam, says a religious person is "self-governing but not autonomous. The shari'a, a system of practical reason morally binding on each faithful individual, exists independently of him or her. At the same time, every Muslim has the psychological ability to discover its rules and to conform to them."[633]

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[630] S. Knights 2007 at paragraph 5.68.

[631] See, for example, *Kosteski v FY ROM* 13 April 2006; *Konttinen v Finland* 3 Dec 1996, *Stedman v UK* 9 April 1997, *Cha'are Shalom ve Tsedek v France* 27 June 2000.

[632] See Mahmood 2001.

[633] See J.W. Scott 2007.

Conclusions

States can harm their citizens by trivialising or ignoring their cultural identities and this harm is commonly described, as we have seen before by Charles Taylor as a failure of recognition. It damages people by denying them their civil and political rights.[634] As Benhabib has said: "[c]ulture matters; cultural evaluations are deeply bound up with our interpretations of our needs, our visions of the good life, and our dreams for the future."[635] As Anne Phillips has recently explained, the authorities should be wary of presuming that culture makes people behave in a certain way and extremely wary of presuming that some cultural groups are less capable of autonomy than others. Blanket bans introduced in the name of protecting the weak and vulnerable should be regarded as particularly suspect.[636]

A view that presents these cultural and religious practices as situations that happen to women without any decision on their part can be criticised for hindering women's ability to live lives of their own choosing. As Benhabib explains in her analysis of the headscarf "affair" in France, the state is acting as the champion of women's emancipation from their own communities. Yet some women resist the state, not to affirm their religious and sexual subordination as much as to assert a "quasi-personal identity independent of the dominant French culture."[637] In a reply to Okin's criticisms of multiculturalism, while accepting that there is an issue to acknowledge, emphasis has been placed on a willingness to see a respect for the different lives of our fellow citizens and an equal preparedness to embrace the complexity of the task of accommodation and toleration.[638] Further, queries have been raised as to one of the biggest problems with culture – the tendency to represent individuals from minority or non-Western groups as driven by their culture and compelled by cultural dictates to behave in certain ways.[639] As Anne Phillips points out: "[c]ulture is now widely employed in a discourse that denies human

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[634] C. Taylor 1992.
[635] S. Benhabib 2004 at p. 103.
[636] Phillips 2007 at p. 132.
[637] S. Benhabib 2002 at p. 94.
[638] M.C. Nussbaum 1999 at p. 114. See also J. Raz 2001 at pp. 169–175.
[639] See A. Phillips 2007 at p. 9.

agency, defining individuals through their culture, and treating culture as the explanation for virtually everything they say or do."

A conflict is evident in the ECtHR's case law on the Islamic headscarf which can be interpreted as a paternalistic version of personal freedom as self-realisation, seeking to force women to conform to standards they may not agree with, purportedly in the name of gender equality. Not only is this case law therefore to be criticised as disrespectful of individual women's identity and choices, and inconsistent with more sophisticated versions of equality and freedom, which allow these values to sit harmoniously together, it can additionally be seen as contradictory to its own jurisprudence which has developed a right to personal autonomy and identity as self-determination in Article 8.[640]

Personal identity is partly defined in conversation with others and through common understandings which underlie the practices of society. People in Europe have legal human rights to have their private lives respected and are free to hold religious beliefs or not. If religious manifestation is seen as not in tune with the "fundamental principle" of gender equality, problems occur. However, this can be avoided if a version of equality is adopted that acknowledges the equal right to each person's identity, not conformity to one uniform standard to which all must conform.[641] Such a conception entails a strong subjectivity, enabling people to be and become what they want as an ongoing process of self-development and self-determination which is all part of their identity. This enabling or empowerment to critically question existing social norms and structures can best exist when individuals have been encouraged to develop such capacities themselves. This must start with others taking seriously, and listening to, the individuals directly concerned. This respects him or her as an equal capable of creating or fashioning their own lives and being who he or she wants to be.

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[640] As highlighted by dissenting Judge Tulkens in *Sahin*.

[641] As it has been expressed "[r]eal inclusion of all human beings requires attentiveness to their specificities" E. Brems 1997 at p. 164.

Part IV

Personal Integrity

Chapter 10

Bodily and Moral Integrity Rights

Introduction

Integrity is defined as "the quality of being honest, fair and good."[642] It is with this definition that Ronald Dworkin is concerned in his judicial interpretation.[643] Integrity is also defined as "the state of being whole or unified" and as "soundness of construction".[644] Bodily integrity has recently been explained as bound up with a claim to exclude others from one's physical space.[645] This links to ideas of human dignity which I explored in chapter two in the context of human rights protection of human dignity. It has been argued that each person's psychic and moral space in which each individual is allowed to evaluate and represent who they are ought to be a legally protected right.[646] In Drucilla Cornell's theory, law can ensure that everyone has an equivalent chance at the struggle to transform her or himself into a person. In order to ensure that chance, three conditions need to be fulfilled: the protection of bodily integrity, access to symbolic forms, and the protection of the 'imaginary domain'. Cornell describes the *imaginary domain* as the space for "re-imagining who one is and who one seeks to become."[647] This concept overlaps with the sense of the self as a unified whole or as in some sense striving or aspiring towards such a goal, if not psychologically then legally, in terms of legal recognition of their being and existence, and of non-intrusion into their body and their psychological constitution and moral framework.

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[642] *The Little Oxford Dictionary* (Oxford: Oxford University Press 8th Edn 2002).
[643] Most fully expounded in Dworkin 1986.
[644] *The Little Oxford Dictionary* 2002.
[645] M. Freedland 2007.
[646] D. Cornell 1995.
[647] D. Cornell 1995 at p. 6.

In 1994, Celina Romany condemned:

> a human rights framework that construes the civil and political rights of individuals as belonging to public life while neglecting to protect the infringements of those rights in the private sphere… Such a framework is criticised for not making the state accountable even for those violations that are the result of a systematic failure on the part of the state to institute the political and legal measures necessary to ensure the basic rights of life, integrity, and dignity of women.[648]

This situation has changed, at least in terms of the ECtHR's interpretation of Article 8 as providing a right to autonomy, identity and integrity and with the development of positive obligations on the state for the actions of private individuals. This chapter is concerned with the development of a right to integrity under the Court's interpretation of Article 8. However, physical or bodily integrity is arguably protected under Article 3[649] and has increasingly been utilised in the sphere of private, as well as public, violations, violence and abuse, including gender-based violence.[650] The interpretation of a right to integrity has been treated as requiring states to avoid causing or allowing seriously adverse effects on a person's physical and moral or psychological integrity. It has been argued that human rights law ought to secure human agency, as this is the most basic form of protection needed for one to live a life.[651] Unwanted intrusions are instigated and acted upon by the government and state as well as by private individuals and aspects of all of these are analysed in this chapter. It will be shown how certain invasions of one's body and psychological well-being are now clearly seen as violations of Article 8, and indeed may constitute the degree of severity necessary to breach Article 3. The case law is varied and covers topics such as unwanted disclosure of medical information and unwanted medical interventions; physical abuse such as rape and sexual assault both by government officials and by private actors; treatment of the disabled, including issues relating to euthanasia; sustaining individuals' mental health, abortion and giving birth. The case

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[648] C. Romany 1994 at 85–6.

[649] See Judge Tulkens in *MC v Bulgaria* 2003 and Pitea 2005.

[650] This fits into the international protection with the UN and international human rights bodies increasingly acknowledging the right to be free from all forms of violence which affect everyone's life, recognising that some forms of violence are sexually related and gender-based, mostly exercised over women.

[651] See J. Marshall 2005 and M. Ignatieff 2001.

law clearly shows protection against unwanted interferences to a person's bodily or physical integrity and also a person's moral or psychological integrity. It has been asked if an integrity right is a right to privacy and it has been argued that this encapsulates the protection of the nature of others' modification of expression.[652] In this connection, such an integrity right has been discussed as expressive autonomy with recognition of the integrity right reflecting the rise in individual rights of expression and "aesthetic-philosophical currents supporting the notion of creative, expressive individualism."[653] The way this right has developed gives real strength to arguments of personal freedom as self-determination and includes elements of leaving people alone as well as helping and supporting them to live the lives of their own choosing.

Of course, there is overlap here with the other themes developed in this book. To a large extent, many of the violations analysed in this chapter could be covered by a right to privacy, and a negative freedom. In 1997 David Feldman predicted that Article 8 case law was likely to be influenced by three factors, one of which is the way in which the Court gives substance to the novel and under-theorised notion of moral integrity.[654] He states that if moral integrity consists of trying to live one's life in accordance with one's ethical standards, the state might fail to respect private life either by significantly limiting the range of choices which one could hope to implement in accordance with one's moral precepts, or by failing to guarantee freedom from the fear that one is subject to pervasive surveillance. As he puts it "[m]oral integrity in this sense demands that we treat the person holistically as morally worthy of respect, organising the state and society in ways which respect people's moral worth by taking account of their need for security." A further extension could compel the state to give practical assistance to those who lack the physical or perhaps financial capacity to give effect to their moral choices. This would thus impose positive obligations on states to provide social and economic rights.[655] Feldman has also described personal integrity as a

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[652] See L.K. Treiger-Bar-Am and M. Spence in Ziegler 2007 pp. 177–187 at p. 178.

[653] Ibid., at p. 180.

[654] D. Feldman 1997.

[655] D. Feldman 1997 at pp. 270–1: he gives examples of euthanasia and abortion rights, and more developments in the field of sexual activity. Feldman sees moral or psychological integrity as a more difficult concept than bodily integrity. It might be engaged by serious interference with a person's ability to pursue a chosen life-style or plan for

collective description of a rather diffuse set of interests concerned with people's abilities to carry on their lives in an autonomous and dignified way.[656] Talking of Article 8 in 1999, Feldman notes that the court had not defined moral integrity, but it seems to be related both to dignity and to freedom from coercion in respect of choice concerning one's decisions and life-style. As such, the case law in this chapter relates back to identity rights and to autonomous choices about one's way of life. It particularly highlights that decisions concerning an individual's mental well-being ought not to be taken away from him or her. This case law, in the main, is interpreted as securing protection to a sphere which is that individual's own. Even when socially formed and needing protection in public as well as private places, priority is given to individual wishes and desires confirming in many ways a self-determining version of personal freedom. Yet, again, there are glimmers of a self-realising version when it comes to decisions which the court could be construed as considering undesirable, for example, euthanasia.

