



Universiteit Utrecht

# Equality and human rights: nothing but trouble?



**Liber amicorum Titia Loenen**

**SIM special 38**

Edited by  
Marjolein van den Brink  
Susanne Burri  
Jenny Goldschmidt

Utrecht, 2015

**SIM**



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Marjolein van den Brink, Susanne Burri & Jenny Goldschmidt (eds.)

Photo Titia Loenen: Maarten Hartman  
Layout: Klaartje Hoeberechts

SIM special 38  
A publication of the Netherlands Institute of Human Rights (SIM)  
Utrecht University, 2015

ISBN 978-90-393-6307-2  
NUR 828

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# List of abbreviations

BW	Burgerlijke Wetboek (Dutch Civil Code)
CAT	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CERD	Convention on the Elimination of all forms of Racial Discrimination
CGB	Commissie Gelijke Behandeling (Equal Treatment Commission)
CJEU	Court of Justice of the European Union
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DEVAW	Declaration on the Elimination of Violence against Women
EAW	European Arrest Warrant
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FGM	Female Genital Mutilation
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LGBT	Lesbian, gay, bisexual, transgender
PDHRE	People's Decade on Human Rights Education
TCNs	Third-country nationals
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN HRC	United Nations Human Rights Committee
VVDM	Vereniging van Dienstplichtige Militairen (Conscript Servicemen's Association)
WHO	World Health Organisation



# Introduction

Marjolein van den Brink, Susanne Burri and Jenny Goldschmidt

## 1. Introduction

On 18 November 2013 a seminar was organised at Utrecht University on the occasion of the departure of Titia Loenen from the Utrecht School of Law to Leiden Law School. While Titia Loenen also has a reputation as being an excellent teacher and, among other things, as the PhD Dean and Director of Research, the focus of the seminar was on the areas of her research during the almost 25 years she worked in Utrecht. Titia Loenen's publications cover a wide range of legal research areas, including legal theory, gender and the law, human rights and international law. We selected a theme that can be seen as a common denominator in her work: the principle of equality and its relation to (other) human rights. Thus the title of the seminar was 'Equality and Human Rights: Nothing but Trouble?'

Lucy Vickers and Eva Brems delivered keynote speeches at this seminar, which are included in this volume. Moreover, we invited Titia's (former) colleagues, students and PhD candidates to contribute to this volume on the theme, offering a choice between either a peer-reviewed longer article or a short 'note' or column on the topic. We are very pleased that so many people accepted the invitation, even though some of them finally had to decline because of too many other commitments (a feature that is increasingly common among academics today). The editors were assisted by Eva Visscher-Simon, Charlotte Mol, Peter Morris and Klaartje Hoeberechts without whom the end result would not have been possible: we thank them very much for their contributions. Similarly, the anonymous peer reviewers contributed to the quality by providing critical feedback, and we are most grateful to them, too.

The resulting volume includes eleven peer-reviewed contributions (these are marked with an asterisk in the table of contents) and eleven shorter papers.

Together they not only honour Titia Loenen but also offer a challenging perspective on a number of related human rights debates that are closely linked to fundamental challenges in today's world. These debates can be divided into several themes. The first theme refers to the contents and essence of the principle of equality and the relation between this principle and (other) human rights in general. It includes the debate on the meaning of the universality of human rights in a 'world of conflict and diversity' (which was the title of the human rights research programme that Titia Loenen directed in Utrecht). The second theme deals with the relation between human rights and democracy, and between human rights and sovereignty. The third theme reflects more specific debates on the position of religion in human rights law, which protects religion as an autonomous fundamental right (the freedom of religion) and protects individuals against discrimination because of their belief. The fourth theme deals with the increasing complexity of the debate itself, resulting from a number of factors, such as the emergence of new human rights systems and institutions, the development of new technological options and of new concepts. Finally, the last theme considers the shift from standard setting and monitoring to the effective implementation of both equality and (other) human rights.

All contributions deal with one or more of these issues. Rather than providing summaries or a comprehensive overview of the debate, we present a bird's-eye view of the debates with the aim of increasing the interest and curiosity of the reader.

## **2. Equality and (other) human rights in general**

### *2.1. Universal protection of rights*

Equality is not only an independent autonomous right guaranteed in all national and international legal systems, but is also an inherent element of all other human rights. Article 1 of the Universal Declaration of Human Rights holds that all human beings are born free and equal and Article 2 reaffirms that everyone is entitled to the rights and freedoms set forth in the declaration. Human rights do not make sense when they do not include entitlements for all human beings. In this way equality is closely related to the universality of

human rights. Universality should not be understood as uniformity. On the contrary, it can be related to the ‘dynamic potential’ of international human rights law, as explained by Bas de Gaay Fortman in his contribution. He sees the Declaration as an expression of *faith* in fundamental human rights. And, as Hana van Ooijen mentions in her contribution: ‘it takes faith for someone to work on equality and human rights as long as Professor Loenen has done’. Conceiving human rights as a reference to the inherent worth of all human beings equally, *equal in dignity*, they are intrinsically linked to liberty and solidarity. De Gaay Fortman develops this idea in his Golden Triangle model, whereby equality (both formal and substantive) is included in human rights-based principles of legitimacy. In this line of thought, human rights criteria should also be applied to budgeting rights, for example, or the organisation of public finance. Thus ‘equal in rights’ may become a ‘crowbar to true universality’.

Philosopher Jos Philips’ contribution deals with a related topic, the equal protection of urgent interests, which, he argues, is an implication of fundamental equality. Philips looks at this protection from a global perspective. He sets out to show that the persisting significant inequalities between different states in the protection of very important interests, such as health and education, are incompatible with the notion of fundamental equality that underlies human rights. He draws the protection of this type of urgent interests beyond the level of the state, in an attempt to overcome the conflict between values such as political self-determination and the protection of very urgent interests (related to life and health), by giving a greater role to NGOs and international organizations as well as interstate assistance. In his opinion institutional transformation is essential for the future of human rights.

## 2.2. *Equality and the human rights of others: cultural dimensions*

In the ongoing debate on the universality of human rights the perceived tension between cultural rights and identities and equal rights for all is one of the hot issues. This debate is closely linked to religion, in particular but not only minority religions, and more in particular manifestations thereof. Religious and cultural norms may conflict with the equality claims of specific,

often less powerful groups within a religious community. The question whether (groups of) individuals have the right to choose for a practice or rule based on their religion which from a different perspective can be seen as discriminatory or humiliating for those individuals is closely related to this aspect. Does universality allow such exceptions to the principle of equality, on the basis of other human rights such as the freedom of religion?

This debate is also relevant with regard to the position of less powerful groups, who may be disproportionately affected by the denial of the freedom to manifest their religion or culture, as well as by the fact that exceptions to general equality obligations are permitted on the basis of religion. The contribution of Eva Brems deals with the first category. She discusses the Belgian 'burqa ban', in particular the arguments of the Belgian Constitutional Court for considering this ban to be compatible with the Belgian Constitution. She recognizes that the realization of the emancipation rights of less powerful groups requires a cultural change both within majority and minority cultures, and discusses the role of law in this process. She bases her findings not only on legal arguments but also on empirical research, which leads her to the conclusion that the veil is not conceived as an aspect of male dominance by the women who wear it. Brems points to the risk that the gender equality argument, as emphasized in Belgium, can easily be abused for the purposes of a racist, Islamophobic agenda.

In his comment, Rob Widdershoven raises some fundamental points. He discusses the issue of national identity, the margin of appreciation that is left for a court when there is an almost absolute parliamentary majority (as was the case in the burqa ban legislation in Belgium), and the decisiveness of the views of the less powerful group itself, since these views are often rejected by feminist scholars as being detrimental to women's emancipation.

Peter Cumper deals with another type of conflict between equality and religious freedom: the claim that human rights, including equality, are a threat to religious freedom. He focuses on the concern of some religious leaders that the rights of believers are violated when sexual minorities (lesbian/gay/bisexual/transgender, LGBT) are given (equal) rights. From this perspective he analyses a judgement of the European Court of Human Rights (ECtHR)



regarding a marriage registrar who refused to officiate same-sex partnerships (*Ladele*).

Cumper presents an overview of the different approaches that are available, including the possibility to distinguish between the freedom of religion and the individual's freedom of conscience. He suggests an alternative approach: in his view it should be possible to allow a 'reasonable accommodation' in order to take the individual needs of religious persons into account. Allowing for exceptions concerning individuals, instead of accommodating general exceptions because of a religious conviction, may be an effective instrument to include individuals belonging to religious minorities.

The contributions we have classified under the relation between equality and (other) human rights already refer to the following aspect of the discourse: the interaction between human rights (including equality) and democracy and sovereignty.

### **3. Human rights, equality, democracy and sovereignty: inclusion and exclusion at different levels**

As indicated above, the relation between democratic decision making and (restrictions of) human rights at the national level, on the one hand, and the relations between international monitoring instruments and national sovereignty at the international level, on the other, is a recurring theme in the human rights discourse. This theme is touched upon by several authors in this volume.

#### *3.1. Majority and minority*

In human rights law many cases that are related to the scope of the power of the majority to determine the rights of minorities are framed in the context of the margin of appreciation that courts have to respect. Lucy Vickers states this clearly in her contribution on the increasing number of non-discrimination grounds: 'allowing the majority to determine the rights of the minority via a reliance on political consensus can lead to a diminution of protection for disadvantaged groups'.

The protection of minorities can be seen as the other side of the majority rule in a democracy. This aspect plays a role in the contributions by Brems and Widdershoven, the latter attaching more importance to the parliamentary majority in a democratic society, which should be accorded sufficient weight by the courts when balancing the interests involved. Brems, on the other hand, emphasizes the protection of minorities to avoid exclusion.

Marloes van Noorloos' contribution deals with an aspect related to that of Cumper, mentioned in the previous section: she refers to the use of criminal law in cases of offences based on the conscience of the actor. She explains that the challenge for liberal states 'is to retain a common idea of justice, but to accept that people have different conceptions of a good life'. And even when criminal law is regularly shaped in very general terms, not all situations can be anticipated. Sometimes exceptions are accepted, so as to include conceptions of the good of a particular minority group, provided that these exceptions do not affect majority rules or open the door to more general exceptions. This brings us to another dimension of the democratic discourse.

### *3.2. General rules versus individual justice*

Jeroen Kiewiet takes up an issue that Titia Loenen raised in 1996: the virtue of the generality of rules, equally applied to all. Titia Loenen's approach relied on the division of powers and on the dependency of individual applicants on the judge. She refers to the boundaries of the law when it comes to doing justice in every individual case. Kiewiet discusses and challenges this approach. Although he generally supports her point of view, he adds a theoretical constitutional perspective on the prerequisite of the generality of rules under the rule of law doctrine. He concludes that the supremacy of general rules is intrinsically linked to the foundations of solidarity in society. These foundations must be transformed from their traditional arrangement into more inclusive forms of solidarity so as to do justice which cannot be achieved on a case by case basis.

This seems to be in line with the views of Widdershoven, and also with those of Cumper, who likewise emphasize the urgency to reveal values that are generally shared between groups which, in specific cases, may be adversaries.

### *3.3. Global developments, sovereignty and citizenship*

National sovereignty is affected by legal and other developments. The role of international organisations, in particular the European Union, decreases the autonomy of the nation state. One of the core elements of national sovereignty is the power to differentiate between nationals and others and to grant or refuse aliens the right to enter the country.

Increasing migration puts pressure on state boundaries. Criminal organisations and terrorist movements operate beyond the borders of individual states. These developments imply new challenges for democracy, the legitimacy of the State as a central actor and for human rights. This issue features clearly (albeit not only) in the contributions related to migration and citizenship issues.

Betty de Hart and Ashley Terlouw discuss legislation which has been proposed in the Netherlands to allow the withdrawal or automatic loss of Dutch nationality for people involved in terrorist organisations or participating in (the preparation of) terrorist acts. After tracing the history of Dutch policies in this regard, they indicate some complications that may occur, for example when the perceptions of former enemies and allies are refuted by the course of history and nationalities have to be restored. In evaluating the Dutch proposals, their most pressing argument is based on equality and non-discrimination: because the deprivation of nationality will inevitably be restricted to persons with more than one nationality to avoid statelessness, these people will be affected disproportionately in comparison to others with just one nationality. De Hart and Terlouw cannot find a sufficient justification for this difference in treatment.

Evelien Brouwer and Karin de Vries concentrate on third country nationals and discrimination on the ground of nationality. Their starting point is the power of states to define the conditions for national citizenship and to grant citizenship, which is a pillar of national sovereignty and includes the power to differentiate between the state's nationals and aliens. This power is restricted by the prohibition of discrimination in human rights law. In the European Union, the freedom of movement of EU citizens, which is related to the aim of economic integration, has led to a new form of citizenship, namely EU citizenship, that includes the prohibition of discrimination

between EU citizens on the basis of nationality. This provision creates a privileged status for EU citizens as compared to other foreigners in a particular member state, which may lead to differential treatment that might not always be justified. On the basis of recent case law the authors argue that the principle of non-discrimination, one of the fundamental rights of the EU, requires a reconsideration of the exclusive interpretation of EU citizenship. The protection of other nationals has to be expanded beyond EU nationalities in cases where the 'nationality-based discrimination presents an obstacle to the enjoyment of equality and fundamental rights (including the right to family life, data protection and the right to effective remedies)'. This approach seems to offer useful tools to find a balance between state sovereignty and human rights. Moreover, the relatively recent emergence of EU citizenship and the human rights aspects connected thereto are also aspects of another dimension of the democracy dimension in the discourse: the fact that the protection of human rights, which traditionally depends on the State, *de facto* becomes part of the responsibilities of other actors as well, such as international organisations and NGOs. Moreover, the monitoring of human rights compliance is increasingly a task for international institutions, and here we see, in particular at the European level, emerging competition between different institutions, such as the ECtHR and the Court of Justice of the EU (CJEU), which also affects the autonomy of the state.

#### *3.4. A changing role of the state amongst other actors*

As already mentioned, Philips advocates a transnational approach of equality regarding the protection of urgent fundamental interests: he proposes to extend the obligations of the state to protect these interests beyond national borders, attributing a more powerful role to NGOs and international organisations. Brouwer and De Vries advocate granting specific rights also to non-(EU)-citizens and this affects the state's autonomy in a different way, since the decision which individuals are entitled to cross borders and enter a state's territory is one of the most fundamental aspects of state sovereignty. Restrictions on states' sovereignty in this field are not easily accepted. In this context the contribution of Hana van Ooijen throws an interesting light on the implications of religious freedom at the immigration stage, referring to

the connection between religious freedom and non-refoulement, in cases where someone's religion increases the risk of ill-treatment or torture.

#### **4. The dual dimension of religion in equality and human rights**

Several contributions to this volume focus on religion. Freedom of religion plays a major role in Titia Loenen's work, as is also evident from her inaugural lecture at Leiden University. The freedom of religion and belief (including the right not to believe) is one of the oldest and most fundamental human rights, granting citizens the right to follow their own beliefs, notwithstanding the beliefs of the dominant or ruling class. But the scope of this freedom is not always clear. It includes the protection of the confession itself as well as the protection of crucial manifestations of religion. However, the scope of the latter is debatable, and the admission of restrictions may lead to discussions. More often than not the restrictions are also justified by the protection of fundamental rights (of others). This may not fundamentally differ from other human rights but the discussion is complicated by the fact that religion is also one of the non-discrimination grounds in many national and international equality provisions. This dual dimension explains why many contributions deal with religion or aspects thereof. We will briefly distinguish several of these aspects.

##### *4.1. The mergence of other religions*

Whereas European societies more or less accommodate the traditional religious pillars, the growing Muslim population has evoked new manifestations of the tensions between religion and (other) human rights such as equality. The 'burqa ban', as discussed by Brems, has already been mentioned. But the emergence of other religions also seems to have given rise to new debates on fundamental aspects of the more familiar religions of Judaism and Christianity. This has arguably been influenced by increasing secularism, but also by the idea that critics, who qualify certain unfamiliar religious manifestations, such as the veil, as intolerant or discriminatory, must apply the same standards to more familiar religions. Thus not only the burqa and the veil are criticised, but the autonomy of other communities

to apply their own norms is challenged too. Matthijs de Blois suggests in his contribution on standards of admittance as applied by orthodox Jewish secondary schools that the debate on possible human rights risks caused by more orthodox and fundamentalist aspects of religious multiculturalism has also affected the religions that have been present for a long time. There is a substantive difference in the legal reasoning in a case that was decided by the Dutch Supreme Court and in a judgment which was delivered by the UK Supreme Court almost 20 years later. In 1988 the Dutch court legitimized the admission policy of a Jewish School, which was based on a strict matrilineal test as prescribed by orthodox Jewish law. The court accepted the school's refusal to admit a pupil whose mother was not regarded as Jewish under this policy. The court based its ruling on the right of parents to choose an education in conformity with their religion, thus basically on the freedom of education and the freedom of religion. The school had been consistent in this policy. The Supreme Court of the UK in 2009, on the other hand, based its decision on the Race Relations Act. The British Court accepted the argument that the school's admissibility test was based on ethnic origin. De Blois argues that these different outcomes can possibly be explained by the influence of the increasing debate between 1988 and 2009 on the human rights implications of the 'new' religions.

#### *4.2. Freedom of religion and freedom of conscience*

Several authors elaborate on the difference between collective and individual aspects of the freedom of religion. Whereas general exceptions to the principle of equality based on the freedom of religion are not so easily justified, many authors, such as Widdershoven and Cumper, see more room for (strictly demarcated) exceptions in individual cases, based on the freedom of conscience rather than on the freedom of religion.

#### *4.3. Religion versus other grounds of discrimination*

The fact that non-discrimination on the basis of religion may conflict with the right to non-discrimination on other grounds is clearly illustrated by the case of civil servants who have conscientious objections to officiate

same-sex relationships. Cumper's analysis of this case shows that solutions are not impossible. Lucy Vickers also deals with an aspect of this problem, concluding that the 'rhetoric of both human rights and equality is much stronger if they are seen as two sides of the same coin'. At the same time she emphasizes that equality is not a unitary concept, and that different grounds should not necessarily be treated the same in all cases.

## **5. The increasing complexity of issues related to equality and (other) human rights**

From the issues mentioned thus far it has already become clear that the debate on equality, and human rights and on the intersection between the two is becoming increasingly complex. We have already mentioned the internationalisation, globalisation, and the presence of 'new' (unfamiliar) religions in Europe, and these are only a few aspects. Several authors discuss the implications of these and other developments such as the divergence of different international interpretations, the growing number of options made possible by technological and medical possibilities, the new ways of communication, cyberspace, and, finally, the fact that the phenomenon of a 'difference' itself is more complicated than a one-dimensional difference between members of two groups.

### *5.1. Interaction between different legal systems*

Whereas the European Convention on Human Rights (ECHR) was for a long time the European human rights instrument with the ECtHR as the supervisory institution, since the Lisbon Treaty the EU has become a full player in the European human rights field, a role that was gradually developed during the decades before this Treaty. Kees Waaldijk manages to bring 'system in the madness' of a European reality where many legal 'family formats' have been recognised and created for both same sex and different sex couples, under a range of names such as joint household, cohabitation, civil partnership, registered partnership etcetera. Not only the formats differ, the legal consequences do too and the two European Courts do not have an easy job in dealing with them and, in their turn, do not show a very consistent

approach. With painstaking precision Waaldijk has drawn up schematic depictions of the classifications of non-marital couples by academic authors, the EU terms used and the restrictions imposed in EU law as well as the challenges that occur from the cases of the ECtHR and the CJEU. This is already a major achievement. However, the conclusion is not so optimistic from a human rights and equality perspective: so far, European law is not very receptive to the recognition of equal protection to non-marital families: this becomes easier when the national law already recognizes some other kinds of partnerships. A stricter application of the comparability test might increase the protection of non-marital couples.

Brouwer and De Vries highlight the difference in approach between the two European Courts and suggest that a complementary role for the ECtHR rights may contribute to a better protection of third country nationals in the EU. Van Ooijen discusses the reverse situation. She explains that the case law of the CJEU may strengthen the protection of the position of refugees who claim that their religion is the cause of their persecution or ill-treatment.

Thus it cannot be said that the existence of two different European systems creates ‘nothing but trouble’: a certain competition between the two may have a levelling-up impact on the protection of human rights including equality.

## *5.2. Complexity of categorisation*

Where more choices and options can be realised in the lives of individuals, the law has to develop new categories.

As mentioned above, Waaldijk discloses the complexity of and the lack of a systemic format in the categorisation of family patterns. Marjolein van den Brink and Jet Tigchelaar zoom in on one aspect of LGBTI family patterns, that is the possibilities for trans women – male to female transsexuals – to obtain legal parenthood of any children they ‘father’ after their transition. This has become possible in the Netherlands since the ‘sterilisation requirement’ as a condition for a legal sex change was dropped in July 2014, because it was considered to be no longer compatible with human dignity. The comparison of this group of trans parents’ legal position vis-à-vis their children with other both biological and social parents is bewildering, but clearly shows



that trans women / parents are not treated equally. Thus, in the short term, human rights have led to ‘equality trouble’ in the area of affiliation law. In the long term, however, it is to be hoped that changes in the system and terminology of this legal area will be beneficial to both human rights and equality.

Also in the area of the reconciliation of work and care, new categories are emerging. Susanne Burri discusses the relevant EU legislation and case law. She shows how parents in what looks like very similar situations, are sometimes nonetheless treated differently. Burri argues that this is primarily due to issues of comparability and a lack of specific rights that are geared toward specific new groups, such as the commissioning parents in cases of surrogacy arrangements.

### *5.3. Intersectionality*

A topic related to the complexity of categorisation, and the resulting risk of reaffirming difference and exclusion, is the recognition of intersectionality, that is the fact that in many cases more than one ground of discrimination is at stake. Individuals combine characteristics such as sex, race, disability and religious beliefs, and people may be discriminated against because of a combination thereof. Merel Jonker analyses different forms of multiple discrimination and the differences in the approaches taken by the CJEU and some selected national institutions. Tackling this form of discrimination is seen as a challenge because the instruments developed to establish whether alleged discrimination has actually occurred cannot be applied so easily: this is especially so because of the practice of looking for an appropriate comparator. Jonker explains how contextual approaches, used for example by the CJEU and by the Dutch national equality body, can be helpful to overcome this challenge.

Also the contributions by Van Ooijen (religion and other grounds) and Brouwer and De Vries (third state nationals versus EU nationals) reflect the need for a less dichotomous and more inclusive approach.

#### 5.4. *Trouble in the cloud*

Tina van der Linden-Smith's contribution deals with the challenges related to the internet. This opens up new ways of communication, including anonymously, with a global range and without relevance to national borders. This cyberspace demands a rethinking of human rights which she illustrates with the right to privacy and the freedom of expression. She emphasizes the need to pay specific attention to aspects of equality and the protection of vulnerable groups.

### 6. Evolving concepts of equality

In her dissertation Titia Loenen developed a conceptual approach to the principle of equality,<sup>1</sup> and since then the development of the concept and meaning of equality has been developed further, both by herself and others, taking into account the position of less powerful groups. Several aspects are discussed in this volume.

#### 6.1. *Stereotyping*

Ineke Boerefijn investigates the contribution of the UN Women's Rights Committee (the CEDAW Committee) to a gender-sensitive interpretation of the human rights related to the issue of violence against women, such as the right to be free from ill-treatment and the right to a fair trial. She sketches a picture of the progressive development of the definition of duties and responsibilities to protect and guarantee the rights of women in case of violence, both in the reporting procedures and in the individual complaints procedure of (especially) CEDAW. One of the aspects she highlights is the consideration of the impact of stereotyping on the right to a fair trial if a decision or judgement reflects inflexible standards in the consideration of how women should behave.

Stereotyping is also an aspect of the critical reflection by Fleur van Leeuwen on the first judgement of the ECtHR on the right to home birth, conceiving the possibility of gender discrimination as a root cause for the denial of the

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1 LOENEN, T., *Vershil in Gelijkheid*, W.E.J. Tjeenk Willink, Zwolle, 1992.

possibility for women to give birth at home. Childbirth is of course not a gender-neutral phenomenon and thus gender stereotypes underlying laws and practices in this field have to be disclosed. Also Goldschmidt refers in her contribution on positive discrimination to the persistence of stereotypes that hinder the full realisation of equality. Burri assesses in her contribution whether and to what extent the case law of the CJEU on reconciliation of work and care reinforces stereotypes regarding the role of men and women in relation to care.

### *6.2. New conceptual elements*

Boerefijn underlines the relevance of cross-fertilisation between different human rights treaties and monitoring bodies: this enables a progressive interpretation of old provisions. It is clearly illustrated by the impact of the UN Convention on the Rights of Persons with a Disability (CRPD), which does not introduce new rights for people with disabilities, but uses different concepts. By emphasizing, for example, the aspect of reasonable accommodation as inherent in the principle of equality and the prohibition of discrimination, the CRPD strengthens not only the rights of disabled people but can also contribute to the equal protection of others by reading the concept into the equality principle in other treaties. This is illustrated by the application of the concept of reasonable accommodation in case of conscientious objections by civil servants in the contribution as discussed by Cumper.

## **7. Effective implementation**

The need to find effective ways to implement the human rights and equality norms is dealt with in several contributions from different disciplinary perspectives. Now that the codification of the norms has been realized in so many national and international documents and monitoring and supervisory institutions, like treaty bodies, courts and national human rights institutions, have been established, the emphasis is on what is needed to turn these norms, reports and decisions into reality.

Boerefijn points out that the existence of a variety of procedures, both within a system (such as the reporting and the complaints procedures) and in different systems, reinforce each other.

In order to obtain an insight into the effectiveness of legal and policy measures, it is necessary to have more information on what happens *de facto*, that is the situation 'on the shopfloor'. Such knowledge has to include the reactions that can be expected from all actors involved in the implementation. Only then may the conditions for the effective implementation of norms and decisions become clear. This kind of information cannot be collected depending on legal research only. As Goldschmidt explains in her contribution, norm addressees may be more persistent in maintaining the old situation and in resisting the imposition of new norms than foreseen. The expectations that a solid system of equality law, a transformation of legislation such as labour law, a policy to encourage the (higher) education of women will entail a proportional increase of women in higher positions, including the universities, has not become true in the Netherlands. Social scientists can provide information on the causes of this gap between law and reality.

This kind of information can also be used in the mobilization of the law in strategic litigation for example. Wibo van Rossum focuses on the role of several actors in legal proceedings. In analysing the first case against the Netherlands at the ECtHR (Engel) in 1976, he provides an insight into the role of activist lawyers, academics and interest groups in the framing of a case on the significance of human rights for conscript soldiers. His analysis reflects elements that are crucial for effective strategic litigation: the framing of the case by outsiders, the mobilization of human rights specialists and the fact that the case uses human rights law 'at the right time'. Moreover, the Court itself was supportive and enabled an effective procedure in this case. Whereas in the Engel case the conscript soldiers themselves supported the case, this was different in the case regarding a Dutch political party, the SGP, that was initiated by, among others, a feminist association more than 30 years after Engel, to force this orthodox Christian party to give women the right to be elected on its list. The Dutch Supreme Court decided this case in favour of the applicants. The complaint lodged in Strasbourg by the SGP was declared inadmissible. This outcome was certainly not unanimously seen as positive

by SGP women. Research has shown that the women involved conceived the external pressure as detrimental to the process of emancipation.

This is what is also reflected in the contribution of Brems, on the basis of her interviews with women affected by the burqa ban, despite the fact that the ban itself was also based on emancipatory arguments raised by others. The women themselves did not perceive the ban as a contribution to their autonomy. Thus, the framing of a case by outsiders can have different kinds of impacts.