Unwanted Intrusions

The non-disclosure of confidential information deeply affects many people's moral or psychological integrity. In this sense, the person concerned wishes to keep information about him or herself private and out of public view. They want it to be a decision for them whether or not to share such information, retaining control of it. It can often be of a nature that concerns an intimate aspect of their personality or it could be simply that the person does not want it to be known to others or wishes to select others to so share it with. This provides a sense of control and choice which is discussed in more detail in chapter four and relates to informational autonomy.[657] Often the information is of a medical nature and there are usually strict rules and guidelines as to medical notes and records' confidentiality. For example, the British Medical Research Council's Guidance on confidentiality states:

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life which was not protected by any of the other Convention rights such as freedom of religion or the right to marry and found a family: Feldman 1997 at p. 535.

[656] D. Feldman 2002.

[657] See in particular the discussion of Barber 2007.

> Respect for private life is a human right, and the ability to discuss information in confidence with others is rightly valued. Keeping control over facts about one's self can have an important role in a person's sense of security, freedom of action, and self-respect. (Personal Information in Medical Research)[658]

It has been noted that in the number of cases in which patients have relied upon Article 8 when complaining about the disclosure of medical information, it has not proved especially difficult for them to establish that any disclosure of their medical records constitutes a prima facie violation of Article 8.[659] The principal obstacle to a successful claim is Article 8(2).

In *Z v Finland*,[660] the applicant Z was married to X who had been charged with a number of sexual offences. X was HIV positive and in order to find out when he became aware of his HIV status, the police sought and gained access to Z's medical records. During the court hearings against X, Z's identity and her medical data were disclosed. The proceedings were ruled to be confidential for 10 years but Z complained of violations of Article 8 invoking in particular (1) the orders obliging her medical advisers to disclose information about her; (2) the seizure of her medical records and their inclusion in the investigation file; (3) the decisions to limit the confidentiality of the proceedings to a period of 10 years and (4) the disclosure of her identity and medical data in the relevant court judgment. The ECtHR decided that Article 8(1) was engaged:

> [t]he protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8.[661]

In relation to items (1) and (2), there was found to be no violation but there were violations of Article 8 as regards (3) and (4) on the Court's reasoning of what was a legitimate aim and proportionality. The nature of the information disclosed was a paramount consideration:

> in view of the highly intimate and sensitive nature of information concerning a person's HIV status, any state measures compelling communication or disclosure of such information without the consent of the patient call for the most careful scrutiny…At the same time, the court accepts that the interests

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[658] Medical Research Council 2000.
[659] See E. Jackson 2006.
[660] *Z v Finland* (1998) 25 EHRR 371.
[661] Ibid., at paragraph 95.

> of the patient and the community as a whole in protecting the confidentiality of medical data may be outweighed by the interest in investigation and prosecution of crime and in the publicity of court proceedings, where such interests are shown to be of even greater importance.

Sufficient justification for interference of this right has been found in the case of disclosure of the applicant's medical records on a limited basis to particular people where there is a need to suppress benefit fraud.[662]

In other cases involving unwanted intrusions into people's lives and wish to be private, the Article 8(2) justifications are largely successful. In *X v the UK*[663] an obligation to complete a census form was unsuccessfully challenged. Although an interference was found, it was justified as being necessary in a democratic society, here in the interest of the economic well-being of the country. The Commission has also dismissed complaints about a system of identity cards which implied an obligation that they be carried and shown to the police on request. Since the cards 'only' contain information concerning name, sex, date of birth and place of living, the Commission was of the opinion that there was no interference in the private life of the applicant.[664]

Physical Abuse

Physical integrity has been described as straightforward and overlaps with rights to life and other rights to bodily integrity.[665] Unwanted physical intrusion, from unwanted touching of a publicly shown part of one's body – say one's arm – through to rape and grievous bodily harm are all physical invasions in some way. In terms of their characterisation as violating one's integrity, this is were psychological and physical are inseparable. The idea of bodily integrity connects to philosophical ideas of ownership of one's body and it certainly not being for anyone else to interfere with

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[662] See also *Peck v the UK* Application no. 44647/98 Judgment 28 January 2003.

[663] *X v the UK* Application no. 9702/82, D&R 30 (1983) p. 239.

[664] *Filip Reyntjiens v Belgium* Appl.16810/90, D&R 73 (1992) p. 136. European Directive 95/46/EC on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (known as the Data Protection Directive). Human Fertilisation and Embryology Act 1990 imposes extra restrictions on the disclosure of information held in confidence by the HFEA.

[665] D. Feldman 1999.

another's body.[666] Interesting observations have been made regarding the effects of invasions of one's bodily integrity. Susan Brison has argued in the face of traumatic memory spurred by sexual assault, autonomy may in fact require us to fragment the self, to compartmentalize and avoid aspects of ourselves that would otherwise immobilize and incapacitate us from acting in the world, forging life projects and moving ahead with life.[667] The prevention and punishment, including holding states to account for human rights law violations, treats the victims of such assaults as worthy of respect and recognition so assisting in some way to the rebuilding of their autonomy, identity and integrity.

Article 8 may be viewed as overlapping to an extent with Article 3 but it also covers some matters which would not be serious enough to amount to Article 3 treatment. In the case of *Costello-Roberts v the UK*, concerning the use of corporal punishment, although deciding that on the facts the treatment was not severe enough to violate Article 3 and in the particular circumstances did not fall within Article 8, the Court considered that there may be circumstances in which Article 8 would be viewed as offering wider protection to physical integrity than that offered by Article 3.[668] Feldman notes that the Court did not indicate where this might happen, but he gives an example of non-consensual medical treatment which did not inflict suffering of sufficient seriousness to violate Article 3.[669] In the case, the Court also left open the possibility that beating a child without parental consent might be a violation of his or her parent's moral integrity as well as the child's physical integrity, as such potentially giving rise to violation of Article 8. Feldman expresses the view that the lawfulness of beating children relates to the parents' autonomy rather than the children's autonomy. So far as the children are concerned, it is their physical and moral integrity and dignity that are mainly threatened.[670]

The rights protected here overlap with international prohibitions of torture which are absolute. The right to be free from torture has achieved the level of *jus cogens* and is a peremptory norm of international law. The prohibition admits no exceptions and states cannot therefore derogate from their obligations in this respect. The ECtHR in *Chahal v the*

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[666] See C. Fabre 2006.
[667] See N. Hirshmann 2003 at p. 39.
[668] *Costello-Roberts v the UK* 1993.
[669] D. Feldman at p. 535 and H. Fenwick 2002.
[670] D. Feldman at p. 694.

UK was very clear about the absolute character of Article 3 stressing that it "enshrines one of the most fundamental values of democratic society."[671] Rape in custody by state officials was established in *Aydin v Turkey* to be a violation of Article 3 of the ECHR.[672] In *Akkoc v Turkey*,[673] the ECtHR found that the applicant's treatment during her detention, which had included electric shocks, physical and sexual abuse and intimidation, was deliberate ill-treatment that caused long-term psychological damage. It was severe enough to be categorised as torture. Similarly in *Algur v Turkey*,[674] the ECtHR held that physical and mental abuse of a woman in detention violated her right to freedom from torture, inhuman and degrading treatment or punishment. Being deported can also violate Article 3 rights in the context of gender-based violence. In *Jabari v Turkey*,[675] the ECtHR found that there was a real risk of the applicant being subjected to treatment contrary to Article 3 of the ECHR if she returned to Iran and therefore that an order for her deportation to Iran by the relevant administrative court in Turkey would, if executed, give rise to a violation of Article 3.[676] In this case, the ECtHR also found a violation of Article 13 which provides for effective remedies with regard to the judicial review proceedings. In *Abdulsamet Yamen v Turkey*,[677] the male applicant's treatment by police in custody, which included sexual violence, was described by the ECtHR as involving very

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[671] *Chahal v the UK* (1996) 23 EHRR 413 at paragraph 79. See A. Lester and K. Best 2005.

[672] See *Aydin v Turkey* (Case 57/1996/676/866) (1998) 1 *Butterworths Human Rights Cases* 300. The Inter-American Court of Human Rights has decided similarly: see *Mejia Egocheaga v Peru* (Case 10.970; Report 5/96, 1996) (1997) 1 Butterworths Human Rights Cases 229. In *Ana, Beatriz and Celia Gonzalez Perez v Mexico*, Report No. 53/01 Case 11.565**,** the Inter-American Commission on Human Rights found that a family of four women who were beaten and gang-raped by Mexican military personnel in detention had been tortured.

[673] *Akkoc v Turkey* (2002) 34 EHRR 51.

[674] *Algur v Turkey* Application No. 32574/96 Judgment 22 October 2002.

[675] *Jabari v Turkey* Application no. 40035/98 Judgment 11 July 2000.

[676] At paragraph 40 and 42. A case concerning similar facts was heard at the CAT – *AS v Sweden* Communication No. 149/1999, UN Doc. CAT/C/25/D/149/1999 (2001). CAT found that substantial grounds existed to believe that the claimant would be subjected to torture if she returned to Iran from Sweden where she had sought refuge. Sweden was held to have an obligation in accordance with Article 3 of UNCAT to refrain from forcibly returning the claimant to Iran.

[677] *Abdulsamet Yamen v Turkey* Application no. 32446/96 Judgment 2 November 2004.

serious and cruel suffering that could only be characterised as torture.[678] In *Devrim Turan v Turkey*,[679] the applicant claimed that during police custody she had been stripped naked, threatened with rape, beaten, hosed with cold water, subjected to electric shocks and hung from her arms.[680] The ECtHR did not find it proven beyond all reasonable doubt that the applicant was subjected to the ill-treatment and found no violation of Article 3 but did find deficiencies in the national courts' handling of the situation enough to constitute a violation of Article 13.[681] In *S.W. v the UK* the ECtHR unanimously rejected the defendants' claims that a UK case removing common law protection of husbands against liability for rape if they have sexual intercourse with their wives without their consent had violated their right under Article 7 of the ECHR not to be subjected to criminal penalties for an act which had not been unlawful at the time it took place. As Feldman aptly puts it:

> The essentially debasing character of rape is so manifest that the result of the decisions . . . cannot be said to be at variance with the object and purpose of Article 7 . . . namely to ensure that no one should be subjected to arbitrary prosecution . . . What is more, the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objective of the Convention, the very essence of which is respect for human dignity and human freedom.[682]

In *YF v Turkey*[683] a husband and wife had been in police custody and the wife alleged she was kept blindfolded, that police officers hit her with truncheons, verbally insulted her and threatened to rape her. The wife was examined by a doctor and gynaecologist while police officers remained on the premises. Following her acquittal due to lack of evidence, five police officers were acquitted of violating her private life by forcing this examination. Relying on Article 8, she claimed that this forced examination violated her right to respect for her private life which covers the

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[678] Ibid., at paragraphs 41 and 47.