A particular aspect in the debate over effectiveness has to do with the role of the different actors. We have already mentioned that the co-existence of several legal fora can provide opportunities for ‘forum shopping’ and thus may have a levelling effect when the different institutions subsequently incorporate the findings of the others. An interesting aspect in the debate on the practice of human rights law is the increasing role of local governments in the realisation of (international) human rights law: this is analysed in the contribution of Barbara Oomen. She sees cities as important stakeholders in the implementation strategy. Initiatives to organise ‘Human Rights Cities’, to incorporate human rights awareness at the local level and to use the knowledge of the citizens themselves to set up effective policies, can be seen as positive achievements. However, as Oomen explains, it may create new inequalities between cities that do have such a policy and cities that do not. In the latter, in particular, less powerful groups such as disabled people, migrants, women and children may be worse off. Despite this risk, there seems to be a great potential in the development of local strategies to concretise abstract human rights norms. The local experiences also show, as emphasized by Van Rossum, the importance of the involvement of *all* actors in the field: public institutions, private actors, NGOs and experts.

## **8. To be continued...**

Above an impression has been given of the different perspectives on equality and (other) human rights discussed in this volume. The contributions tackle some of the major themes in the current debate, reflecting different perspectives applied to different topics. The question whether there is ‘nothing but trouble’ can easily be answered with a positive reply, because

there is a great deal of trouble, not only where the fundamental rights conflict with each other, but also where the increasing complexity of both human rights systems and the world around us add new dimensions to old questions. Human rights will never be an easy possession. But there are also positive developments, such as the recognition of same-sex relations, the recognition of violence against women as a serious violation of equality as well as of other human rights of women. The issues have become more complex, and we can only hope that it is the confusion related to the new circumstances that causes the negative consequences and that here too, a fair balance will be developed.

The realization of human rights demands the involvement of all actors, public and private institutions, NGOs, academics and independent institutions at all levels.

Academics have a role to play: this volume raises at least as many questions as it answers. Therefore, we are confident that Titia Loenen is certain to take up some of these in her future research, thus she will remain the source of inspiration she has been thus far, as is clearly reflected in this volume.

## Part I

Equality as a principle underlying human rights





# The crowbar to universality: implications of ‘equal in rights’

Bas de Gaay Fortman

## 1. Introduction

In May 2003, at Mofid University in Iran’s holy city of Qom, an institution for the academic education of Islamic clerics, I had the pleasure of listening to Titia Loenen’s presentation of her paper for a Conference Workshop on ‘Human Rights: Universality versus Cultural Diversity.’ It was very well attended, particularly by young women from all over Iran, wearing – like Titia herself – their obligatory, yet joyous headscarves. What Professor Loenen addressed was *Human Rights, Universality and Gender Bias*.<sup>1</sup> Bypassing secondary issues such as the legally mandated female attire, her critique was on the international human rights framework, questioning the true universality of its nature. Her point was that the Universal Declaration of Human Rights (1948), the Charter-Based declarations, and the Treaty-Based instruments that followed reflect an inherent assumption that the human being is male. Since the entire post-WWII venture is founded upon the non-discrimination principle, women ought to be protected by these rights no less than men. Yet, how have these rights actually been defined? With a central focus on the risks people face in the public sphere, which men are generally concerned about, Loenen concluded. Now attention is to be drawn to the private sphere, the domain where women tend to face substantial risks. Naturally, she referred here to domestic violence, pointing to ‘the invisibility of human rights violations in the private sphere.’ Domestic violence, that ‘regretfully universal phenomenon,’ is absent from the International Bill of Human Rights, and, one may add, even from the Convention for the Elimination of All Forms of Discrimination Against

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1 LOENEN 2005.

Women (CEDAW).<sup>2</sup> The prevalence of domestic violence must be truly seen as one of the major components in the 'global human rights deficit.'<sup>3</sup> Loenen directed a similar critique concerning the universality of human rights with regard to the right to work, again a domain in which 'the implicit standard of reference often [is] male life experiences and models of living rather than female ones.'<sup>4</sup> Thus, in the crucial UN documents there is just work and leisure – completely neglecting any 'right to (give) care'<sup>5</sup> – while work has been rather obviously connected to a male head of the household responsible for feeding *his* family.

This is a strong critique, further elaborated in a highly instructive article by Ivana Radačić entitled 'Human rights of women and the public/private divide in international human rights law.'<sup>6</sup> Yet, rather than joining feminist rejections of 'male chauvinist' human rights *per se*, Loenen emphasized the dynamic potential of international human rights law: '... the provisions in the human rights conventions are formulated open enough to allow for a dynamic interpretation.'<sup>7</sup> Indeed, the 'human rights system has turned out to be a rather flexible system, which provides space for dynamic development and interpretation.'<sup>8</sup> Thus, in 1993, the UN General Assembly added to CEDAW the Declaration on the Elimination of Violence against Women (DEVAW).<sup>9</sup> Moreover, through a general comment identifying domestic violence against women as a discriminatory practice the CEDAW Committee has incorporated this human rights violation in its mandate.<sup>10</sup> Loenen concluded:

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2     Meanwhile, the CEDAW committee has included this under discrimination.

3     DE GAAY FORTMAN 2011.

4     LOENEN 2005, at p. 593.

5     LOENEN 2005, at p. 589.

6     RADAČIĆ 2007.

7     LOENEN 2005, at p. 591.

8     LOENEN 2005, at p. 591.

9     UN General Assembly, Declaration on the Elimination of Violence against Women, A/RES/48/104 (1993).

10    CEDAW COMMITTEE, 'Violence against women, General Recommendation No. 12' (1989), in *Compilation of general comments and general recommendations adopted by human rights treaty bodies*, UN Doc. HRI/GEN/1/Rev.9, Vol. II, 331-336, and CEDAW COMMITTEE, 'Violence against women, General Recommendation No. 19' (1992), in *Compilation of general comments and general*

... I would say we should use the dynamics of the human rights system to do away with gender bias and to make it truly universal. The image is one of restructuring and adding, of incorporating and extending the human rights building, not of demolishing and building anew from scratch.<sup>11</sup>

I concur. All too often well-founded criticism of the global human rights venture culminates in proposals for new paradigms. What is neglected there is both the positive reception of human rights within the international community and the flexibility of the international venture to protect everyone's basic human dignity by law. Following Loenen's advice, this chapter will take the dynamic nature of international human rights in general, the Universal Declaration in particular, and more specifically the First Article, as a starting point to a political economy approach towards the significance and implications of that crucial phrase *equal in rights*. This is a clause on which there is hardly any literature, let alone jurisprudence.<sup>12</sup>

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*recommendations adopted by human rights treaty bodies*, UN Doc. HRI/GEN/1/Rev.9, Vol. II, 331-336.

11 LOENEN 2005, at p. 594.

12 Several treaty-based committees have recognized the necessity of equality, but the result of all these expressions of equality in the Committees' Comments has been extensive rhetorical output with essentially no implemented outcomes. The ESCR Committee asserts that women have an equal right to the enjoyment of rights stating, 'these may include the adoption of temporary special measures to accelerate women's equal enjoyment of their rights, gender audits, and gender-specific allocation of resources.' (CESCR, General comment No. 16, 'The equal right of men and women to the enjoyment of all economic, social and cultural rights,' (2005)). Apparently, it is considered not enough that women are equal in rights, so the Committee renders this principle hollow by claiming that women are also entitled to 'equal enjoyment of rights.' If women are already equal in rights, then why must they also have an equal right to the enjoyment of them? Parsing out equality to such an extent has the opposite effect of promoting equality – but creates a false division that sanctions difference – thereby justifying inequality and perpetuating the status quo. Similarly, the CEDAW Committee affirmed 'the equality of human rights for women and men in society and in the family,' and that variations in laws may have the impact of 'restricting [women's] rights to equal status and responsibility within marriage.' (CEDAW, General Recommendation No. 21, 'Equality in marriage and family relations, (1994)). The CAT Committee emphasized that '... equal weight to the testimony of women and girls' should be afforded during judicial proceedings and that vulnerable groups, including LGBT '... people, must be treated fairly and equally ...' (CAT, General comment No. 3, 'Implementation of article 14 by States parties,' (2012)). The CRC Committee expressed concern '... about the difficulties faced by particular categories of children in relation to enjoyment and conditions of equality of the rights defined in article 31, especially girls, poor children, children with disabilities, indigenous children, children belonging to minorities, among others.' (CRC, General comment No. 17, 'The right of the child to rest, leisure, play, recreational activities, cultural life and the arts,' (2013)), The CMW Committee acknowledged

However, it is essential to examine if in efforts to enhance true universality of human rights – without bias – there might be potential for a methodological approach.

Notably, we abstain from philosophical inquiries into distinct meanings of equality, and instead start from existing human rights law in the light of concrete implications of inequality in actual struggles to protect human dignity. First, our focus will be on universality as represented by the word 'all.' Second, we will examine the general meaning and implications of Article 1. Third, we shall look into the general meaning of equal in rights as a normative statement, connecting the idea of human rights to both formal and substantive equality. Finally, the 'equal in rights' principle will be applied to the challenges of overcoming the global human rights deficit as apparent in the public/private divide, the impunity of state-related perpetrators of gross and systemic violations, abuse of the rights of oppressed collectivities, and structural non-implementation of the rights of the poor.

## 2. The struggle for true universality

In assertions of an entirely 'Western' history of human rights, it is usually assumed that these are to be seen as inalienable rights to protect citizens against their own sovereign, *viz.* the state. Crucial here is the notion of rights, regarded as (primarily individual) interests protected by law.<sup>13</sup> Human rights, then, are fundamental interests, *viz.* fundamental freedoms and basic human entitlements, protected by law. It is crucial that these are truly inalienable, which means sacrosanct in confrontations with any state. Since to a large extent the formation of modern nation states began in 'the

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the right of migrants to '... enjoy equal treatment to that of nationals in respect of remuneration, other conditions of work and terms of employment.' They further explained that '[t]he equal treatment principle also covers any other matter that, according to national law and practice, is considered a working condition or term of employment, such as maternity protection.' (CMW, General comment No. 2, 'The rights of migrant workers in an irregular situation and members of their families,' (2013)). The CRPD even redundantly recognized previous comments, stating '[t]he Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Convention on the Rights of Persons with Disabilities each specify that the right to equal recognition before the law is operative 'everywhere.' (CRPD General comment No.1, 'Article 12: Equal recognition before the law,' (2014)).

13 Cf. VON IHERING, at pp. 49-50.

West,' so did the struggle for the inalienability of rights. Indeed, if rights pertaining to freedoms and entitlements derived from people's basic human dignity could be simply taken away based upon 'raisons d'état,' they would lose all meaning. Thus, the history of the human rights endeavour became a struggle for the rule of law; in the sense that a state is itself subject to established legality, too, and committed to respect the rights of its citizens including their *human* rights.

Actually, however, this is just the account of a struggle to realise one particular category of fundamental rights, called civil and political rights, intended to protect fundamental freedoms primarily against state power. In terms of realising peoples' basic human dignity in a confrontational context, the struggles to implement a second category called economic, social and cultural rights, meant to ensure peoples' basic entitlements, are no less crucial, and that applies to the whole world including 'the West.' Illustrative in this respect is the 'right to work' (UDHR Art. 23), a 'universally declared' right that is devoid of legal significance in any kind of jurisdiction in the sense of grounding concrete claims to employment. Additionally, the 'right to work' appears to be practically absent from day-to-day politics in whatever situation of gross and systemic unemployment.<sup>14</sup>

Moreover, while first restricted to citizens' rights, international efforts have extended the endeavour to realise fundamental freedoms protecting people against abuse of power and to ensure basic entitlements to sustain daily livelihoods, to *all human beings*. Naturally, this happens to be a mega struggle too, a meta-Western one for that matter, and not only a battle *against* 'the West,' as in the case of the slave trade, slavery, and of colonialism in all its manifestations of oppression of 'the others' (the natives). Notably, the struggle against such a systemic denial of universal human rights has been full of contradictions. Thus, in the Declaration of Independence, 1776, the United States plainly declared:

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14 Typically, in the United States the 'Right to Work principle', a guiding concept of the National Right to Work Legal Defense Foundation, affirms the right of every American to work for a living without being compelled to belong to a union. Thus, 'Right to Work laws', as have been enacted in 24 states, in line with section 14 (b) of the Taft-Hartley Act rather than guaranteeing employment just guarantee that 'no person can be compelled, as a condition of employment, to join or not to join, nor to pay dues to a labor union'.

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed, by their CREATOR, with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness. That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed ...

Unbelievably, however, normative notions such as 'equal,' 'liberty,' and 'consent of the governed' excluded indigenous peoples, slaves, women,<sup>15</sup> and the like. Indeed, the laws of slave states called the slave 'a chattel personal.' Yet, it is precisely her reflection on universal morality that induced Angelina Grimké, the daughter of a slaveholder, to become an active abolitionist. In a letter written in 1838 she acknowledged 'the rights of the slave' arguing:

The investigation of the rights of the slave has led me to a better understanding of my own. I have found the Anti-slavery clause to be the high school of morals in our land – the school in which morals are more fully investigated and better understood and taught, than in any other. Here a great fundamental principle is uplifted and illuminated, and from this central light rays innumerable stream all around. Human beings have *rights*, because they are moral beings: the rights of all men grown out of their moral nature; they have essentially the same rights.<sup>16</sup>

The 'Anti-slavery clause' refers to Thomas Jefferson's draft of the Declaration of Independence. Much of that draft was ultimately adopted by Congress, but only after removing his clause on British culpability in promoting the slave trade in America and on encouraging slaves to rise up in insurrection against their slaveholders. Later John Adams wondered if the failure to publish

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15 In 1848, women and men (Frederick Douglass, for one, attended) who were working on abolition also held a conference regarding women's issues, which resulted in 'The Declaration of Sentiments, Seneca Falls Conference, 1848' where they re-wrote the Declaration of Independence to include women as follows: 'We hold these truths to be self-evident: that all men and women are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted, deriving their just powers from the consent of the governed.' *Modern History Sourcebook*, Fordham University, available at: [www.fordham.edu/halsall/mod/senecafalls.asp](http://www.fordham.edu/halsall/mod/senecafalls.asp).

16 Grimké 1838, at p. 10.

that draft had been due to its ‘vehement philippic against Negro slavery.’<sup>17</sup> Strikingly, it is that erased clause which convinced Angelina Grimké that all fundamental freedoms grow out of our moral nature and that as moral beings essentially we all have the same rights or, in other words, we are all ‘equal in rights.’ Consequently, this is a normative statement, apparently derived from a struggle for true universality. As a foundational value it has found its place in the Universal Declaration of Human Rights of 1948 (UDHR).

### 3. Article 1 of the universal declaration of human rights<sup>18</sup>

Although designed as a credo, the first article of the Universal Declaration (UDHR) is not well known. This applies to both the general public and the international community itself. Indeed, there is relatively little literature on that text, which stipulates:

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.<sup>19</sup>

Notably, every word in the UDHR is important, even seemingly small words such as ‘equal’ and ‘all,’ since the drafting of the UDHR was one in which, ‘... delegates ‘thrashed out’ their differences and poured over the draft text ‘line by line’ and ‘word by word.’<sup>20</sup> This scrutiny is to be understood in the light of that global endeavour to find a moral-political basis for universal recognition and equal protection of the dignity of each and every human being, which the international community was determined to get enacted as its main goal after the moral-political catastrophe of Nazism and the ensuing World War.

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17 FINKELMAN 2001, at p. 140.

18 This section benefits from my recent inquiry, DE GAAY FORTMAN 2014a.

19 On the origin and inclusion of Art. 1 UDHR see, notably, MORSINK 1999; FACING HISTORY AND OURSELVES NATIONAL FOUNDATION; LINDHOLM 1992; Morsink’s book review of that volume, MORSINK 1995; WALTZ 2002; BAILEY; DANCHIN.

20 LAUREN 1998, at p. 234.

Although nearly every other article in the UDHR has been codified into a treaty and served as the basis for jurisprudence,<sup>21</sup> there is hardly any jurisprudence on Article 1 UDHR (Article 1), however.<sup>22</sup> In the scarce literature on this foundational text, two major issues are addressed: origin and inclusion, and basic values. A primary focus, then, is on the drafting process.<sup>23</sup> The adoption of Article 1 'reflects the inspirational nature of the project,' as one author put it.<sup>24</sup> It was included, he writes, 'only after much controversy about whether it was just stating the obvious, or whether it should be included in the preamble rather than the main text [...] The reason for including it in the main text, then, is to state firmly the basis of

21 National courts throughout the world have looked to the UDHR as a source of law. For example, in *Tayazuddin and another v. Bangladesh*, the Bangladesh Supreme Court used Article 3 of the UDHR as well as the Bangladesh Constitution to hold that the government was responsible for protecting victim rights, and not just the rights of the accused, in criminal trials in order to have free and fair trials. As one scholar describes, 'Through the reference to Article 3 of the UDHR, the court explained that the right to life, liberty and security of a person applies as much to the victim as to the accused, so that the court could weigh the liberty of the accused against the sense of security of the victim. Considering the gravity of the crime alleged, the court held that the right of victims to security and freedom from fear would prevail over that of the accused.' (Md. Mostafa Hosain, 'Application of UDHR by Supreme Court of Bangladesh: Analysis of Judgments,' January 13, 2013, available at: [www.clcbd.org/journal/13.html](http://www.clcbd.org/journal/13.html)). In South Africa, in a case regarding housing for the homeless, Judge Yacoob declared, 'The proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom.' (as quoted by DE GAAY FORTMAN 2011, at p. 159). Even in the United States, where incorporating international human rights domestically has encountered resistance, courts have used the UDHR in decisions, including the Supreme Courts of California, Connecticut, Oregon, and West Virginia. The UDHR has been cited regarding rights to education, a minimum standard of living, protecting prisoners, privacy, freedom of movement, and freedom from discrimination as well as cruel and unusual punishment. (*Pauley v. Kelly*, 162 W. Va. 672, 679, 255 S.E.2d 859, 864 (1979); *Moore v. Ganim*, 233 Conn. 557, 637, 660 A.2d 742, 781 (1995); *Sterling v. Cupp*, 290 Or. 611, 620, 625 P.2d 123, 130 (1981); *Rodriguez Fernandez v. Wilkinson*, 505 F. Supp. 787, 797 (D. Kan. 1980); *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 130, 610 P.2d 436, 440 (1980); *Am. Nat'l Ins. Co. v. Fair Employment & Hous. Com.*, 32 Cal. 3d 603, 608, 651 P.2d 1151, 1154 (1982); *In re White*, 97 Cal. App. 3d 141, 148, 158 Cal. Rptr. 562, 567 (Ct. App. 1979)).

22 It is primarily 'human dignity' that plays its part in judicial decision-making, but only in cases in which national and/or regional sources also refer to this foundational value.

23 On the origin and inclusion of Art. 1 UDHR see, notably, MORSINK 1999; *FACING HISTORY AND OURSELVES NATIONAL FOUNDATION*; LINDHOLM 1992; Morsink's book review of that volume, MORSINK 1995; WALTZ 2002; BAILEY; DANCHIN.

24 BAILEY.



all human rights, the rationality of human persons and their *obligation* to deal fairly with everyone else, regardless of race, sex, wealth and so on.<sup>25</sup> As Eleanor Roosevelt acknowledged, during the drafting of the UDHR, '[s]he believed in an international community that respected the value and variety of all human life where no nation or individual person could be truly free as long as others were not. Consequently, as she expressed herself in thought and action it became clear that her commitment to human rights embraced presidents and ambassadors as well as the 'everyday people' of the world, and extended from the large citadels of government power to tiny hamlets and villages.<sup>26</sup> According to her, it was designed '... as a common standard valid 'for all people and all nations.'<sup>27</sup>

Actually, the middle part of the text – on the human endowment with reason and conscience, and the subsequent duty to treat others as fellows – was added somewhat later at the drafting stage after there had been an argument as to its factual basis. Deliberately, then, the article is voiced as a matter of faith rather than fact. In the General Assembly, the term 'by nature' – in respect of the endowing force – was deleted as the gist of the Declaration was to keep disputed ('metaphysical')<sup>28</sup> beliefs out of a *universal* declaration. (In a similar vein, the General Assembly rejected the Dutch delegate Leo Beaufort's amendment to the preamble, referring to 'man's divine origin and immortal destiny').<sup>29</sup> Finally, the statement of duty – 'should act towards one another in a spirit of brotherhood' – was intentionally placed at the end. A proposed phrase referring to 'duties to the community' was shifted to Article 29.<sup>30</sup>

Obviously then, Article 1 was framed as opening articles of statutes and constitutions commonly are, in both public and private settings, namely as *jus divinum* in the metaphorical sense of a fundamental statement of faith and mission – a statement of principles – as opposed to *jus positivum*, implying concrete norms and rules enacted to be observed and if necessary

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25 BAILEY. Emphasis added.

26 LAUREN 1998, at p. 218.

27 LAUREN 1998, at p. 234.

28 LINDHOLM 1992.

29 MORSINK 1999, at p. 288.

30 LINDHOLM 1992, at p. 40.

enforced.<sup>31</sup> Indeed, the first article of the Declaration is to be regarded as an expression of that reaffirmed *faith* in fundamental human rights expressed in the preambles to both the Charter and the Declaration. Thus, human rights are based upon universal faith in certain crucial values. It is primarily as a normative basis for both law-making and judicial interpretation that these values are to play their part.

On the normative proclamation that human beings are all equal in rights, the United Nations does not provide much instructive comment. Indeed, an educational explanation on the UN digital programme *Cyber schoolbus* is not particularly enlightening: 'Equal does not mean that we are all the same. Each of us is different in our own special way. But we also have the common qualities that make us all humans. So each of us should be treated with respect and dignity and treat others in the same way.'<sup>32</sup> The point is, of course, that Article 1 does not declare all human beings to be generally equal but rather specifically equal *in dignity and rights*. The educational statement then proceeds to a positive interpretation of 'equal in dignity,' leaving 'equal in rights' aside.

Equal in dignity does, indeed, refer to the inherent worth of each and every human being, simply as an innate consequence of human existence whether or not an individual person is convinced of it.<sup>33</sup> Inherent is, indeed, the adjective used in the Preamble to the Universal Declaration of Human Rights, meaning that human dignity is a matter of being rather than having, and hence implying that it cannot be taken away.<sup>34</sup> But what about 'equal in rights?' Actually, this might be seen as the most difficult normative assertion in the whole Declaration. However, before tracing its meaning and implications in practice, it should first be noted that Article 1 must be read as one text, connecting *liberty* (all human beings born free), *equality* (born equal in dignity and rights) and fellowship or *solidarity* (should act towards

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31 In canon law, an amazing distinction is made between *jus divinum positivum* and *jus divinum naturale*. Notably, the term *jus divinum* is used here in a purely metaphorical sense, referring to a statement of faith.

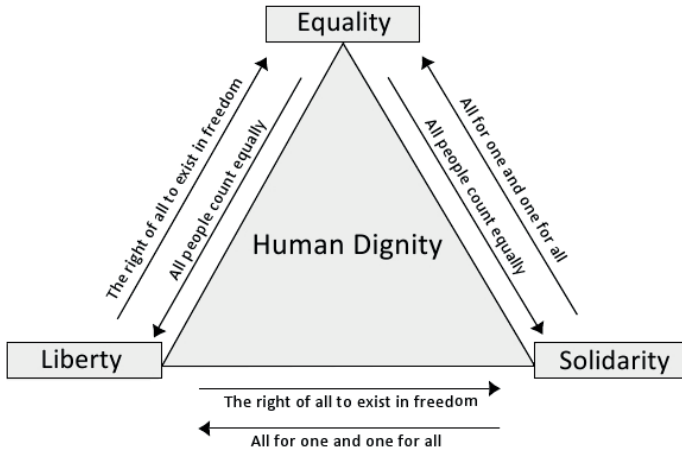
32 United Nations, 'Cyber School Bus,' available at: <http://www.un.org/cyberschoolbus/humanrights/declaration/1.asp>.

33 DE BLOIS 1998, at p. 531.

34 See DE GAAY FORTMAN 2014b.

one another in a spirit of ‘brotherhood’) in one triangle displaying human dignity in three manifestations:

Figure 1 The ‘Golden’ Triangle of Human Dignity Manifestation



Source: DE GAAY FORTMAN 2012, note 12, at p. 8.

Markedly, human dignity qualifies the three major human rights principles with the adjective *all*, while also connecting them as branches from the same tree. This crucial link between liberty, equality and solidarity implies that there cannot be a hierarchy of fundamental rights and their underlying values; a balancing exercise between different interests behind claims in the light of all relevant (competing) rights and core values is, indeed, vital. As was noted in a joint dissenting opinion in a European Court of Human Rights (ECtHR) case, ‘the Court must decide whether a fair balance has been struck between competing interests. It is not, therefore, a question of deciding which interest must, in a given case take absolute precedence over others [...] It must perform a ‘balancing of interests’ test and examine whether in the present case the French system [the legal system at issue], struck a reasonable balance between the competing rights and interests.’<sup>35</sup>

35 ECtHR, *Odièvre v. France* 13 February 2003 (Appl.no. 42326/98), joint dissenting opinion of

Thus, in actual practice the three basic values also qualify one another, each with its own core perspective. Indeed, Ronald Dworkin calls here for 'solutions to *simultaneous equations*.'<sup>36</sup> It is important, in other words, not to play one value out against another (liberty versus equality, for example) but to aim at simultaneous realisation.

#### 4. The equal rights of all: (1) formal equality

Perusing international human rights law and the comments and observations of its distinct supervisory bodies, one is struck by a primary interpretation that relates the equality principle to the subjects of human rights, in particular 'the equal rights of men and women.' Actually, it is already in the preamble to the UN Charter that the 'Peoples of the United Nations' reaffirm their faith in ... 'the equal rights of men and women.' This expression is repeated in the preamble to the UDHR whilst human rights treaties themselves use phrases like 'the equal right of men and women to the enjoyment of all rights set forth in the present Covenant.'<sup>37</sup>

A first issue in this respect is the meaning of equal enjoyment. In its General Comment No. 16 (2005) the Committee on the International Covenant on Economic, Social and Cultural Rights (CESCR) has provided a conceptual framework for this purpose. Its primary distinction is between formal (*de jure*) and substantive (*de facto*) equality. The former requires equal status before the law in the sense of equal treatment of equal cases. Often quoted in this connection is Aristotle's characterization of formal justice where '... equals are to be treated equally and unequals unequally.'<sup>38</sup> In other words, a principle of consistency.<sup>39</sup> However, since antiquity accepted slavery, one thus has to be careful. To regard a fellow human being as an 'unequal' due to certain circumstances requires legitimation in the light of that fundamental principle based upon the birth of *all* as human beings 'equal in rights.'

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judges Wildhaber, Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää.

36 DWORKIN 2011, at p. 3. Emphasis added.

37 It is a bit odd to grant people rights to enjoy rights. Perhaps typical of the soft nature of the international human rights venture.

38 As quoted by POJMAN and WESTMORELAND 1997, at p. 2.

39 POJMAN and WESTMORELAND 1997, at p. 3.

Naturally, then, in adjudication and law enforcement, women ought to be treated as equals in the sense that they should not be the objects of discrimination. But there is more. The Canadian Charter of Rights and Freedoms of 1982, Article 15(1) reads: ‘Every individual is equal *before and under the law* and has the *right to the equal protection* and equal benefit of the law *without discrimination* ...’<sup>40</sup> Thus, apart from the prohibition of discrimination there is also the requisite of ‘equal protection of the law.’ The latter may well call for special measures, for example to protect women from violence under cover of privacy. The point is that the law ought to protect men and women alike in all aspects of their human dignity, including bodily integrity. This responsibility may well entail different (unequal) approaches in unequal cases in order to equally protect both men and women. This is precisely Loenen’s argument as recalled at the outset of this chapter.