[679] *Devrim Turan v Turkey* Application no. 879/02 Judgment 2 March 2006.

[680] Ibid., at paragraph 12.

[681] See also *X and Y v Argentina* from the I-ACHR Rep. 38/96, Case 10.506 Annual Report of the IACHR at p. 50 where vaginal inspections of prison visitors, were considered "absolutely inadequate and unreasonable" at least in relation to a 13 year old girl subject to this treatment: see further E. Abi-Mershed 2000 at pp. 432–3.

[682] *S.W. v UK* the ECtHR 22 Nov 1995 Series A no. 335–B para. 44.

[683] *YF v Turkey* (2004) 39 EHRR 34.

physical and psychological integrity of the person. The Court made clear that a person's body concerns the most intimate aspect of one's private life. Thus a compulsory medical examination violates this.

In *Wainwright v the UK*,[684] the ECtHR held there to be a breach of Article 8 by subjecting the applicants to an unduly intrusive strip search. The applicants, Mrs Wainwright and her mentally and physically impaired son, were strip searched during a prison visit. A number of prison rules were breached during the search including Mrs Wainwright being searched in front of a window overlooking the street, both applicants were required effectively to strip naked; neither party was shown a consent form before the search began; the officers put their fingers in the son's armpits, handled his penis and pulled back his foreskin despite the rule that only a visitor's hair, mouth and ears should be touched. Both applicants were distressed by the search and the son developed post-traumatic stress disorder, they brought claims against the UK Home Office in battery, intentional infliction of emotional distress and breach of privacy. The Home Office conceded that the touching of the son's genitals was a battery but the other claims were unsuccessful at the UK House of Lords. Having reiterated that the right to respect for private life includes a right to physical and moral integrity, the ECtHR said there was no doubt that the requirement to submit to a strip-search will generally constitute an interference under Article 8(1).[685] Although here the searches were carried out in accordance with law and pursued a legitimate aim, which was to stamp out drug taking in prison, they were not held to be proportionate to that aim. Prison authorities must comply strictly with procedures set down for searching prison visitors and by rigorous precautions protect the dignity of those being searched. The officers failed to do so, therefore constituting a breach of Article 8. The treatment was not held to have violated Article 3, not reaching the level of severity required. For that, the search must have "debasing elements which significantly aggravate . . . the inherent humiliation of the procedure" or have "no established connection with the preservation of prison security and prevention of crime and disorder."[686] In *Valasinas v Lithuania*[687] where officers obliged a

[684] *Wainwright v the UK* Application No 12350/04, Judgment 26 September 2006.
[685] Ibid., at paragraph 43.
[686] Ibid., at paragraph 42.
[687] *Valasinas v Lithuania* Application no. 44558/98, 24 July 2001.

male prisoner to strip naked in the presence of a female prison officer and touched his sexual organs with bare hands before handling his food the level of severity necessary to violate Article 3 was reached. Similarly in *Iwanczuk v Poland*[688] where a strip search, submission to which was a condition of voting, was accompanied by verbal abuse and derision from guards, Article 3 was also violated. These cases make clear that the right to respect for private life includes protection from unwanted touching and intimate observation.[689]

One of the most important cases establishing the right to physical and moral integrity as arising from Article 8 is *X and Y v The Netherlands*.[690] In that case, the Court held that when there is no right under domestic law to bring criminal proceedings for rape, a violation of Article 8 has occurred. In that case, one of the applicants was a handicapped girl who alleged rape but was unable to bring proceedings under Dutch law because of her handicap: it was impossible to file a criminal complaint for alleged rape on behalf of a victim who was over 16 (as the applicant was) and who was not legally capable of lodging the complaint on her own.[691] Whilst in that case the court did not see the need to examine Article 3 separately, the matter was more extensively surveyed in the more recent case of *MC v Bulgaria*, were the ECtHR found violations of Articles 3 and 8 of the ECHR.[692]

In *MC v Bulgaria*, MC claimed that the domestic law and practice of Bulgaria in rape cases and the investigation into her rape did not secure the observance of that state's positive obligations to provide effective legal protection against rape and sexual abuse. MC claimed that when she was 14 years old, she had been raped by two men known to her. The investigation into the allegations was terminated with the conclusion that there had been insufficient proof of the applicant being compelled into having sex. It was found that there could be no criminal act under the relevant provisions of the Bulgarian Criminal Code unless the applicant was coerced into having sexual intercourse by means of physical force or

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[688] *Iwanczuk v Poland* Application No. 25196/94, 15 November 2001.

[689] See also N.A. Moreham 2007.

[690] *X and Y v Netherlands* (1985) 8 EHRR 235.

[691] Although the right not to be subjected to inhuman and degrading treatment was alleged pursuant to Article 3 of the ECHR, the court deemed it unnecessary to examine this given that it found a violation of Article 8.

[692] *MC v Bulgaria* Application No. 39272/98, Judgment 4 December 2003.

threats; thus presupposing resistance. Referring to Recommendations of the Committee of Ministers of the Council of Europe and to the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) on rape,[693] the ECtHR found the basic principle common to the reviewed legal systems to be that serious violations of sexual autonomy are to be penalised. The court stated that sexual autonomy is violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant. Given that Article 1 of the ECHR secures the rights and freedoms in the ECHR to everyone, it is perhaps unsurprising that states are required to take measures designed to ensure that individuals' rights within their jurisdiction are guaranteed and not violated, including violations by private individuals.[694] Accordingly, the Court stated that Article 3 requires states to take measures designed to ensure that individuals within their jurisdictions are not subjected to ill-treatment including ill-treatment administered by private individuals.[695] It reiterated that Article 8 imposes positive obligations, involving the possible need for adoption of measures even in the sphere of the relations of individuals between themselves. Although there is a margin of appreciation, effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal law provisions.[696] The court made clear that states therefore have a positive obligation inherent in Articles 3 and 8 to enact criminal law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution. Yet the court went further than this. Not only is there an obligation to effectively punish, investigate and prosecute rape, those positive obligations must be seen as requir-

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[693] Recommendation Rec (2002) 5. In paragraph 35 of its Appendix, it states that in criminal law, member states should "penalise any sexual act committed against non-consenting persons, even if they do not show signs of resistance…". The relevant ICTY cases are *Furundzija* 2000 and *Kunarac* 2001. The factual circumstances in *Kunarac*, effectively involving a rape detention centre, amounted to circumstances that were so coercive as to negate the possibility of consent by the individuals held there.

[694] See *MC v Bulgaria* at paragraph 149. *A v UK* Judgment 23 Sept 1998, Reports of Judgments and Decisions 1998–VI, p. 2699 paragraph 22; *Z and others v UK* [GC], no 29392/95 paragraphs 73–75, ECHR 2001–V.

[695] *MC v Bulgaria* ibid., at paragraph 149.

[696] Ibid., at paragraph 150. The ECtHR has not excluded the possibilities that the state's positive obligation under Article 8 may extend to questions relating to the effectiveness of a criminal investigation: ibid. at paragraph 152, citing *Osman v UK* 1998.

ing penalisation and *effective* prosecution of any non-consensual sexual act including in the absence of physical resistance by the victim.[697] So, because the investigations and their conclusions must be centred on the issue of non-consent, and as that had not been done in this present case, the Bulgarian approach was restrictive, practically elevating "resistance" to the status of the defining element of the offence. The Bulgarian government was further criticised for delays in the handling of the case and for attaching little weight to the particular vulnerability of young persons. The system here therefore fell short of the requirements inherent in the states' positive obligations to establish and apply effectively a criminal law system punishing all forms of rape and sexual abuse.[698] It was noted by Judge Tulkens in her concurring opinion that it is important to do this analysis under both Articles 3 and 8 since rape constitutes a violation of both physical integrity which she saw as covered by Article 3 and autonomy covered by Article 8.[699]

The Center for Reproductive Rights has commented that Article 3 could give the right to ensure that laws provide for adequate health services when a crime such as rape occurs. For example, many countries in Central and Eastern Europe could be liable for violations of provisions of the ECHR when medical facilities do not provide emergency contraceptives as part of health-care services for sexual assault victims because of legal or policy restrictions on access to emergency contraceptives or health-care workers' conservative attitudes. The denial of this service it is claimed may rise to the level of inhuman or degrading treatment by unnecessarily putting women at risk of a pregnancy resulting from a crime. The Center take the view that "the European Court of Human Rights has tremendous potential to further the promotion and protection of women's reproductive health

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[697] Ibid., at paragraph 166. The court noted that a requirement that the victim must resist physically is no longer present in the statutes of European countries and that the development of law and practice in the area reflects the evolution of societies towards effective equality and respect for each individual's sexual autonomy (at paragraphs 157 and 165).

[698] Ibid., at paragraph 185.

[699] This point is taken up by Pitea who describes it as Article 3 being used for the purpose of protecting physical integrity in the context of sexual abuses by state officials while Article 8 has been considered relevant where the intrusion into the sphere of sexuality is regarded as violating personal autonomy: Pitea 2005.

and rights."[700] As to the extent of engaging the ECHR in the provision of contraceptives, abortion and giving birth, see further below.

Treatment of the Disabled

Internationally, there are movements to 'mainstream' disability issues and a convention has recently been adopted to explicitly enshrine the international rights of the disabled: The Convention on the Rights of Persons with Disabilities and its Optional Protocol.[701] The United Nations express this Convention as marking a 'paradigm shift' in attitudes and approaches to persons with disabilities, taking to a new height the movement from viewing persons with disabilities as "objects" of charity, medical treatment and social protection towards viewing persons with disabilities as 'subjects' with rights, who are capable of claiming those rights and making decisions for their lives based on their free and informed consent as well as being active members of society.[702] This Convention aims to have an explicit social development dimension. It adopts a broad categorization of persons with disabilities and reaffirms that all persons with all types of disabilities must enjoy all human rights and fundamental freedoms. It clarifies and qualifies how all categories of rights apply to persons with disabilities and identifies areas where adaptations have to be made for persons with disabilities to effectively exercise their rights and areas where their rights have been violated, and where protection of rights must be reinforced. It has been noted that in the UK in 2005, people with disabilities "…remain more likely to live in poverty, to have fewer educational qualifications, to be out of work, and to experience prejudice and abuse."[703]

In a case heard by the ECtHR concerning a severely mentally and physically disabled child requiring 24 hour attention, the applicants alleged that certain decisions taken by a hospital authority and its doctors with respect to the treatment of the first applicant interfered with his right to

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[700] Center for Reproductive Rights at p. 18.

[701] This convention was adopted on 13 December 2006 and opened for signature on 30 March 2007: see http://www.un.org/disabilities/default.asp?navid=12&pid=150.

[702] Ibid.

[703] Cabinet Office Strategy Unit Improving the Life Chances of Disabled People (London: The Stationery Office 2005), Executive Summary.

respect for personal integrity.[704] The allegations of violations of Article 8 concerned treatment of the boy in a hospital, giving him drugs against the wishes of his mother, the second applicant, and the fact that 'DNR' (meaning do not resuscitate) was written on his medical notes without the knowledge or consent of his mother. The applicants contended that domestic law and practice failed in the circumstances of this case to ensure effective respect for the boy's right to physical and moral integrity within the meaning of "private life" in Article 8.[705] The Court considered that the decision to impose treatment on him in defiance of the objections of his mother – his legal proxy – gave rise to an interference with his right to respect for his private life and in particular his right to physical integrity.[706] Although the applicants alleged there was an interference with their family life, the Court considered that only examination of the issues raised from the standpoint of the first applicant's right to respect for his personal integrity and regarding the second applicant as his mother and legal proxy were required.[707]

For the Court, the applicants' contention in reality amounts to an assertion that the dispute between them and the hospital staff should have been referred to the courts and that the doctors treating the first applicant wrongly considered this as an emergency with the hospital trust failing to make a High Court application. The hospital's decision to override the mother's objection to the proposed treatment in the absence of authorisation by the high court resulted in a breach of Article 8. The court therefore did not consider it necessary to examine separately the applicants' complaint in relation to the DNR notice.[708]

In *Price v UK*,[709] the applicant was a female wheelchair user who did not have the use of any of her limbs. She was sent to prison for one week and alleged that whilst in custody she was forced to sleep in her wheelchair, she could not reach the emergency buttons and light switches, and that she was unable to use the toilet. She alleged that she was lifted onto a toilet by a female prison officer but was then left sitting on the

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[704] *Glass v the UK* 2004 at paragraph 3.
[705] Paragraphs 59 and 61.
[706] Citing *X and Y v the Netherlands; Pretty v the UK* and *YF v Turkey*: at paragraph 70.
[707] At paragraph 72.
[708] The decision has one dissenting opinion by Judge Casadevall.
[709] *Price v UK* Application no. 33394/96, Judgment 10 July 2001.

toilet for over 3 hours until she agreed to allow a male nursing officer to clean her and help her off the toilet. Mrs Price alleged that her treatment constituted inhuman and degrading treatment under Article 3. The ECtHR decided in this case that to detain a severely disabled person in conditions where she is dangerously cold, risks developing sores because her bed is too hard or unreachable, and is unable to go to the toilet or keep clean without the greatest difficulty constitutes degrading treatment in violation of Article 3.

In *Botta v Italy*[710] the applicant and his friend who were both physically disabled went on holiday to the sea but there was a lack of bathing facilities equipped for enabling disabled people to reach the sea and the beach. The applicant's claim was unsuccessful under Article 8. The Court noted that Recommendation No R (92)6 of 9 April 1992 of the Committee of Ministers of the Council of Europe urged states to 'guarantee the right of people with disabilities to an independent life and full integration in society, and recognize society's duty to make this possible' making all leisure, cultural, and holiday activities accessible to them without discrimination. The court also took account of Recommendation 1185 (1992) of the Parliamentary Assembly of the Council of Europe on rehabilitation policies for disabled people, and Article 15 of the Revised Social Charter on the right of people with disabilities to independence, social integration, and participation in the life of the community. The Italian state had enacted laws to give effect to these rights and recommendations.

Although the applicant was unsuccessful in his Article 8 claim, the court did not accept the argument advanced by the Italian state and the Commission that positive obligations could not arise under Article 8 in respect of economic and social rights which required a more flexible and discretionary approach than they had argued could have been provided under Article 8. The Court considered that the notion of 'respect' for private life gave rise to positive obligations under Article 8 where there is "a direct and immediate link between the measures sought by the applicant and the latter's private and/or family life. . . . the instant case, however . . . concerns interpersonal relations of such broad and indeterminate scope that there can be no conceivable direct link between the measures the state was urged to take in order to make good the omissions of the private bathing establishments and the applicant's private life."[711] Feldman

[710] *Botta v Italy* 26 EHRR 241 at paras 34–35.
[711] Ibid., at paragraphs 34–35.

has stated that this implies that a state or public authority which accepts an obligation in respect of social or economic rights which directly and immediately affect a person's ability to lead their lives independently to the full may have to discharge that obligation in ways which take account of positive obligations under Article 8.[712]

Importantly, Sir Nicholas Bratza states in the case that:

> . . . positive obligations may exceptionally arise in the case of the handicapped in order to ensure that they are not deprived of the possibility of developing social relations with others and thereby developing their own personalities . . . the crucial factor is the extent to which a particular individual is so circumscribed and so isolated as to be deprived of the possibility of developing his personality.

Medical Interventions

In line with the developments shown in this book, the conception of privacy developed at the ECtHR has been described as the "broad conception".[713] Beyleveld argues that wholehearted adoption of such a broad conception requires the deployment of a 'co-operative' rather than a 'conflict' model of the relationship between privacy values and medical research values.

Several cases under Article 8 relate to the issue of medical treatment in the context of physical integrity. In *X v Austria*[714] concerning a compulsory blood test, the Commission held that a compulsory medical intervention even if it is of minor importance must be considered as an interference with the right.[715] In *Herczegfalvy v Austria* the court stated that Article 8 was applicable in the context of the forced administration of food.[716] Article 8 protects the patient's right to determine his own medical treatment when competent. In this case, the commission held that the right to respect for a person's private life includes his right to decide himself

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[712] D. Feldman 2002 at p. 536.

[713] Beyleveld 2006 at p. 154 and p. 163.

[714] *X v Austria* Application No. 8278/78, 18 DR 154 at 156.

[715] See also *X v the Netherlands* 16 DR 184.

[716] *Herczegfalvy v Austria* (1992) 15 EHRR 437. And the ECJ court has stated that the right requires that a person's refusal be respected in its entirety. *X v Commission of the European Communities* [1994] ECR i-4737.

whether he wishes to undergo a certain medical treatment.[717] It has been argued that where the patient is incompetent, and there is no advance directive, that Article 8 provides the family with a right to be involved in any treatment decisions.[718] In the case, the applicant had been convicted of criminal offences and detained in a psychiatric hospital. He complained that detention was unjustified under Article 5, the right to liberty and security of the person, that he had been unnecessarily and involuntarily given sedatives and tied to a hospital bed for weeks contrary to Article 3.[719] The Commission said that imposing medical treatment on someone without their consent could violate Article 3. However, although there were held to be violations of Article 8 and Article 5(4), concerning terms of treatment when detained, Article 3 was not found to have been breached. This was because the Court took the view that treatment and care carried out because of therapeutic necessity cannot be regarded as inhuman or degrading treatment.[720] This has been described as an unfortunate decision that goes a very long way towards removing the protection of Article 3 standards from one of those people most at risk of having their dignity, autonomy and physical integrity invaded by official action.[721] It is noted that Article 3 will normally be violated when a person who is capable of deciding whether or not to accept such treatment is subjected to compulsory treatment except in the rare case like this one where the preservation of life may be necessitated by the treatment when the state is responsible for the welfare of the person as a result of their imprisonment or similar arrangements as in this case. The Court held there was such a breach of Article 3 in *Ribitsch v Austria*[722] where the Court stated that "any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3."[723] However, the treatment was justified by reference to the state's responsibilities under Article 2, in respect of the detainee's right to life.[724]

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[717] At 471.
[718] A.R. Maclean 2001 at p. 787 and D. Feldman in 1997.
[719] *Herczegfalvy v Austria* (1992) 15 EHRR 437 at paragraphs 85–92.
[720] Ibid., at paragraphs 79–84.
[721] See D. Feldman 1999 at p. 693.
[722] *Ribitsch v Austria* Dec 4 1995 Series A no. 336.
[723] At p. 26.
[724] See analysis by D. Feldman 1999 at p. 693.

In *X v Denmark*, the commission held that medical treatment of an experimental character and without the consent of the patient may under certain circumstances be regarded as prohibited under Article 3.[725] It has been noted that the requirement of an experimental treatment will not be easily satisfied.[726] This protection is echoed in ICCPR Article 7 expressly stating that no one shall be subjected without his free consent to medical or scientific experimentation. The Court must satisfy itself that the medical necessity had been convincingly shown to exist. Any medical interventions and decisions of the ECtHR in this regard must be read in conjunction with the European Convention on Human Rights and Biomedicine 1997.[727] This Convention stresses the respect for the human being as an individual and as a member of the human species and recognises the importance of ensuring the dignity of the human being.

In terms of the meaning of Article 3 in this context, the Court has recently stated in *Selmouni v France*,[728] that:

> having regard to the fact that the Convention is a 'living instrument which must be interpreted in the light of present day conditions', the court considers that certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in the future. It takes the view that the increasingly high standard being required in the area of protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.

On the issue of refusal of treatment during pregnancy and how the court may handle this,[729] it has been argued that maternal refusal of medical treatment during pregnancy would be recognised as similar to the situation of treatment refusal and hence that Article 8 would be deemed at least to include a pregnant woman's right to refuse medical treatment. In the English case of *St George's NHS Trust v S*,[730] an emergency caesarean

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[725] *X v Denmark* (1988) 32 DR 282 at 283.