A strategic issue in this regard is whether the categorization of rights entailing special measures to fight gender discrimination and to provide legal protection in case of gendered vulnerability might be conducive to the struggle as such. My view is that in light of both the systemic nature of human rights violations – specifically directed against women and the need for a global moral platform the slogan ‘Women’s Rights are Human Rights’ has been fully understandable.<sup>41</sup> Probably, it has worked too. The term *women’s rights* may well have exerted substantial positive affect on the struggle against such practices as sex discrimination in law, sexual violence, female genital mutilation (FGM), and trafficking.

Currently, however, two downsides manifest themselves. First, the slogan emphasizes difference – where the challenge is to convince society of (gender) equality in principle. Consequently, a motto like ‘Equality Now’ is more in conformity with the fight for universality and against exclusion.<sup>42</sup>

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40 Quoted by SADURSKI 2008, at p. 95. His emphasis.

41 In preparation for the Second International Conference on Human Rights (Vienna 1993) this slogan was coined by the women’s lobby. Hillary Clinton used it in her speech, ‘Remarks by the First Lady Hillary Rodham Clinton to the United Nations Fourth World Conference on Women Plenary Session,’ September 5, 1995, available at: [www.un.org/esa/gopher-data/conf/fwcw/conf/gov/950905175653.txt](http://www.un.org/esa/gopher-data/conf/fwcw/conf/gov/950905175653.txt).

42 Actually, this is the name of a global women’s movement founded in 1992: [www.equalitynow.org/ourwork](http://www.equalitynow.org/ourwork).

Second, the categorization of rights according to specific characteristics of legal subjects has become disturbingly widespread. Thus, we formerly had LGBT rights: Lesbian, Gay, Bisexual and Transsexual, which meanwhile has been extended to abbreviations as odd as LGBTQIA (adding Questioning, or Queer, Intersex and Asexual). This specification and categorization has become not only bizarre but also counterproductive. Human rights are all encompassing. Thus, it is unnecessary to speak of 'a right to be human,' a 'right to be a woman,' or 'a right to be gay' – all of which sounds absurd, since the term human rights is intended to be comprehensive. Moreover, it confuses the argument and mobilizes counterforces against people with non-mainstream sexual orientations. The point is that *all* people are *equal in rights* and hence shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race, sex, sexual orientation, or on any other grounds whatsoever shall not be permitted.<sup>43</sup>

## 5. The equal rights of all: (2) substantive equality

Nationally, equal protection tends to be constitutionally embedded as, for example, in the Fourteenth Amendment to the US constitution. Of course, this is not enough to realise genuine equality in rights. On the contrary, David Cole, a US constitutional law scholar, argues that although the US '... criminal justice [system] is explicitly based on the premise and promise of equality before the law, the administration of criminal law ... is in fact predicated on the exploitation of inequality.'<sup>44</sup> Based on an empirical analysis of *Race and Class in the American Criminal Justice System*, he concludes

... our criminal justice system affirmatively depends on inequality. Absent race and class disparities, the privileged among us could not enjoy as much constitutional protection of our liberties as we do; and without those disparities, we could not afford the policy of mass incarceration that we have pursued over the past two decades.<sup>45</sup>

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43 Notably, the last two sentences constitute an English translation of Article 1 of the Dutch Constitution. Strategically, the term 'or on any grounds whatsoever' should suffice.

44 COLE 1999, at p. 5.

45 COLE 1999, at p. 5.

Race and class disparities manifest themselves in collective prejudice and consequential discrimination on the part of law enforcement officers as well as juries and judges. Exemplary in the struggle for *equal in rights* in this respect is the Innocence Project in the US, a non-profit national litigation and public policy organization dedicated to exonerating wrongfully convicted people through DNA testing and reforming the criminal justice system to prevent future injustice. Not surprisingly, all their clients are 'poor, forgotten, and have used up all legal avenues for relief.'<sup>46</sup>

With regard to civil litigation, Marc Galanter completed an extensive legal-anthropological inquiry into structural disparities among parties in cases involving claims presented to insurance companies. The article carries the striking title *Why the Haves Come Out Ahead*.<sup>47</sup> The companies happen to be 'repeat players' while individual claimants are 'one-shotters.' As parties in litigation, the large and professionally organised repeat players specialise in legal services, and appear to enjoy substantial advantages, extending even to favourable rules and due process barriers.<sup>48</sup>

Notably then, procedural equality is not enough. Merely settling for formal rights, Freeman has argued,

... one is locked into the subtle constraints of the equal opportunity game, including a pressure to legitimize its results (the 'qualified' get ahead) and a resistance to deviation from its premises ... If equality of opportunity does not work, then rights acquisition by itself cannot deliver on its substantive promise.<sup>49</sup>

Indeed, formal rights acquisition may even result in some negative effect on public opinion when it comes to substantive equality. Thus, once the American civil rights movement had achieved equal citizenship, its claims regarding substantive equality were seen as less urgent.<sup>50</sup> Similarly, after meaningfully achieving formal equality goals the women's rights movement

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46 'Innocence Project,' available at [www.innocenceproject.org/news/](http://www.innocenceproject.org/news/).

47 GALANTER 1974.

48 GALANTER 1974, Figure 3 at p. 125.

49 FREEMAN 1988, at pp. 335-36.

50 ESKRIDGE 2002, at p. 2098.

faced growing opposition against its demands for affirmative remedial measures.<sup>51</sup>

What, then, are possible elements of a struggle to achieve substantive equality? Notably, there is a crucial distinction between the demands for formal and substantive equality, especially in terms of the recognition and protection of equality. Refugees, for example, are either granted a right to seek asylum or not. Since rights discourse also uses absolutes, it supports judicial action. To achieve substantive equality, however, requires relative approaches of a political rather than judicial nature. Thus, levelling down socio-economic inequalities is a common objective in political struggles for social justice. Yet, from a judicial perspective substantive equality entails some conclusive implications, too.

First, obviously the 'equal in rights' principle also pertains to economic, social and cultural rights. This applies to articles 22-26 of the UDHR as well as to the ICESCR treaty. Indeed, it is the ESCR Committee that pays consistent attention to issues concerning equal opportunities in respect of entitlements protected by these rights such as education, work and health care. What is at stake here is *resource equality*. As Dworkin holds, 'we cannot guarantee people well-being, let alone equal well-being, but we can offer them equal resources and make sure that they are compensated for brute bad luck and do not profit from brute bad luck.'<sup>52</sup> Specific implications of resource equality may be identified in equal opportunities of acquirement such as equal availability and equal accessibility. In an article entitled 'Taking Equality Seriously: Applying Human Rights Frameworks to Priority Setting in Health,' Yamin and Norheim have analyzed such implications in respect of health care.<sup>53</sup> In such a methodology, 'equal in rights' is translated into 'human rights criteria,' as they call certain specified principles, applied to priority setting in systems of health care. It is an approach based not so much on human rights legality but on criteria derived from human rights-based principles of legitimacy, including formal and substantial equality.<sup>54</sup>

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51 ESKRIDGE 2002, at p. 2114.

52 As characterized by POJMAN and WESTMORELAND 1997, at p. 11.

53 YAMIN and NORHEIM 2014.

54 Behind each distinct human right is a principle connected to basic human dignity. Examples following from the UDHR are the value of human life per se, bodily integrity and the trinity of



Second, in the same vein ‘... individuals have a right to *equal concern* and respect in the design and administration of the political institutions that govern them.’<sup>55</sup> This, again, may be seen as a precept of substantive equality derived from the ‘equal in rights’ principle. It entails human rights criteria to be applied to administrative budgeting at all levels of government. Not surprisingly, then, an international non-governmental organization called *Equalinrights* used to focus particularly on ‘budgeting rights.’<sup>56</sup> Several other INGOs as well as UN treaty bodies have paid explicit attention to human rights budgeting in relation to many different states parties, e.g. the CRC Committee.

Exemplary in this respect is a doctoral study by Yanqing Hong on qualitative inequality in basic education between urban and rural areas in China examined in the light of the human right to education and the equal in rights principle.<sup>57</sup> Political economy analysis showed that the contextual background to this inequality in rights lies in the organization of public finance. Strikingly, although this analysis demonstrated evident systemic violations of the ICESCR, which China had ratified, this appears to be an issue on which the country has never been questioned in any UN human rights setting.

## 6. Overcoming the global human rights deficit: a struggle for true universality

In much of her work on human rights, Titia Loenen has pointed to the gendered nature of a problematique that is part of what I call the global human rights deficit,<sup>58</sup> *viz.* the public/private divide. Indeed she advocates a reconceptualization of international human rights law so as to include

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Article 1: liberty, equality and solidarity. Such principles underline the legitimacy of any use of power that affects people’s lives and living conditions.

55 DWORKIN 1977, at p. 180. Emphasis added.

56 *Equalinrights* (2004–2011) was a joint initiative of the Dutch Development Agency ICCO and the Netherlands Institute of Human Rights. See [www.aprodev.eu/files/Development\\_policy/Dev-RBA/budgeting\\_human\\_rights-Jan%202007.pdf](http://www.aprodev.eu/files/Development_policy/Dev-RBA/budgeting_human_rights-Jan%202007.pdf). This methodology is also available through other means. See the UN Practitioners’ portal [hrbaportal.org/archives/tools/budgeting-human-rights](http://hrbaportal.org/archives/tools/budgeting-human-rights).

57 HONG 2011.

58 DE GAAY FORTMAN 2011. See also ARTS and MIHYO 2003.

specific violations that affect women in particular such as domestic violence, forced prostitution, trafficking, female genital mutilation and sexual crimes. What is necessary here is interpretations of the 'equal in rights' principle that acknowledge difference and effectuate special measures to protect such essential elements of human dignity as bodily integrity beyond the four walls of privacy, too. Indeed, in our world today women are *not* equal in rights. Intolerable impunity of those responsible for gross and systematic violations of human rights, affecting women in particular, reflects a prevailing acquiescence to major constraints on true universality. Here 'equal in rights' may well serve as a wake-up call to break through double standards.

A second component of that global deficit concerns the impunity of state-related perpetrators of human rights violations, *viz.* those holding powers of government and their subordinates. Although international law has crossed the frontiers of national sovereignty, its range does not extend to the 'owners' of major state power. For example, victims of gross and systematic human rights violations in Chechnya, Tibet, Afghanistan, Israel and Palestine – to mention just a few – are not equal in international human rights. Indeed, the International Criminal Court (ICC) has itself become a major accomplice to current acquiescence in double standards, since no charges have been filed in relation to these situations.

'Double standards are better than no standards at all', appears to be the prevailing mood – even within the international human rights movement itself (except for the laudable advocacy of NGOs with a genuinely universal mission such as Amnesty International). With its legitimacy seriously undermined by double standards, international criminal justice will not be in a position to reach out to the hearts and minds of all global citizens. Here again, 'equal in rights' may serve as a wake-up call to truly commit humankind to universality. It is imperative that international criminal justice standards apply equally to all states, regardless of their fungible power or positions within the international system.

Thirdly, major global deficiencies present themselves in the area of so-called minority rights. Markedly, the issue as such is not a problem of minorities but of the ways and means in which dominant (usually majority) power is abused to withhold recognition, protection, resource equality and equal

concern from specific categories of people. As minority security depends on the very government that abuses their rights, oppressed collectivities may well be expected to move. In this connection an important aspect of the 'equal in rights' principle comes to the fore, *viz.* geographical inequality. During the last two hundred years, global geographical income inequality<sup>59</sup> in terms of real purchasing power has risen from a factor of 1:3 to over 1:100, meaning that on average an individual born in one of the most destitute spots in our world today 'enjoys' a purchasing power of less than one dollar for every one hundred dollars of average purchasing power per capita in the most privileged regions. From an 'equal in rights' perspective, the least one would expect here is a universal freedom to move. Yet, in their attempts to flee from absolute destitution people characterized as 'economic refugees' drown at sea. Applying human rights criteria to migration policies, one would expect at least some attention to be paid to the need for flexible rather than rigid rules regulating migration. International as well as regional and national refugee laws that allow resettlement only as political asylum seekers neglect the whole prevailing problem of spatial horizontal inequality in a globalized perspective. Again, 'equal in rights' might serve as a wake-up call to this predicament.

Finally, and obviously related to the preceding paragraph, another manifestation of the global human rights deficit lies in structural non-implementation of the rights of the poor. Already in the previous century United Nations development agencies called poverty 'a brutal denial of human rights.'<sup>60</sup> At the turn of the millennium, the World Bank's *Voices of the Poor* studies revealed daily hardship in efforts to sustain livelihoods to be a problem of contextual constraints such as failing political, economic and judicial institutions.<sup>61</sup> Hence, it is not primarily the dissemination of human rights texts that 'the poor' require, but also support in actual struggles to secure the basic entitlements that human beings universally require to survive.

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59 S. Mansoob Murshed and Scott Gates call this spatial-horizontal inequality. See their article, MANSOOB MURSHED and GATES 2005. See also CEDERMAN, GLEDITSCH and BUHAUG 2013, at p. 30 ff.

60 UNITED NATIONS DEVELOPMENT PROGRAM 1998, at p. 27.

61 NARAYAN et al. 2000 and CHAMBERS et al. 2000.

In conclusion, *equal in rights* is a strong normative statement directly derived from basic human dignity. It legitimates and supports struggles against exclusion. In respect of formal equality, 'equal in rights' constitutes a legal precept of equal protection as well as an injunction against discrimination. In efforts towards substantive equality, it entails norms and values that may serve as both legal principles in interpretation and principles of legitimacy in making and executing policies. Indeed, 'equal in rights' may well function as a crowbar to true universality.