[726] E. Wicks at p. 61.

[727] Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (1997), although this document is not legally binding. See also Recommendation 1160 (1991) of the Parliamentary Assembly.

[728] *Selmouni v France* (2000) 29 EHRR 403, 442.

[729] See R. Scott 2002 p. 147 ff.

[730] *St George's NHS Trust v S* [1999] Fam 26.

section performed on S against her wishes was held to be a trespass. Judge LJ stated that while pregnancy increases the personal responsibilities of a woman it does not diminish her entitlement to decide whether or not to undergo medical treatment. The judge made clear that an unborn child is not a separate person from its mother and its need for medical assistance does not prevail over her rights: "she is entitled not to be forced to submit to an invasion of her body against her will, whether her own life or that of her unborn child depends on it. Her right is not reduced or diminished merely because her decision to exercise it may appear morally repugnant". On the rights of the pregnant woman and her foetus, the Court's treatment of this issue, particularly by reference to the case of *Vo v France* will be explored below.

Although the Court decided that Article 3 was not violated on the facts of *Herczegfalvy*, a failure to provide appropriate medical care was found in the circumstances of the case in *Hurtado v Switzerland.*[731] It has been noted that since a patient is extremely vulnerable to mistreatment, the result of the treatment withdrawal is death and bearing in mind the ECtHR's comments in *Selmouni*, it has been submitted that the level of severity required to breach Article 3 would be fairly readily reached.[732] This is said to be supported by the Commission's opinion in *Warwick v the UK* where a single stroke of a cane across the hand of a 16 year old girl in the presence of another man breached the girl's rights under Article 3.[733]

Mental Health

The ECtHR has explicitly stated that mental health must be considered a crucial part of a person's private life. Moral integrity entails a sense of non-invasion from outside influences when one wants that, and for the prerequisites to exist socially for a sense of one's self and moral integrity to be built up by the strengthening of one's mental health. Tied to this is the element of recognition and treating people as of moral worth in and of themselves. These are pre-conditions to enabling a person to live a life in which freedom as self-determination is key.

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[731] *Hurtado v Switzerland* (1994) series A, No. 280.
[732] See A. Maclean 2001.
[733] (1986) 60 DR 5.

In *Bensaid v the UK*,[734] an Algerian national with a diagnosis of schizophrenia complained that his pending deportation to Algeria from the UK would constitute a violation of his human rights. He alleged there would be a violation of his Article 3 rights as he would not receive psychiatric medication in Algeria and this would thus subject him to inhuman and degrading treatment. He also alleged violation of his Article 8 right – it would have a severely damaging effect on his private life in the sense of his moral and physical integrity. No violation of Article 3 was found having regard to the high threshold set by Article 3 particularly where the case does not concern the direct responsibility of the contracting state for the infliction of harm. There was also held to be no violation of Article 8. Interestingly, and somewhat restrictively, the Court said that "not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private life guaranteed by Article 8."[735] The applicant had not established his moral integrity would be substantially affected to the degree falling within the scope of Article 8. However the court stated that mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity, reiterating that Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with others. As such, the Court stated that the preservation of mental stability is in that context an indispensible precondition to effective enjoyment of the right to respect for private life.[736]

Pregnancy, Abortion, Giving Birth and Parenthood

Pregnancy and abortion are emotive topics but have been connected in the Court's jurisprudence to the mental health of the mother-to-be. The position of the foetus and the pregnant woman is often presented as one of a conflict of rights – rights of the foetus and the rights of the pregnant woman. Ronald Dworkin describes the connection between a pregnant woman and her foetus in the following terms: "her fetus is not merely 'in her' as an inanimate object might be, or something alive but alien that has been transplanted into her body. It is 'of her and is hers

[734] *Bensaid v UK* Application no 44599/98, Judgment 6 Feb 2001, (2001) 33 EHRR 10.
[735] At paragraph 46.
[736] At paragraph 47.

more than anyone's' because it is, more than anyone else's, her creation and her responsibility; it is alive because she has made it come alive."[737] Dworkin considers contraceptives and abortion to be issues of privacy and sovereignty over personal decisions.[738] He argues that most people share the belief that human life is intrinsically valuable such that its destruction is always a very bad thing. However it does not follow that all forms of human life should have rights. He argues that most people share a deep belief in the sanctity of human life and therefore always regard abortion as a morally serious matter. He identifies procreative autonomy – a freedom to make choices about reproduction – as a vital aspect of the concept of human dignity which is a feature of all democratic societies and as one of the "critical interests" of a person's life.[739] Unplanned parenthood, particularly for women and unsought motherhood goes to the heart of one's sense of personhood and can deeply affect and damage one's sense of self. It has been argued that the importance of bodily integrity to privacy reasoning does not entail a property analysis of the body but rather a recognition that bodily integrity is central to individual identity.[740] Reproductive freedom has been described as fundamental "because it involves the core of a woman's identity – her embodiment, her self-formative processes, her life projects, and her self-understanding are all at stake."[741] Lady Justice Arden in a UK case which then proceeded to the ECtHR, *Evans*, described the ability to give birth as something from which many women obtain a "supreme sense of fulfilment and purpose in life. It goes to their sense of identity and to their dignity."[742]

In terms of choices people make and the attachments they seek to make throughout their life which are fundamental to their identity, having a child or not is surely high on the list. Many if not most people consider, as Hursthouse has expressed it, that "parenthood in general, and motherhood and childbearing in particular, are intrinsically worthwhile, are among the things that can be correctly thought to be partially constitutive of a flourishing human life."[743] Jackson argues that the uniqueness of the bond

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[737] Dworkin 1994 at p. 55.
[738] Dworkin 1994 at p. 106.
[739] R. Dworkin 1994 pp. 200–2.
[740] J. Cohen in S.I. Benn and G. Gaus at p. 160.
[741] J. Cohen at p. 161.
[742] *Evans v Amicus Healthcare* [2004] EWCA Civ 727.
[743] R. Hursthouse "Virtue Theory and Abortion" in D. Statman (ed) *Virtue Ethics* (Edinb

that exists between a pregnant woman and her foetus should alert us to her intrinsic interest in defining for herself the scope of her relationship with the foetus that is living inside her body. Thus rather than ascribing some essential and separate moral status to the foetus, Jackson argues that its interests can only be determined in conjunction with a consideration of the interests of the pregnant woman within whom it exists. So we acknowledge the special bond of pregnancy precisely by treating the pregnant woman's moral agency with particular respect. Jackson argues that reproductive freedom is sufficiently integral to a satisfying life that it should be recognised as a critical conviction about what helps to make a life good. In relation to women, a lack of respect for their reproductive autonomy may even involve infringing their bodily integrity.[744]

A vast amount of women die and suffer every day worldwide because they are pregnant. The intention of the WHO report on Advancing Safe Motherhood through Human Rights, for example, was to facilitate initiatives by governmental agencies and NGOs to foster compliance with human rights in order to protect, respect and fulfil women's rights to safe motherhood. Strategies have been suggested to encourage professional, institutional and governmental implementation of the various human rights in national and international laws relevant to reduce unsafe motherhood, and to enable women to go through pregnancy and childbirth safely.[745]

All of this suggests that reproductive freedom is needed to sustain a sense of integrity and that the ECtHR should therefore be deciding as such in its case law. However, the Court's case law on abortion has been patchy and on the whole avoids commitments to particular sides. There is a lack of jurisprudence explicitly highlighting that a pregnancy is a matter of a woman's moral and physical intregrity without recourse to debates about public interest and rights to life of a foetus.

U P 1997) at pp. 227–44. She goes on to say that "if this is right, then a woman who opts for not being a mother…by opting for abortion may thereby be manifesting a flawed grasp of what her life should be…I say '*may* thereby': this *need* not be so." But some are avoiding parenthood for the worthless pursuits of having a good time or the pursuit of some false vision of the ideals of freedom or self-realisation."

[744] E. Jackson 2001 at p. 7. See also E. Wicks' discussion of Harris and Robertson who have both developed theories of procreative autonomy and liberty respectively which apply also to medically assisted conception in E. Wicks 2007.

[745] R.J. Cook et al. 2001.

Since 1976, it has been clear that pregnancy and the interruption of pregnancy are part of private life and also in certain circumstances family life.[746] The legal regulation of abortion is an intervention in private life which may or may not be justified under Article 8(2).

In *Bruggeman and Scheuten v Germany*, it was pointed out that legislation regulating the interruption of pregnancy touches upon the sphere of private life which includes establishing relationships with others yet is not solely a matter of the private life of the mother. The Commission declared admissible a complaint about German abortion laws but it subsequently held that there was no conflict with Article 8(1). The case has been criticised for not taking a strong stand on pregnancy being a matter of private life. For example, Loucaides states that "private life must cover pregnancy, its commencement and its termination: indeed, it would be hard to envisage more essentially private elements in life."[747] Since the *Bruggeman* decision, it has been noted that the Court has increasingly recognised a pregnant woman's right to terminate a pregnancy under Article 8, following the liberalisation of abortion laws in almost all of Europe in the late 1970's.[748] In *Paton v the UK*,[749] the Commission dismissed the applicant's submission that he had standing to protect his unborn child's right to life and that his right to respect for his private and family life guaranteed by Article 8 had been violated because his partner had sought an abortion. Instead the Commission found that the pregnant woman's right to respect for her private life prevailed, and the need to avert risk of injury to her physical and mental health. Similarly, a male applicant was unsuccessful in *Hercz v Norway*.[750] The Commission said that states have a discretion in 'this delicate area'. Any rights of the potential father must first of all take into account the mother's rights, "she being the person primarily concerned with the pregnancy and its continuation or termination". In connection with such decisions of the Commission, van Dijk et al make the point that it is not evident that the woman's right to respect for her private life should rule out the possibility of a man in principle being consulted. Article 8(2) was said to

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[746] Eur. Comm. HR, *Bruggeman and Scheuten v Germany*, Report of 12 July 1977, DR 10 p. 100.

[747] See L. Loucaides 1990 at p. 179.

[748] See Center for Reproductive Rights at p. 8.

[749] (1980) 3 EHRR 408.

[750] *Hercz v Norway*, Application no. 17004/90.

offer sufficient opportunity for the priority of the mother's right should the man refuse his consent.