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# Fundamentally equal but unequally protected? Human rights, unequal protection, and states as duty bearers

JOS PHILIPS<sup>1</sup>

## 1. Introduction

The Universal Declaration of Human Rights famously declares that ‘all human beings are born free and *equal in dignity and rights*.’<sup>2</sup> The italicized phrase can certainly be regarded as one of the most important guiding thoughts of the contemporary practice of human rights. Yet at the same time the protection that is actually provided by human rights varies widely across countries. The right to health, for example, will get a person far fewer protections – and of lesser quality – in South Africa than in, say, Germany. For example, in Germany this human right would likely translate into the provision of renal dialysis for those who need it; in South Africa it is very unlikely that it would.<sup>3</sup> Furthermore, such differences arise because of deep-seated features of the current way of organizing human-rights protection – such as the central role given to states, in a world where states vary greatly in (among other things) wealth. And the differences do not only concern socio-economic rights but may – where they arise on account of wealth differences, for example – also concern civil and political rights, such as

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1 Some of the themes of the present essay were first developed in my article PHILIPS 2014. ‘On Setting Priorities among Human Rights,’ (2014) 15 *Human Rights Review* 239–257. I thank Arienne Mulder for agreeing to write a BA thesis on the topics of this article under my supervision – which kept me thinking about the subject. Many thanks also to Marjolein van den Brink, Jenny Goldschmidt, and two anonymous reviewers for some excellent remarks. Last but certainly not least, many thanks to Titia Loenen – along with her reading group on human rights – for thought-provoking and stimulating discussions over several years.

2 Universal Declaration of Human Rights, Art. 1 (emphasis added).

3 The example is inspired by Albie Sachs’s discussion of the constitutional right to health in South Africa. See SACHS 2009, at p. 161ff.

the right to security; consider, for example, the amount of money spent on training the police.

This state of affairs seems problematic. The meaning of all human beings being ‘equal in dignity and rights’ (or, as I will also put it, ‘fundamentally equal’) is not exactly clear – something to which I will extensively come back below. However, whatever precisely its meaning, there is a real question whether it could be compatible with significant inequalities among humans with regard to the protection of very important interests. On the face of it, further explanation is required if one is to maintain that human beings are fundamentally equal yet it is all right for some human beings to receive far less protection of their urgent interests (such as health) than others.<sup>4</sup> In this essay, I want to investigate whether the two – fundamental equality and the unequal protection of urgent interests – might be compatible after all. It will be concluded that there are severe limits to their compatibility (Section 2). I will go on to argue that this has implications for how we should conceive of the duty bearers of human rights (Section 3). In particular, one cannot stick to states as the main and primary duty bearers of human rights – each state for the people within its jurisdiction – with other agents only being subsidiary duty bearers, playing a relatively minor role, or fall-back duty bearers which only come into the picture where states fail to act as they should.

The approach of this essay will be philosophical rather than juridical. That is to say, it will draw on all reasons that seem appropriate rather than only on reasons that are deemed admissible in a juridical framework. Its notion of human rights will be philosophical, too: this notion will not – in a manner to be explained in detail in a moment – be bound to juridical meanings and uses but can depart from these if there are good reasons to do so.

For the sake of clarity, let me say a little more about the particular philosophical conception of human rights which I shall use.<sup>5</sup> Some main elements of this conception are the following. First, human beings are

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4 For a clarification of the notion of ‘urgent interests’ see Section 2.1 below. For the question of which interests can plausibly count as urgent, see Section 2.3.

5 It is generally beyond the scope of the present essay to defend this conception of human rights against alternatives. It *will* be argued, however, that this conception provides a particularly strong interpretation of the post-WWII practice of human rights. See Section 3.2 below.

regarded as fundamentally equal – although, as said, we will have to elaborate on what this means precisely. Secondly, they all have legitimate claims that their urgent interests must be protected against certain threats.<sup>6</sup> However, it is not conceptually implied in the notion of human rights, as I understand it, that all human beings should receive equal protection of their urgent interests against threats.<sup>7</sup> (I will come back to the notions of ‘urgent interests’ and ‘equal protection’.)

On the other hand, even though human rights do not imply that equal protection of urgent interests should be provided, they obviously do say something about which protections should be provided. I think it is helpful to think of them as doing this on two levels. First, there is a more abstract level where the threats to interests are specified as well as the protections to be provided, all of this in a fairly general way and sometimes rather implicitly; see for example UDHR, Art. 14(1): ‘Everyone has the right to seek and to enjoy in other countries asylum from persecution.’ Secondly, the answer to the question of *concretely which* protections are to be provided – e.g. concretely which arrangements to protect and promote health – will not at all times be the same. For I take it that human rights cannot plausibly consume all wealth and resources that the world has available (generated through social cooperation etc.).<sup>8</sup> This would also imply – and I would accept this implication – that if the world were, for example, to become much poorer, less could be required as a matter of human rights than is presently the case. At the more abstract level just mentioned, nothing would change, and human rights would be valid across time and space. But at the

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6 More particularly, the threats in question may be called standard threats – a notion which refers, among other things, to the threats being common and predictable. Cf. SHUE 1996, at pp. 29-34. I assume that in the case of human rights, the interests on which these threats bear are urgent for wide categories of humans across time and place.

7 As for the UDHR: when it declares, for example, a right to a fair trial for everyone, I think that it demands that, for all humans, there are protections which can reasonably count as fulfilling this right. It does not demand that the protections for all humans are equal. Incidentally, if this should be wrong, and if the UDHR does demand equal protections, many questions asked in this article will remain standing: is unequal protection – as it is systematically engendered by the current institutional set-up – justifiable if we assume fundamental equality? And, can a plausible interpretation of the practice of human rights abandon states as duty bearers to some considerable extent?

8 What part of that wealth they may plausibly consume must be discussed on another occasion.

second, more concrete level, something *would* change. The background idea is that, at a concrete level, human rights can only demand such protections as the wealth of the world as a whole could amply afford if everyone were to receive them. Put differently: although human rights do not conceptually imply equal protection, I assume that human rights cannot plausibly require such ambitious protections that the world as a whole would not even amply have the wealth to provide them to everyone.

Furthermore, the philosophical conception of human rights which I will use assumes that when we speak of human rights, we have some idea about who is to bear the duties that come with such rights.<sup>9</sup> And finally, it will be assumed that there may be other duty bearers of human rights than states (each state for its own people). Foreign states, intergovernmental organizations, NGOs, business corporations etc. might also be duty bearers. This does not mean, of course, that it is always – or even usually – a good idea to assign human rights duties to, say, NGOs. Nor does it settle the question of how to distribute duties in an acceptable way or, put differently, the question of how to set up a plausible division of moral labour.<sup>10</sup> These are all very large questions which the present essay can obviously not answer, although it will have some things to say about them.

So much by way of a clarification of the philosophical conception of human rights that will be used in this essay. Let us now return to our main topic: whether fundamental equality could plausibly go together with unequal protection.

## 2. Fundamental equality and unequal protection

### 2.1 *Are fundamental equality and unequal protection compatible?*

Human rights, as I have understood them, assert that all human beings are fundamentally equal. But is the fundamental equality of all human beings compatible with an unequal protection of their urgent interests, where this

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9 On the other hand, we can speak of human rights even when we cannot get these duty bearers to behave as they should. See NICKEL 2007, at p. 29ff.

10 Important general considerations that bear on the assignment of duties, i.e. of human rights realization, include the *capacity* to carry out a task, and *causal contribution* to a problem (to there being a task in the first place). Cf. MILLER 2005b; SHUE 1996.

inequality is at least foreseen and often more than that – e.g. is systematically engendered by the ‘regime’ of protection?

As said, it is not exactly clear what it means to say that human beings are fundamentally equal. Nonetheless, I will argue that a plausible definition of fundamental equality denies that fundamental equality *conceptually implies* the equal protection of urgent interests. (If it should be otherwise and there were a conceptual implication, our question would be answered immediately.)

To show that there is no conceptual implication I will now further explain my usage of ‘equal[ity] in dignity and rights’ or ‘fundamental equality’ (as said, I will use these two expressions interchangeably).<sup>11</sup> I take these expressions to mean that human beings matter a lot and that they *all* matter a lot (‘equal dignity’). Furthermore, this translates, for all of them, into their being justified in making certain claims (‘equal rights’). To be sure, not all claims are envisaged by the human rights framework but only those claims that relate to goods (and a level of goods) without which human life could arguably not normally go minimally well.<sup>12</sup> Examples would typically include an adequate quantity and quality of food, freedom of movement within certain confines, a certain level of literacy etc. (I will refer to these goods as urgent interests.)<sup>13</sup> Certain sorts and levels of protection of these interests should be provided, and in such a way that everyone counts for one and no one counts for more than one. But this is as yet a rather vague requirement. In particular, it does not by definition mean that *equal protection* must be provided, in the sense that people receive the same protection of their urgent interests if their need

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11 In what follows, I will only be concerned with the phrase ‘equal[ity] in dignity and rights’ as a whole, not with dignity and rights as separate concepts (see footnote 15 below). Furthermore, I will explain my interpretation of this phrase but it is beyond the present scope to defend this interpretation vis-à-vis alternatives. In any case, I do think that my interpretation is plausibly in line with the UDHR. See e.g. MORSINK 1999; GLENDON 2001.

12 Furthermore, human rights will typically only deal with goods that apply to wide categories of people across all times and places. What it is for a life to ‘go minimally well’ would certainly need more discussion. One possibility is to draw on John Rawls’s approach and say that people should, among other things, be able to form, carry out and revise a conception of the good. See RAWLS 2000.

13 Thus I will use such expressions as basic needs, fundamental goods and urgent interests interchangeably. Although distinctions (of a more or less technical sort) might of course be made between these concepts, my interchangeable usage is not uncommon in the philosophical literature. Cf. TSAI 2014, at p. 81.

for protection is the same.<sup>14</sup> (Equal protection, as I use this expression, does not imply that people with different needs for protection receive the same protection; it may rather imply that they receive differential protection, which in some plausible way tracks the differences in what they need.) To give a – perhaps somewhat contentious – example, suppose that all human beings were the children of one mother.<sup>15</sup> They matter a lot to her and they all matter equally, in the sense that all count for one and no one counts for more than one. And this gives rise, for all of them, to certain claims to have their urgent interests protected. This, however, need not imply that they have a claim to receiving the same protection even if their basic needs are the same. Why not? The reason is, generally speaking, that there may be valid reasons – even in the face of similar needs – to provide more protection to one child than to the other. However, in the absence of such reasons they *should* receive the same – if we genuinely think they are all very important and no one is to count for more than one. In other words: for it to be justified, in these circumstances, to provide the children with unequal protection, we require good reasons for this.

To return to our immediate subject: there is logical space for saying that fundamental equality need not translate into equal protection; but those who wish to defend unequal protection in the face of fundamental equality

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14 Some suitable division of moral labour would then determine who is to *provide* this protection. I will also say that if such a division of labour is in place, and people receive equal protection, they are treated with *equal concern*. Incidentally, it may be more accurate to speak of equivalent protection rather than equal protection. The basic idea of equal protection is that everyone ends up with equally good protection of their interests but this need not be done in the same way everywhere, and it may not even always concern the exact same threats (for example, a fair trial may be guaranteed by different institutional arrangements which are generally equally good overall but which have different advantages and disadvantages). However, I will continue to speak of equal protection.

15 The example may be contentious in the sense (among other things) that in a mother-child case we would not normally primarily speak of rights; we would generally only do this in institutional contexts. Still, the example can in important respects illustrate what could be meant by ‘equal[ity] in dignity and rights.’ Again, I have only tried to explain the meaning of this expression as a whole. I will not consider the concept of dignity separately; many philosophical questions on this concept are as yet unanswered and it is beyond the scope of this article to try to answer them. For example, is dignity to be regarded as the ground of human rights, and if so, how can it steer a middle road between being too empty (and thus rather useless as a ground) and being too substantive and close to the rights themselves? Cf. for somewhat similar dilemmas BEITZ 2013.

will need to make their case. They will have to provide good enough reasons. The question we must now ask is whether they can do this.

## 2.2. *Reasons (1): special relationships such as those of co-citizenship*

If people wish to assert that, in the end, fundamental equality and unequal protection are compatible, there are – as far as I can see in the literature – two kinds of reasons that stand out. They may be labelled reasons of special relationships and reasons of self-determination.<sup>16</sup> I will discuss these reasons and argue that, ultimately, they are both unconvincing.<sup>17</sup> Hence there is an incompatibility (at least to a large degree) between endorsing the fundamental equality of all humans and accepting that their urgent interests are unequally protected.

Let us consider the first kind of reasons. They are rather fundamental and appeal to special relationships, such as co-citizenship, participation in a cooperative scheme, or subjection to coercive rules. In these cases, additional duties are generated for participants. And it may be thought that these duties (among other things) justify additional claims on the part of participants, compared with non-participants. In what follows, I will always only consider cases where such additional claims concern less weighty matters and not cases where they concern what could arguably be matters of citizens' human rights (such as dialysis).<sup>18</sup> For example, perhaps citizens of rich countries, who pay

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16 For literature references see notes 22 and 27 below. Both kinds of reasons involve large-scale philosophical debates. In the present context, only the basic shape of the relevant debates can be provided. (Incidentally, I will leave aside such complications as those arising from the possibility – if any – to forfeit rights.)

17 That is, they are unconvincing for unequal protections that concern matters which would in rich countries be regarded as matters of human rights (e.g. the provision of dialysis for those who need it). For other kinds of unequal protections the story may sometimes be different; but it is beyond the scope of this article to consider those.

18 Cases where the choice is between, say, dialysis for insiders or for outsiders (and where they both cannot receive it) are very difficult. Perhaps insiders may often justifiably get precedence here. Importantly, however, such conflicts will not arise for human rights matters – inasmuch as the level of protection required under human rights will – also in rich countries – be tuned towards what the wealth and resources of the globe as a whole can amply afford. What needs to concern us, rather, are conflicts between the global provision of such things as dialysis (=protections of urgent interests at a level near to what rich countries regard as a matter of human rights) and attending to other interests of rich citizens.

the taxes that help sustain a health-care system,<sup>19</sup> may have a greater claim to health-care provisions than outsiders, even in cases where the choice is between using the tax money for very urgent care for outsiders (e.g. dialysis) and less urgent care for citizens (say, specific kinds of treatment for non-life threatening, chronic diseases).<sup>20</sup> If so, the world's poor may, where the protection of their urgent interests depends on assistance by rich countries, justifiably end up receiving less such protection – less than the level which rich countries regard, for their citizens, as a matter of human rights (e.g. dialysis).<sup>21</sup>

Yet I think that reasons of special relationships are not very likely to succeed in providing the required justification. Let me outline why – while noting that the literature about which kinds of special relationships generate which claims (and how weighty these claims are) is still incipient.<sup>22</sup> First, often there will (on a suitable division of moral labour) not even be a *prima facie* conflict between duly attending to the demands of special relations and protecting the urgent interests of all humans equally. The above example may not be such a case, but negative dimensions of human rights do often provide cases in point: honouring special claims of citizens is (although there may arguably be exceptions) not normally in conflict with refraining from killing people anywhere.

Secondly, however, in other cases conflicts *do*, on the face of it, certainly remain possible.<sup>23</sup> Think, for instance, of the positive provisions associated

19 Citizens and those who pay taxes do not always refer to the exact same groups. Depending on the exact version of the argument on which one wants to draw, the relevant categories may be, say, those paying taxes, those subject to the laws of the country, or those subject to certain duties that come with citizenship. For simplicity I will refer to them as 'citizens' – and to the duties that they have among one another as duties of 'co-citizenship' – although this may not in all cases be exactly accurate.

20 I am assuming throughout that it is possible effectively to provide these outsiders with the provisions in question. Furthermore, interstate assistance is of course only one way to realise an ambitious global equality of human rights protection. Other ways will be discussed notably in Section 3 below.

21 In a future essay, I will be concerned with the normative importance of this level of protection.

22 This literature cannot be discussed here in any detail. Key references include BLAKE 2011; NAGEL 2005; SANGIOVANNI 2007; SANGIOVANNI 2012.

23 It should be noted that 'equal protection of urgent interests' is not plausibly realized by levelling down to the lowest common denominator. See Section 3.1 below.



with health care, education or also upholding the rule of law. For example, may citizens of a relatively affluent country prioritize domestic tertiary education to elementary education abroad?

In the end, I think, the answer in such cases should often be negative. For we are, as said, generally talking about goods that are less urgent (e.g. tertiary education) versus goods that are considerably more urgent (e.g. primary education). In addition, only those protections can plausibly be regarded as matters of human rights, even in rich countries, where but a small part of the global wealth and resources would allow these protections to be realized everywhere. Thus after duly attending to human rights across the globe,<sup>24</sup> a large part of social wealth in rich countries remains available for other causes, and shifts can be made as to how to use it – for tertiary education, expensive cancer drugs, a new highway, or a new swimming pool. Therefore it is not in the end defensible for citizens of rich countries to say that care for the protection of urgent interests abroad – up to a level, approximately, of what counts as a human rights requirement in a rich country – directly gets in the way of, say, expensive cancer treatments or an extensive education system. Such causes may continue to receive due attention, even if rich states become considerably more concerned about globally achieving the protection of urgent interests.

The above argument may also be stated as follows. With claims such as those of co-citizenship, three kinds of cases are possible (we are always focusing on co-citizenship claims in affluent countries): (1) These claims could concern the protection of urgent interests in a way that would, in affluent countries, be regarded as a matter of human rights (e.g. dialysis). (2) These claims could concern the protection of urgent interests in a way that would not, even in affluent countries, be regarded as a matter of human rights (e.g. certain expensive cancer treatments). (3) These claims could concern, not the protection of urgent interests, but other goods (a new highway, etc.). In cases (1)<sup>25</sup> and (2), claims of co-citizenship may perhaps win out over contributing to the protection of urgent interests abroad (protection up to

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24 Here I assume a suitable division of moral labour, including a certain amount of slack taken up from a restricted number of free riders.

25 We have only been concerned with case (1) in footnote 18 above.

a level which would in affluent countries be regarded as a matter of human rights). For example, dialysis for co-citizens might trump dialysis abroad, and also expensive cancer drugs for co-citizens might trump dialysis abroad. Very importantly, however, it has emerged that these are false dilemmas. Recall that in my conception of human rights, these urgent interests can only claim protection to the extent that this protection would not absorb all, or even nearly all, means available. Finally, concerning case (3), it is very unlikely that claims arising from co-citizenship – and the like – may win out here, all the more so because the interests underlying such claims may, here too, receive considerable attention even after human rights claims have duly been taken into account. And there is something else to consider as well: Thomas Pogge, for example, argues that rich countries and their citizens are not mere bystanders to the plight of the world's poor but help to cause their poverty by imposing certain institutional rules.<sup>26</sup> This consideration further weakens the weight of claims of co-citizenship in case (3). In sum, in none of the cases can such claims plausibly justify rich countries in not realizing, or not helping to realize, greater global equality of the protection of urgent interests – up to the level, approximately, which would in rich countries be regarded as a matter of human rights.

### *2.3. Reasons (2): political and cultural self-determination and other values*

A second important kind of reasons found in the literature may be more promising.<sup>27</sup> These reasons say that certain important values – such as preserving important cultural identities or safeguarding the self-determination of a political community – cannot be adequately attended to if, globally, the equal protection of very urgent interests is realized, up to the level, approximately, of what is now a matter of human rights in affluent countries. This would be because globally realizing such a level of protection would require that we move to more globalized institutional arrangements that make it impossible to realize such values as the political and cultural self-determination of distinct communities.

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<sup>26</sup> POGGE 2005; POGGE 2008.

<sup>27</sup> These reasons are broadly in the spirit of RAWLS 1999; and MILLER 2005a; MILLER 2007.

There are at least two replies to this concern. The first is to deny the importance or weight of values such as political self-determination. However, this is not a particularly promising road to take. For although it is true that the equal protection of very urgent interests<sup>28</sup> is very important, some of the values whose realization one allegedly has to sacrifice to get there may also be very important. For example: political self-determination, and the ability to be meaningfully involved in decisions about the development of deep cultural identities, may touch upon weighty political and cultural rights. Therefore, we will at least hesitate in saying that fundamental equality requires realizing the equal protection of urgent interests, if such equal protection jeopardizes political or cultural self-determination etc. (It is true that, as they stand, these judgments about which interests/values etc. are particularly weighty or urgent remain intuitive. Ideally, we would want to outline a developed theory to guide us here;<sup>29</sup> but this is beyond the scope of our article.)

There is, however, an alternative line of reply: one could deny that there is a conflict between duly attending to values such as political and cultural self-determination and globally realizing the equal protection of very urgent interests (such as interests in life and health). I believe that this line of reply works quite well; both the globally equal protection of urgent interests and values such as political self-determination may fare well if, instead of moving to very globalized institutions (relatively close to a world state), one were to accept a greater role for NGOs, international organizations, and – as was in the background of Section 2.2 above – interstate assistance.<sup>30</sup> Such tendencies are already clearly present in the current global situation, which is sometimes called post-Westphalian.<sup>31</sup> Crucially, actually protecting urgent interests more equally does not assume that we move away entirely from states, which are now often the main instruments of political and cultural

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28 Where, of course, the protection of values such as political and cultural self-determination are not already included among those urgent interests. Typical urgent interests one may think of are interests in security, a fair trial, food, health, etc.

29 The list of real freedoms that Martha Nussbaum proposes in her capabilities approach may be an example. NUSSBAUM 2000.

30 Exactly which actions NGOs etc. may permissibly take, should of course be discussed in detail – if one is to avoid dangers such as paternalism and falling foul of political self-determination. But I cannot undertake to do this here.

31 See e.g. FRASER 2008.

self-determination. This is important, for not only could such a complete sidelining of states as duty bearers (each state primarily for its own people) jeopardize political and cultural self-determination, it might also make us move into what Mathias Risse<sup>32</sup> calls *terra incognita* – a configuration of institutional arrangements whose shape and effects (including possibly adverse effects) we cannot remotely foresee. Such a configuration might also endanger the equal protection of urgent interests.

#### 2.4. *Taking stock*

I have argued that those who claim that the fundamental equality of all humans is compatible with a factually unequal protection of urgent interests will have to make their case. Subsequently it has been suggested that the two most common lines of argumentation fail to provide good enough reasons – at least where we are concerned with protections which in rich countries would be regarded as matters of human rights. Principled reasons appealing to special relationships such as co-citizenship (among rich citizens) will often not conflict with the equal protection of urgent interests across the globe, or else they will not have enough weight. A second line of argument would be that globally realizing the equal protection of urgent interests comes at too high a price for other important values, such as the self-determination of a political community. It has been argued, however, that this price need not be so high. In short: human rights, which accept the fundamental equality of all human beings, should also accept globally equal concern, that is, the equal protection of urgent interests across the globe – or at least considerably more equal protection than we currently find.

### 3. States as human rights duty bearers – and beyond

#### 3.1. *Moving away from states*

We now need to ask how we are to move closer to the globally more equal concern that is required. We will begin by considering two possibilities for accommodating globally more equal concern within the institutional

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32 Risse 2012.

system that we find in today's world, and that puts a heavy emphasis on states as the main and primary duty bearers of human rights – each state for its own people.<sup>33</sup> It will turn out that neither of them works. Hence, we need to move away considerably from states as the main duty bearers if we are to move closer to the required equal concern.

Here, then, are two ways of realizing more equal concern within an institutional system centred on states as the main duty bearers. The first is to ensure that states would have equal wealth – as well as an equal willingness to realize human rights.<sup>34</sup> But this will not be realized in any remotely near scenario. Nor is it even very realistic to imagine, in some near future, a significantly *less* unequal distribution of wealth (or a willingness to realize human rights) than we now have. So this first possibility should, at least at present, be discarded. The second possibility is to realize equal concern by levelling down to the lowest common denominator, that is to say, by providing equally little protection to everyone. Obviously, however, this possibility can be dismissed even more quickly. For although the level of protection required by human rights, if it is to be uniform across the globe, needs to be such that it is easily affordable given the level of global wealth – i.e., leaving ample resources and wealth free to be devoted to non-human rights causes – a uniform level of protection cannot plausibly imply that it is alright to bring the level of protection down to what the poorest states can afford.<sup>35</sup> It seems, then, that if we are to move significantly closer to equal concern, we ought to move away considerably from states (each state for its own people) as the main and primary duty bearers of human rights.

Still, there are at least two reasons why one might resist such a move away from states. The first was addressed above: it is the concern that certain important values – such as cultural and political collective self-determination – could not be adequately accommodated if such a move were to be made. However,

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33 Here, 'main' means that non-state parties are generally only subsidiary duty bearers, playing a comparatively minor role. These parties may only become more important as secondary, back-up duty bearers when states do not act as they should.

34 Many thanks to Arienne Mulder for insisting that an unwillingness, too, could be a disturbing factor.

35 Indeed, this affordability requirement is even met by the approximate protections at a level, approximately, of what now counts as a matter of human rights in rich countries.

it has been argued that this concern is unjustified.<sup>36</sup> The second reason for resisting a move away from states is that if we made such a move we would no longer be offering a remotely plausible interpretation of the post-WWII practice of human rights. I will now offer a detailed answer to this charge.

### *3.2. Interpreting the practice of human rights*

To begin with, we must ask how we are to go about interpreting the practice of human rights. Charles Beitz says that there is (to his knowledge) no good systematic way of doing this.<sup>37</sup> But I do believe that there are certain things one can say. There are at least two questions to be asked here: (1) what is there to be interpreted? And (2) how do we go about interpreting it? After considering these questions, we can turn to the issue of which interpretations are the most plausible. Let us take these questions in turn.

Concerning the first question: the practice of human rights – the interpretandum – can be taken to refer to the words and actions of states, NGOs, business corporations, and social movements with regard to certain key human rights documents – I think particularly of the main human rights declarations and treaties of the UN,<sup>38</sup> most notably the Universal Declaration of Human Rights (UDHR).<sup>39</sup> If we understand the practice in this way, it may perhaps not always be crystal clear what falls within and outside it, but its broad boundaries will be clear.

As for the second question, I take interpretation to be an exercise of trying to arrive at some kind of reflective equilibrium, to broadly adopt a notion of John

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36 In fact, this argument played a central role in establishing that there was a case for greater equal concern in the first place.

37 BEITZ 2009, at p. 107.

38 Other important documents are the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of all Forms of Racial Discrimination (CERD); the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW); the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD). Furthermore, secondarily one may also refer to certain key regional human rights documents, such as the European Convention on Human Rights.

39 Cf. BEITZ 2009, at pp. 25-26.

Rawls's:<sup>40</sup> we try to get at a reconstructive account – in this case of the practice of human rights – which we can endorse in the light of its presuppositions, coherence and consistency, its implications, and also – importantly – in the light of its 'fit' with the practice. Where our interpretation does not seem to fit the practice of human rights, we will make revisions to our interpretation or discard certain elements of the practice (as peripheral or even mistaken). Eventually, this back and forth between the 'raw materials' of the practice and our interpretation will get us to a stable position – reflective equilibrium – or, as Rawls also puts it, it will give us an interpretation that we can 'on reflection' accept.

Back to our main question: will an interpretation that *abandons states* to a considerable extent as the main and primary duty bearers (call this interpretation 'Ab') emerge as at least as good as one that does not abandon states (call this interpretation 'N-Ab')?<sup>41</sup> In other words, consider an interpretation ('Ab') which assigns certain – albeit not all – human-rights duties (concerning, for example, education or health) to foreign states, international bodies, NGOs, or business corporations. And consider an interpretation of the practice ('N-Ab') which always regards states as the main duty bearers, each state for its own people. Could the former interpretation be at least as good as the latter? I think so, for the following reasons.

Firstly, an acceptable interpretation need not, if we broadly follow a reflective equilibrium approach, capture as many elements of the practice as possible. For instance, many states and agents in civil society regard states as the main duty bearers of human rights. But our interpretation need not follow this. Rather it should strike the right balance with regard to the elements of the practice we want, on reflection, to endorse and reject. Therefore I see no reason to find interpretation Ab to be less acceptable than interpretation N-Ab merely because it discards more elements of the practice of human rights – namely, it additionally discards those that put heavy emphasis on states as the main and primary duty bearers of human rights. Nor, of course, is Ab for this reason *more* acceptable than N-Ab.