In terms of considering the foetus to have rights under the Convention, in *Boso v Italy*,[751] the Court rejected as inadmissible a complaint that Italian abortion law violated Article 2, saying that such provisions strike a fair balance between the need to ensure the protection of the foetus and on the other hand, the woman's interests. The Court has had to consider on a few occasions applications claiming that the foetus has a right to life under Article 2. In the now leading case of *Vo v France*,[752] the Court drew heavily on and summarised the Convention jurisprudence on abortion noting that the unborn child is not regarded as a person directly protected by Article 2 and if the unborn do have a right to life, it is implicitly limited by the mother's rights and interests.[753] The Court viewed questions such as who is a person and when does life begin to be within the margin of appreciation. The Court did say that it may be common ground that the embryo/foetus belong to the human race. The potentiality of that being and its capacity to become a person may require protection in the name of human dignity, without making it a "person" with the "right to life" for the purposes of Article 2.[754] O'Donovan notes that "Convention institutions having previously arrived at a settlement not to upset domestic laws on abortion, the Court feared that a decision on foetal status might re-open this matter."[755]

The applicant in this case had tragically lost her unborn child through fault by the hospital who had mistaken her for another patient. She claimed that the right to life protected under Article 2 of the ECHR had been violated. The Court took as its starting point a consideration of previous case law relating to abortion, followed by a consideration of the question of when life begins, observing that at European level there is no consensus on the nature of status of the embryo and/or foetus. The Convention on Human Rights and Biomedicine gives no definition of "everyone" and the explanatory report shows that in the absence of unanimity on the definition it was agreed to leave this to domestic law. In its desire to avoid making a morally contentious ruling on the scope of

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[751] *Boso v Italy* Application No. 50490/99 5 Sept. 2002.
[752] *Vo v France* 2004.
[753] At paragraph 80.
[754] *Vo* at paragraph 84.
[755] K. O'Donovan 2006 at p. 115.

a foetal right to life, the court adopted what O'Donovan highlights as a 'neutral stance' and left the determination of any such right to national authorities, by way of the margin of appreciation doctrine.[756] The decision on the applicability of Article 2 to foetal life was left in abeyance.

Of the majority of fourteen, five judges objected stating that in their view, Article 2 is inapplicable on the basis of two distinct arguments. Firstly, the unborn life is considered worthy of legal protection distinct in quality and scope from that afforded to the child after birth and therefore Article 2 is inapplicable. Secondly, the majority's consideration of the procedural guarantees afforded by Article 2 to the present case was unnecessary and irrelevant if the foetus did not have protection under Article 2. Two judges were of the view that Article 2 applied but was not violated. As O'Donovan explains this preoccupation with the question of when the right to life begins precluded a very different examination of the harm that was done to Mrs Vo that would have provided recognition and primacy to her wish that her foetus continue to live.[757] As O'Donovan states

> [e]xamining this case from the point of view of women whose pregnancies are terminated against their wills takes us back to women's rights to autonomy and bodily integrity.[758]

And as Barbara Hewson notes, Mrs Vo's right to physical and moral integrity under Article 8 were undoubtedly infringed by the performance of a non-consensual, and entirely inappropriate, medical intervention. However, Mrs Vo did not pursue a complaint based on Article 8.[759] Since a medical error led to the death of the foetus and the term abortion is usually confined to voluntary termination the focus on abortion is misplaced. From the point of view of the woman concerned involuntary and voluntary termination of the pregnancy are quite different matters. O'Donovan suggests that Article 12 may have been a better ground for the complaint, thus making the pregnant woman's autonomy and freedom to procreate the focus of legal reasoning. If the woman's rights and interests limit those of the foetus, as acknowledged by the court, why are her rights not central when she intends to have a child? As O'Donovan

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[756] Ibid., at p. 118.
[757] See Judge Ress para. 7, Judge Costa and Traja para. 16.
[758] K. O'Donovan 2006 at p. 120.
[759] B. Hewson 2005 at p. 372.

notes, disentangling the rights of the foetus from those of the mother is difficult. In a wanted pregnancy the foetus is protected by the mother through her body. Interference by a third party against the will of the mother is a violation of her bodily integrity. The Court failed to distinguish the position of the mother from that of third parties and in its lack of clarity about the relationship of a mother with her wanted foetus. The practical point is that there was a third-party interference with Mrs Vo's autonomy and bodily integrity with her life plans and with her relationship with her unborn child. The view has been expressed that explaining this as a question of the child's rights only and that it must be born alive in order to vindicate its rights is inadequate.[760] Involuntary termination of a pregnancy against the wishes of the mother is a wrong *to her*. The law should take seriously the views of mothers in determining how to respond. The diversion of the Court along a definitional path of questions about when life begins and the nature and characteristics of her foetus led the court to lose sight of the relationship between the mother and her potential child, of the mother's reproductive freedom and autonomy.[761]

In the very recent case of *Tysiac v Poland*, a violation of Article 8 was found to exist where the applicant had sought an abortion on account of the threat to her health, particularly to her eyesight, during pregnancy but it had been refused.[762] The applicant's condition of myopia put her at risk of blindness if her pregnancy was continued. Her sight deteriorated after the birth of her child and she commenced criminal proceedings against the doctors involved. The proceedings were discontinued by a decision of the relevant District Court. The ECtHR's analysis focuses on positive obligations under Article 8, emphasising the positive obligations on states to secure to its citizens their right to effective respect for

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[760] K. O'Donovan 2006 at p. 122.

[761] K. O'Donovan 2006 at p. 123. In *Evans v the UK*, the Court made clear that the right to procreate is part of the applicant's right to a private life covered by Article 8: see *Evans v the UK* Application No. 6339/05 Judgment 7 March 2006.

[762] *Tysiac v Poland* Application no. 5410/03 Judgment 20 March 2007. In *D v Ireland* Application no. 26499/02, Judgment 27 June 2006, the applicant challenged the Irish law on termination of pregnancy which provided for legal abortion only where the life of the woman was in danger and placed restrictions on provision of information on obtaining abortions abroad. The ECtHR decided that she had failed to exhaust domestic remedies. The different handling of these two cases is highlighted by dissenting Judge Borrego Borrego in *Tysiac v Poland*.

a person's physical and psychological integrity.[763] Whilst the Court stated that abortion regulation involves the balancing of privacy with the public interest, it also stressed the fact that state regulation must, in the case of therapeutic abortion, be also assessed against the positive obligations of the state to secure the physical integrity of the mothers-to-be. The applicant had claimed under Articles 3 and 8 that the failure of Poland to make a legal abortion possible in circumstances which threatened her health and to put in place a procedural mechanism necessary to allow her to have this right realised, meant that the applicant was forced to continue with a pregnancy for six months knowing that she would be nearly blind by the time she gave birth. The Court said that the resultant anguish and distress and the subsequent devastating effect of the loss of her sight on her life and that of her family could not be overstated. The Polish system was criticised by the Court who said that any national procedure should ensure that decisions to terminate are timely so as to limit or prevent damage to a woman's health. Poland had failed to demonstrate that its laws as applied to the applicant's case contained any effective mechanisms capable of determining the conditions for obtaining a lawful abortion.[764] Absence of any such preventative procedures amounted to a failure of the state's positive obligations. The applicant also argued that the treatment she had been subjected to was inhuman and degrading, breaching Article 3. She argued that treatment was degrading if it aroused in its victim "feelings of fear, anguish and inferiority capable of humiliating and debasing them." The court reiterated its case-law on the notion of ill-treatment and the circumstances in which the responsibility of a state may be engaged, including under Article 3 by reason of the failure to provide appropriate medical treatment.[765] In the circumstances, the Court did not find that the facts disclosed a breach of Article 3 and considered it more appropriate to deal with the applicant's complaints under Article 8. The quote from the case which starts this book is worth repeating:

> The court . . . reiterates that 'private life' is a broad term, encompassing, inter alia, aspects of an individual's physical and social identity including the right to personal autonomy, personal development and to establish and develop

[763] Ibid., at paragraph 107.
[764] Ibid., at paragraph 124.
[765] Referring to the case of *Ilhan v Turkey* Application no. 22277/93, Judgment 27 June 2000 para. 87.

> relationships with other human beings and the outside world… Furthermore, while the Convention does not guarantee as such a right to any specific level of medical care, the court has previously held that private life includes a person's physical and psychological integrity and that the state is also under a positive obligation to secure to its citizens their right to effective respect for this integrity.[766]

Dissenting Judge Borrego Borrego criticised the Court's decision presenting a view of human rights law as protecting human dignity and moral autonomy rather than the integrity of the pregnant woman:

> All human beings are born free and equal in dignity and rights. Today the Court has decided that a human being was born as a result of a violation of the ECHR. According to this reasoning, there is a Polish child, currently six years old, whose right to be born contradicts the Convention. I would never have thought that the Convention would go this far, and I find it frightening.[767]

It has been stated, in a concurring opinion, that denying a pregnant woman unconditional medical aid could give rise to a violation of both Article 2 and Article 3 of the ECHR.[768] The Court has also presented the view, in the concurring opinion of Judge Ress joined by Judge Kuris in the anonymous birthing decision of *Odievre*, that it is in the general interest for appropriate measures to be taken to protect children's lives by reducing so far as possible the number of abortions, whether legal or illegal. Judge Greve, also concurring, argued that "no society should in the name of the promotion of human rights be forced to leave a woman with abortion as the only apparent safe option."

Considering this issue to be one of a mother-to-be's integrity and autonomy reflects the great deal of work carried out in the context of reproduction and abortion in terms of a personal choice.[769] Yet, in this literature maternity is conflated with motherhood. Women who continue their pregnancy are generally assumed to want a child; the assumption being that, if they did not, they would terminate the pregnancy. As

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[766] *Tysiac* at para. 107, citing *Pretty* para. 61, *Glass v UK* 61827/00; *Sentges v The Netherlands* 27677/02 8 July 2003; *Pentiacova v Moldova* 14462/03; *Nitecki v Poland* 65653/01 21 March 2002; *Odievre v France* Application no. 42326/98, Judgment 13 February 2003.

[767] *Tysiac*, dissenting opinion of Judge Borrego Borrego at paragraph 15.

[768] *Odievre v France* concurring opinion of Judge Greve p. 28 of 34.

[769] See, for example, S. Sheldon, 1997; E. Jackson 2001.

O'Donovan and I have previously argued, conceptual clarity requires a distinction to be made between maternity and motherhood, notwithstanding the assumption made currently that continued gestation signifies an intention to take up mothering[770] or at least to be acknowledged as 'mother'. The identity of a woman 'who gives away her child' is less acceptable; she, unlike the surrogate mother or the woman who gives up her child for adoption, is not performing that one last, altruistic, sacrificial, *maternal* act to promote the welfare of her child. The decision of the mother in *Odievre* sheds light on the contrasting views of personal freedom as self-determination or self-realisation. For some second wave feminists, children and childbirth issues have been central to arguments about autonomy. Debates over issues such as abortion, extra-uterine-birth, work-life balance, bodily integrity, and making life plans involve arguments about women's freedom of choice: in some shape or form, their autonomy.

As O'Donovan has argued, various stories are told of motherhood: they range from natural instinct, to altruism or martyrdom, to self-interest, and unpicking these is difficult. Not only are individual childhood stories of motherhood subjective and particular, but suggestions of a woman's choices after giving birth touch on fears of abandonment and rejection.[771] Further, abortion entails a decision being made by the pregnant woman before a child has been born and brought into physical existence outside the woman's body. If an abortion happens, no child will be born. In adoption or abandonment situations, a living child exists. A new person with its own rights exists. Two parents are now responsible for a child's welfare too, not just the woman. Yet as we have seen in chapter eight, the concern for a full sense of one's identity hinging on knowledge of the exact identity of one's biological mother, the birthgiver, is gaining momentum – as if a person cannot be 'whole' unless they know this fact. In the decision, there are assumptions made about the women who give birth with corresponding ideas of their autonomy. The literature on what exactly ability to choose means, and the relation between exercise of choice and ideas of identity, correlate with empirical studies carried out as to why women give birth in secret. There have been two main empirical studies carried out by French feminists in this field.[772] Bonnet, the author of one

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[770] K. O'Donovan and J. Marshall 2006.

[771] See K. O'Donovan 2000a and 2002.

[772] See K. O'Donovan 2000a and 2002: these are C. Bonnet 1991 and N. Lefaucheur

of the studies, argues that the women involved gave up their children to protect them, as a gesture of love.[773] The children were safeguarded from infanticide and abuse because anonymity was a *choice* for their birthgiver. Bonnet's argument is that a woman's right to give birth anonymously is a fundamental freedom, linked to privacy,[774] and is a right to renounce forever the motherhood of a particular child.[775] A contrasting empirical study by Lefaucheur adopts a different conception of autonomy. Her emphasis is on hardships of various kinds by the women involved. These reflect not a right to choose but a *lack of autonomy* and resources. The issues for these women include fear of parental reaction, pressure by parents from a religious or conservative background, personal problems, an inability to cope with another child, domestic violence and large families in economic difficulties.[776] To summarise the two positions:

> [to] Lefaucheur, it is precisely because the X women lack autonomy that they seek anonymity and the consequent adopting out of their child. For Bonnet, however, such action is a mark of choice and freedom, and is a woman's right. Both use the word autonomy but come up with different definitions.[777]

There are times in life when a sense of commitment places constraints on people's lives from which they may not be able to unbind themselves without self-betrayal and personal disintegration.[778] Many would say that giving birth to a baby involves such a commitment and that therefore

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2000. See also N. Lefaucheur "The French 'tradition' of anonymous birthing: the lines of argument" (2004) 18 *International Journal of Law, Policy and the Family* 319–342.

[773] Which is the title of her book on the subject and was influential in the early 1990's in debates in the French parliament on the issue of anonymous birthing as well as in country-wide debates generally.

[774] Of such importance in the French legal system that it is a breach of an aspect of private life to publish without her consent, information that a woman is pregnant, even though her condition is visibly public – see para. 37 of the *Odievre* judgment.

[775] K. O'Donovan 2000a at p. 82, O'Donovan 2002 at p. 363.

[776] As mentioned already in chapter eight, the French government in *Odievre* presented evidence of three main categories of women who chose to give birth anonymously: young women who were not yet independent; young women still living with parents in Muslim families originally from North African or Sub-Saharan African societies in which pregnancy outside marriage was a great dishonour; isolated women with financial difficulties, some the victims of domestic violence. Reasons for seeking confidentiality sometimes included rape or incest. – see paragraph 36.

[777] K. O'Donovan 2002 at p. 371.

[778] T. Regan 1986 p. 27.

anonymous birthing leads to such self-betrayal and personal disintegration and lack of autonomy is a problem. Such views chime with conceptions of the self in some ethic of care or cultural feminist work,[779] communitarian conceptions of selfhood,[780] and versions of what Helen Reece has described as the "post-liberal self".[781] In some instances, there seems to be a draw towards notions of 'authenticity', with inauthenticity seeming to entail that one's actions or decisions are out of line with one's *identity*. 'Authenticity', as used in this discourse, must be understood in relation to agency and becoming: 'autonomy comes from agency which takes place within a context of becoming'.[782] Thus a constrained subject is to strive for authenticity in their actions. It is this achievement that leads to 'authenticity', where actions and decisions fit with one's sense of self. Yet the requirement of a constant effort in seeking authenticity is open to criticism as unattainable. The subject may never reach that desirable state. She may reproach herself in her reflexivity. And in the meantime, practical decisions once taken may not be revocable on reassessment.

As already pointed out, the conventional reaction to a woman who 'gives away' her child is one of distaste, even horror. This is an 'unwomanly' woman, one more like the wicked stepmother of fairytales than a 'real woman'.[783] Even those sympathetic to her plight may tell the woman that the decision to renounce motherhood after giving birth is a debilitating action. When it is said 'you will regret that later', or 'it is not natural' the message is that the self is divided against the self, that the proposed action is inauthentic.[784]

As Emily Jackson explains, a person's reproductive choices are shaped by multiple external influences but they are the only choices available and they are therefore of critical importance to one's sense of self. The decision to have an abortion for example is made because for a variety of reasons this particular woman does not want to carry her pregnancy to

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[779] C. Gilligan 1982, R. West 1988, A. Rich 1976.

[780] M. Sandel 1998, Taylor 1992, Avineri and De-Shalit 1992, Etzioni 1988.

[781] H. Reece 2003. Although I use the term here, this version of the self draws on a rich pre-liberal tradition – see, for example, Guignon's analysis: Guignon 2004.

[782] M. Griffiths, 1995, p. 179.

[783] K. O'Donovan 2000a, 2002.

[784] H. Reece 2003 argues that the search for authenticity, in following the right path in personal decisions, can be never ending, and is an aspect of the therapeutic state. Eventually this search is coercive, as much so as the traditional rules it replaces.

term or give her child away, including in the anonymous birthing system available in France under examination in *Odievre*. That the woman in question is not in control of all of those reasons should not lead us to ignore her deeply felt preference. Even if it is recognised that social forces may shape and constrain choices, the sense of being the author of one's own actions, especially when they attach to something as personal as reproduction is profoundly valuable to all of us. When we disregard an individual's reproductive preferences, we undermine their ability to control one of the most intimate spheres of their life.[785]

Dying

It is argued that the way one dies is part of one's private life as a matter of personal autonomy. This issue was dealt with by the Court in *Pretty v the UK*. The applicant suffered from motor neurone disease, a progressive degenerative illness. She wished her husband to assist in her ability to control how and when she died to be spared "…suffering and indignity."[786] When she sought assurance from the relevant UK authority that he would not be prosecuted in the event of her death, this was refused. Being unsuccessful at national courts, she took her case to the ECtHR. There she was also unsuccessful. Her arguments were that her Article 2, 3, 8, 9 and 14 rights under the ECHR had been violated. Little analysis is provided of Articles 2, 3 and 9.[787] However, Article 8(1) was said to be engaged on the facts of the case.[788] The court makes explicit that the right to respect one's private life is a broad term, not given to exhaustive

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[785] E. Jackson 2001 p. 7.

[786] *Pretty* 2002 at paragraph 8.

[787] Article 2 is described by the Court as not concerned with the quality of life or what a person chooses to do with his or her life and it cannot be interpreted to provide a right to die – see *Pretty* at paragraphs 39 and 40; the applicant's claim that the refusal of the DPP to give an undertaking not to prosecute her husband disclosed inhuman and degrading treatment for which the state is responsible as it will thereby be failing to protect her from the suffering which awaits her as her illness reaches its ultimate stages was said to be placing a new and extended construction on the concept of treatment which was unsustainable under Article 3 – see paragraph 54; her opinions and views on assisted suicide did not constitute beliefs in the sense protected by Article 9(1) or manifestations of religion or beliefs – see paragraphs 82–3.

[788] *Pretty* at paragraph 67.

definition, protecting a right to personal development, and the right to establish and develop relationships with other human beings.[789] The Court observed that the ability to conduct one's life in a manner of one's own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned. The Court accepted that how the applicant wished to live her last days was a part of the act of living.[790] It has been argued that the period of dying forms part of life and to deny that a provision which prohibits interference with the way in which an individual leads his life relates to the manner in which he wishes to die "seems to involve a fundamental misunderstanding of the conceptual connection between the right to personal autonomy and respect for human dignity, the preservation of which is the underlying objective of all human rights law."[791] Pedain expresses the view that the possibility of a chosen death has sometimes been perceived as the very cornerstone of a dignified human existence, which requires that individuals can understand themselves as free human beings, quoting the Roman philosopher Seneca.[792] Yet in introducing the concept of human dignity here, there is a risk of imposing standards which Pedain seems to want to avoid.[793] It appears she is using it in the 'dignity as empowerment' sense rather than 'dignity as constraint'.[794]

At paragraph 65, the Court takes the view that:

> it is under Article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity.

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[789] *Pretty* at paragraph 61.

[790] *Pretty* at paragraph 64.

[791] A. Pedain 2003 at p. 190.

[792] A. Pedain 2003 at p. 190.

[793] Although covered by Article 8(1), the court considered the prohibition on assisted suicide to be justified pursuant to Article 8(2). The legislative aim of the prohibition is to reflect the public interest in preserving the lives of its citizens and to protect vulnerable persons from acting upon a death wish which may be temporary or induced by undue influences of others or related to personal conditions affecting the validity of their judgments Pedain questions whether an exceptionless prohibition is necessary to achieve these legitimate objectives (Pedain 2003 at p. 192).

[794] See chapter two.

Writing about euthanasia generally, David Orentlicher has noted that "society recognizes a right to be free of unwanted touching to ensure that individuals have control over their bodies and are able to exercise self-determination. Yet a right to euthanasia/assisted suicide would also ensure that individuals have control over their bodies and are able to exercise self-determination. We still need to explain why considerations of personal autonomy are more important with respect to treatment withdrawal than euthanasia/assisted suicide."[795] Sylvia Law has described the euthanasia dilemma as concerning at core the individual's desire to retain control over his or her body and life. As Ronald Dworkin explains: "death has dominion because it is not only the start of nothing but the end of everything, and how we think and talk about dying – the emphasis we put on dying with "dignity" – shows how important it is that life ends appropriately, that death keeps faith with the way we want to have lived."[796] Ronald Dworkin and other eminent liberal scholars succinctly state the issue to concern the following: "[c]ertain decisions are momentous in their impact on the character of a person's life – decisions about religious faith, political and moral allegiance, marriage, procreation, and death, for example. Such deeply personal decisions pose controversial questions about how and why human life has value. In a free society, individuals must be allowed to make those decisions for themselves, out of their own faith, conscience, and convictions . . . Most of us see death – whatever we think will follow it – as the final act of life's drama, and we want that last act to reflect our own convictions, those we have tried to live by, not the convictions of others forced on us in our most vulnerable moment . . ."[797]

As Pedain evaluates the case, Mrs Pretty's possibility to take her own life came to represent her freedom as a human being. It was the only area of conduct in which she still saw a possibility to shape her own life in a meaningful way in the light of her personal circumstances. What could amount to self-determination for a person in her situation was to make

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[795] D. Orentlicher "The Alleged Distinction between euthanasia and the withdrawal of life-sustaining treatment: conceptually incoherent and impossible to maintain" (1998) *University of Illinois Law Review* 837 at 848.

[796] R. Dworkin 1994.

[797] Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon and Judith Jarvis Thomson Amici Curiae Brief for Respondents in *Washington v Glucksberg* 117 S Ct 2258 (1997) and Vacco Quill 117 S Ct 2293 (1997) Cited in E. Jackson 2006 at p. 941.

a choice about the manner and time of her own death.[798] This is why that choice became for her the epitome of personal autonomy. The Court is criticised for contrasting the case with *Dudgeon* in that the margin of appreciation was narrow where an intimate area of a person's sex life is concerned. As Pedain puts it:

> [a]pparently the Court considers suicide a rather peripheral aspect of individual self-determination when compared to such matters as the ability to live one's sexual preferences.[799]

In her view, what is required for the purposes of applying Article 8(2) is a realisation that the burden imposed on personal freedom is not absolute but relative to the factors which determine the impact of a restriction on certain types of individuals. The weight of the restriction is a function of the scope of activity open to a person to live out their personal autonomy. So dying is central to persons close to death and is not made any less so because it is marginal for the young, the middle-aged and the healthy.[800] The reason why we respect her choice, says Pedain is not that it is *the right* choice, but that it is *her* choice. Whilst that might be the case, caution does need to be exercised in such sensitive situations where there is a risk of exploitation of the vulnerable, and human rights law does have a role to play in this.[801] The self-determination arguments presented in this book mean that individual choice does need to avoid becoming an untrammelled freedom to all to do whatever they want. Ideas of dignity as constraint appear evident in the judgment, as they do in *Laskey* discussed in chapter seven, with a sense of permitted free choice only up to a point. The moral framework of the good means that her choice was not allowed.

In terms of the applicant's Article 14 claim, she alleged discrimination on the basis of her disability as she was unable to commit suicide due to her illness. The Court held that there was objective and reasonable justification for not distinguishing in law between those who are and who are not physically capable of committing suicide, pointing to the

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[798] See discussion by A. Pedain 2003 at pp. 193–7.
[799] A. Pedain 2003 at p. 193.
[800] All in A. Pedain 2003.
[801] J. Montgomery 2006.

protection of the vulnerable arguments already employed in considering Article 8(2).

Conclusions

As we have seen, the case law concerning bodily and moral integrity rights covers a great deal of substantive areas of law: physical abuse, including unwanted intrusions and unauthorised disclosure of private information, sexual and other assaults and rape by government officials and private actors, the treatment of the disabled, medical interventions against one's will, mental health, abortion, and aspects of dying. The Court has been keen to stress personal integrity's fundamental nature to the right to respect for one's private life protected under Article 8 which in many ways has provided a fall back position when the level of severity of the treatment does not reach that required for Article 3 to be violated. Most of the case law supports a view of personal integrity, both bodily and moral, which connects to self-determining freedom to live a life of one's own choosing.

Chapter 11

Conclusion to the book

This book has sought to develop the concepts of personal autonomy, identity and integrity which the ECtHR has explicitly reiterated – in recent years and developed throughout its jurisprudence from its earliest of days – is protected for all persons under Article 8 of the ECHR. The concepts often overlap and some cases do not fit easily into one category rather than another. Overall however, the jurisprudence shows the possibility of a profound respect for personal freedom as manifested in these concepts. In many ways, the case law has developed to increase the personal freedom in a way which goes to the very heart of what it means to be a person, protecting intimate areas of one's life and increasingly doing so even when the affects are felt in public rather than private life for the applicants concerned.

The Court has clearly shown that it will not be enough to leave people alone for their rights to be protected under this provision. However, leaving people alone when they want to be left alone and preventing harm and damage to another's mental and physical stability is necessary and is evidently protected. Yet problems do arise when the Court looks to the nature of the activity in question and fails to see the importance of it to the applicants in question, as in *Pretty* and in *Laskey*. Here, issues of moral standards and a moral framework are introduced which sometime veer the Court towards the protection of the majority rather than focusing on the nature of human rights as a protector of individuals, often against the opposition of the moral majority. Yet, having said that, a slippage into ideas of personal freedom as self-determination wholly without moral and social context is, in my view, undesirable. In such decisions it is necessary for the Court to uphold certain standards but these should rest on the importance of personal freedom, respecting the choices people make and treating them to equal respect from the legal system. The Court's approach to religion as particularly seen in the Islamic headscarf cases illustrates their lack of doing this most clearly. There is a tendency therefore for

the Court's jurisprudence on Article 8 to be incoherent as to the type of personal freedom, autonomy, identity and integrity it is upholding. The danger is that a moral autonomy, human dignity as constraint and freedom as self-realisation will be the prevalent view of what personal freedom, as protected by European human rights law, means.

The way the Article 8 right has been developed in the sexual identity cases shows in legal form that the development of one's personality does not need to entail a belief in an inner *essence* in the sense of an unchanging foundational core that may be prohibitive, in that it can be used to justify placing constraints on new ways of being, focusing on individuals' 'finding out' who they 'truly' are, with ideas of core 'authenticity' or self-realisation. Instead, it can be expressed as the *potential* to form projects and exist in the world in a meaningful way. Given this potential, political and legal programmes can assist in its fruition because the projects people choose and the way they choose to exist and who they choose to become is created in large part by the social conditions individuals find themselves in. Structures and an environment, including human rights' institutions, that allow people the chance to think about what is possible for their lives, and then put this into concrete terms, are required. The human rights law analysed here can play an important role in protecting existing choices. However, it can also play a vital part in allowing identity formation, through creating the social conditions to enable an individual to develop their personality and identity as they wish. While the right to access information relating to one's childhood existence and development, as in *Gaskin* and *M.G.*, is also part of this idea of freedom, when it comes to 'biological truth' the case law has the tendency to validate a version of freedom as self-realisation which could prove problematic as we saw in the strong dissenting judgment in *Odievre*. Freedom as self-direction and self-development is not something that individuals can sustain on their own. Identity is partly defined in conversation with others and through common understandings which underlie the practices of society. Yet linking it so deeply with one's biological parentage in the sense that it is more 'natural' and 'authentic' needs to be investigated to ensure that undue constraints on freedom do not result. The problem with self-realisation is that it seems that 'wrong' or inauthentic choices may open a space for state intervention.[802] The danger with presenting a view of the "human

[802] H. Reece 2003.

core" which is always there and can somehow be reclaimed or discovered and realised consists in fixing and constraining identity, taking us back to ideas of human nature or function. It allows the more powerful to tell people what a true essence is and so try to persuade others to think in certain ways about their identity that will purport to enable this "true inner essence" to be fulfilled, in a similar way to Berlin's analysis of the one harmonious whole of rationality and its authoritarian tendencies. If an idea of existence is used rather than essence, seeking an expansion of human potential, this removes those dangers.[803]

Loucaides in his 1990 review of the case law on private life as personality, notes that the Convention organs "have gone beyond the established traditional meaning of private life and have extended this meaning to cover a wide range of elements and manifestations of the individual's personality, supporting the view that private life should be considered as co-extensive with the needs of the personality."[804] He continues to note that the personality of the individual functions in an environment involving a continuous process of give and take between one's individuality and the requirements of society as a whole. Manifestations of the personality are inevitably affected by the passage of time and their recognition for purposes of legal protection depends upon social conditions. The dynamic and evolutive nature of the Convention principles shows that what was once thought outside the scope of the Convention will now be covered by it. The protection of the privacy of the individual extending beyond acts of interference by a government to encompass a requirement of positive action from them to prevent and deal with any violations by private actors is also an important development in this area. There is a need to deal with securing the necessary opportunities and means to enable people to exercise effectively the freedom to express and develop their personalities. The right to personality implies the widest possible freedom of choice and the minimum of coerced choices for individuals. Living in a society this means that all need to have these rights secured. However the tendency to view equality as some form of principle to which all have to conform in sameness and uniformity is to be avoided. By contrast, for example, recently in the UK, the charity Age Concern described a version of equality based on the equal participation in society of all because of respect for

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[803] See further on this J. Marshall 2005.

[804] L. Loucaides 1990 p. 189.

the dignity of each person. This includes acknowledging people's different identities, needs and aspirations.[805] Such a version would prove more fruitful in the Court's analysis. Re-interpretation of law, and in this case of regional human rights law, needs to be seen in the light of the fundamental objectives of that area of law – that is, to safeguard and potentially develop, personal freedom in a communal setting to enhance lives.

[805] Equalities Review p. 7.

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