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40 RAWLS 1971.

41 For other elements of what I take to be a plausible interpretation of the practice, see footnote 26 above.

However, there *are* reasons for deeming interpretation Ab to be the more acceptable one. The first reason is that one can tell a more attractive story as to what human rights are if one relies on Ab rather than N-Ab. If the protection of widely urgent interests is what human rights are ultimately about, this gets us close to, for example, the Preamble to the Universal Declaration, which refers to the horrors to which human beings had been subjected (e.g. in WWII) and to the preservation of peace. By contrast, if human rights were in the end to be about the protection of such interests *by states*, their appeal might become more parochial and less straightforward. Second, there is another reason why under interpretation N-Ab human rights may become more parochial concerns: they will be more closely tied to a particular institutional order, and one that is already changing in a globalizing world. The human rights agency of, for example, business corporations and NGOs is increasingly important – as is recognized by many.<sup>42</sup> Moreover, in the current post-Westphalian world order the roles of the international community are growing and the internal and external sovereignty of states is being ever more perforated. This seems to leave interpretation N-Ab with the choice either to deny the applicability of the notion of human rights to such a world order or to come up with a second conception of human rights – in addition to N-Ab – which *would* be applicable to such a world order, even if N-Ab is not. Neither seems to be particularly attractive. The former is a paradigm case of condemning human rights to parochialism and the latter is unattractive – if for no other reason – because it is not very parsimonious to have two accounts rather than one.

All in all, then, interpretation Ab seems clearly preferable. However, there may be objections. First, someone could take issue with the above claim that, on a reflective equilibrium approach, Ab and N-Ab are equally acceptable interpretations of the post-WWII practice of human rights. This objector would typically point to some ‘raw materials’ that we would have to discard on interpretation Ab but should not be willing to discard. And it is doubtlessly true that there are many ‘raw materials’ – doings and sayings concerning the

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42 Including lawyers, e.g. ALSTON 2005; CLAPHAM 2006.



central human rights documents – where states are regarded as central.<sup>43</sup> But I believe that it is possible to give a coherent reading of the practice, and one with attractive implications, where the centrality of states as duty bearers (above all, each state for its own people) is at least mitigated to some extent. In fact, this is just the challenge in which many are engaging in the current globalizing setting, where humanitarian intervention, the involvement of non-state agents, and cross-border assistance in human rights protection and realization are gaining increasing prominence. Of course, the outlines of such a post-Westphalian human rights landscape would need to be considered in greater detail. I cannot undertake this here, but it is important to reiterate that interpretation Ab need not imply that states lose every role whatsoever as duty bearers; N-Ab only envisages that their importance is mitigated in certain important ways.<sup>44</sup>

A second objection to the effect that Ab is not in the end preferable to N-Ab could say that, contrary to what was argued above, it *is* possible to tell an attractive story as to what human rights are about if one accepts N-Ab. However, I cannot see what this story would look like. Human rights could be about ‘protection by the state’, and one could look to the famous American and French examples of the late eighteenth century. But these are citizens’ rights and their relation to human rights, as I have understood them, remains to be discussed.<sup>45</sup> Charles Beitz, whose own proposal for (what he

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43 It may be objected that states are central in these documents themselves. However, these documents only exist through interpretation. So the objection is better put as asserting that the most acceptable interpretations of these documents should give a very central place to states as duty bearers; but this assertion largely takes us back to our present discussion.

44 Cf. Section 3.3 below for a more concrete idea of what this may look like.

45 To elaborate: it *is* attractive that states have to observe certain fundamental rights; but it is something else to say that human rights are *only* or *mainly* about states honouring or promoting these rights. Why would they only be about this? In the French and American examples the answer seems to be: because we are concerned, from the outset, with a particular state (the French or the American state). But then we are talking about citizens’ rights. A different answer could be: because our world is largely Westphalian in structure (i.e. to a great extent focused on largely sovereign states). But then, this does not produce an attractive story in favour of N-Ab; it merely makes human rights hostage to what seems to be a contingent situation.

calls) a practical conception of human rights is close to N-Ab,<sup>46</sup> compounds the problem by claiming that ‘human rights do not appear as a fundamental moral category’ and that ‘human rights need not be interpreted as deriving their authority from a single, more basic value or interest such as those of human dignity, personhood, or membership’.<sup>47</sup> This may be dangerously close to asserting that it is very hard to tell a coherent and attractive story of what human rights are about.

I conclude that the objections are not convincing, and that Ab should be regarded as superior to N-Ab. Let us recall why this is important. As we saw, if we are to realize a globally more equal protection of urgent interests, we must move away from states as duty bearers to some considerable extent. Now the importance of the above discussion is that it has shown that we can justifiably do this while still offering an interpretation – and indeed a good interpretation – of the practice of human rights.

### *3.3. Beyond states: examples*

What could a decreased importance of states as human rights duty bearers mean more concretely? We need to know this if we are to see more clearly how to move ahead. In considering this, I will again take Rawls’s lead.<sup>48</sup> In what he calls ‘non-ideal theory’, Rawls distinguishes two kinds of situations. The first kind are situations where states are unwilling to act as they should and the second kind are situations where they are unable to do so, due to unfavourable circumstances. For the first kind of situations, Rawls holds that forceful intervention may be justified in the case of, for example, grave human rights violations (although extreme care is always needed in judging particular cases). This has some similarities with the Responsibility to Protect.<sup>49</sup> For the second kind of situations, Rawls adopts a duty to assist with institution building, which should be carried out in a way so as to

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46 Beitz sees three components in human rights. Briefly put, these are: (1) the protection of urgent interests, (2) with states as the primary and main duty bearers, each state first of all for its own citizens, and (3) pro tanto reasons for the international community to become involved. See BEITZ 2009, at p. 109.

47 BEITZ 2009, at pp. 127-128.

48 This time: RAWLS 1999.

49 See UN General Assembly, 2005 World Summit Outcome, UN Doc. A/RES/60/1 (2005), at 139.

be compatible with, for example, cultural and political self-determination.<sup>50</sup> All of this does not sound very radical and for the most part it remains focused on states. But it does concern states' engagement with those beyond their borders, and as such it *does* move away significantly from each state as the main and primary duty bearer for its own people – and is in line with Ab rather than N-Ab. Furthermore, this move away from states may be supplemented in two ways. First, one may also see certain roles for non-state agents such as business corporations and NGOs, for example in failed states (a current example arguably being Congo-Kinshasa), which typically constitute some vague middle category between an inability and an unwillingness to realize human rights.<sup>51</sup> Second, the above examples where states act for the sake of those beyond their borders may be extended – as always, with due care – to intergovernmental organizations such as the UN, and these may arguably constitute the beginning of institutional constellations that take an ever greater distance from Westphalian arrangements. These, then, are some elements of what a shift away from states as human rights duty bearers may look like more concretely.

#### 4. To conclude

The main thesis of this article has been that human rights, which clearly subscribe to the idea that all humans are fundamentally equal, should also move much closer to equal concern, that is, equal protection of urgent interests. At present, the protection offered as a matter of human rights often turns out to be blatantly unequal in practice; recall what the human right to health is bound to get one in Germany – quite a lot, including probably such treatments as renal dialysis – versus in South Africa. Similar examples could be given for civil and political human rights, such as the right to security. Such differences are not only predictable but they arise on account

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50 Cf. Risse 2005. There are already some tendencies in this direction in the practice of human rights; see e.g. ICESCR, Art. 2.1. Risse also rightly points out that it is not always easy to estimate whether such a duty of assistance applies – whether it is possible acceptably to contribute to institution-building from the outside, and if so, in what ways. Furthermore, assistance with institution building should in certain cases arguably be supplemented by the provision of urgent humanitarian assistance. See Risse 2012, at p. 173.

51 O'NEILL 2004; O'NEILL 2005.

of deep-seated features of human rights arrangements. In response to this, I have welcomed the move away from Westphalian arrangements that we can already see is happening. It is true that we should beware of moving too quickly towards institutional arrangements whose potential disadvantages and advantages we do not even remotely grasp.<sup>52</sup> And we should also beware of well-known dangers such as paternalism. Institutional transformation needs to be cautious and gradual – work in progress. But the future of human rights remains bound up with it.

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52 As Risse cautions in RISSE 2012, at p. 80ff.

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# Equality problems in multicultural human rights claims: the example of the Belgian ‘burqa ban’

Eva Brems

This paper will look at equality reasoning in the context of multicultural human rights claims. It will look at different ways in which equality reasoning is mobilized in multicultural debates and explore the inherent or resulting difficulties. Throughout the paper, the Belgian ‘burqa ban’ will be used as a case study. This is criminal legislation that prohibits appearing in public with one’s face being (partially) covered so as to make recognition impossible.<sup>1</sup> It is generally called the ‘burqa ban’ because, despite its neutral language, it is abundantly clear from the political and societal debates surrounding it that its only actual target is the Islamic face veil, the niqab, which is commonly – yet wrongly<sup>2</sup> – called a ‘burqa’. It is not the objective of this article to extensively discuss all aspects of the ‘burqa debate’ in politics, society or academia. The present article focuses specifically on the mobilization of equality claims in the context of this debate. In particular it will look at conflicting equality

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- 1 Act of June 1, 2011 ‘to institute a prohibition against wearing clothing that covers the face or a large part of it’ was published in the *Belgian Official Journal* on July 13 and entered into force ten days later. The Act inserts Article 563*bis* into the Belgian Criminal Code. ‘Subject to legal provisions to the contrary,’ the Article punishes persons ‘who appear in places accessible to the public with their faces covered or concealed, in whole or in part, in such a manner that they are not recognisable’ with a monetary fine of 150 Euro and/or a prison sentence of one to seven days. Paragraph two of Article 563*bis* of the Criminal Code specifies that the prohibition contained in the first paragraph shall not apply when face covering is permitted or imposed by ‘labour regulations or municipal ordinances owing to festivities’ (translation from Dutch/French EB). For an overview of the situation throughout Europe regarding face-covering bans, see BREMS (ed.) 2014, pp. 1-12. For a detailed description of the legal and political context in which the ban was adopted in Belgium, see VRIELINK, OUALD CHAIB and BREMS 2013.
  - 2 The term ‘burka or burqa’ refers to the mostly blue piece of clothing covering the entire female body, including the head, except for a small region around the eyes, which is covered by a concealing net or grille. Such coverings are typical for certain areas in Pakistan and Afghanistan. They are virtually never worn in Western Europe. To the extent that face veils are worn in Western Europe, these veils are generally ‘niqabs’: face veils which do not cover the eyes but the rest of the face.

claims on both sides of the debate, and at the abuse of equality arguments for discriminatory purposes. On account of this specific focus, the present article is complementary to related publications by the present author, to which reference is made in the footnotes.

The 'burqa ban' touches upon gender equality as well as upon non-discrimination against religious minorities. The next sections will successively examine three different angles that each see in the burqa ban the mobilization of an equality argument to the detriment of another equality goal. Yet before discussing equality in society, a point has to be made about equality in human rights discourse, in relation to the case study.

### **1. Equality in human rights: inclusion and exclusion in the cultural framing of rights<sup>3</sup>**

Equality can be considered to be one of the structuring principles of human rights law. In that sense, the principle of universality can be seen as one of its expressions: in its most basic understanding, universality means that all human beings, without exception, should enjoy all human rights. There can be no exclusion when it comes to the enjoyment of human rights. The drafters of the Universal Declaration of Human Rights had an abstract human being in mind, a human being devoid of group characteristics such as age, ethnicity or gender. The point was that regardless of one's ethnicity, gender, age, social status or any other marker that in the history of mankind has been used to create hierarchies among people, all human beings have the same rights. Sixty-five years later, however, the world has witnessed a range of emancipation movements that have resulted in numerous additions to and amendments of international human rights law, so as to improve its inclusiveness and correct bias. This is because in the real world there are no abstract human beings, and there is no neutral vantage point from which to conceive such a human being. Hence, despite the best intentions of the drafters of human rights texts, the 'human' in human rights inevitably reflected the views, needs and experiences of dominant groups: they reflected

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3 For more background, see BREMS 2001.



a human being who was, among other things, male, adult, not disabled, heterosexual, and Western.

Taking seriously the criticisms of non-dominant groups has resulted in many improvements that have made human rights more inclusive, because they reflect the lived realities of more people. This has required a willingness to change perspectives and to question long-held assumptions – these may be seen as cultural changes within human rights. For example the women's movement challenged the dominant idea that human rights were at play only in the public sphere, in the relationship between an individual and public authorities, and not in the private sphere. By gaining recognition of domestic violence as a human rights issue, the women's movement realized a paradigm shift in human rights. Likewise, the children's rights movement required us to see children differently, by emphasizing not only their vulnerability and the limits of their capacities, but rather their autonomy and the recognition of the capacities that children do have. And the movement for the rights of people with disabilities led to a reconceptualisation of a disability not as a medical characteristic inherent in a person, but rather as a social issue, constructed by the interaction between a person and her/his environment. Likewise, the full inclusion of people with a non-Western cultural background requires a willingness to open up certain concepts. For many cultures, it would for example be absurd to limit the concept of 'family' in the right to the protection of family life to the nuclear family. Also for many, it is unsatisfactory to focus only on the individual as a subject of rights, as for them rights should also belong to groups. International human rights law has undergone a number of additions to take non-Western or non-Judeo-Christian cultural conceptions into account, for example we find collective rights in the African Charter on Human and Peoples' Rights and in the Declaration on the Rights of Indigenous Peoples. Yet in the concrete interpretation and implementation of human rights, the willingness to take seriously non-dominant cultural views is often lacking, in particular at the domestic level vis-à-vis cultural and religious minorities. This is clear, for example, in the attempts in many European countries to model religious freedom on the needs of the Christian majority. Contemporary European Christians' interpretation of their religion generally does not include dress

codes<sup>4</sup> or food rules,<sup>5</sup> and as a result it seems that many people's conception of religious freedom does not cover such manifestations. Such bias toward the dominant religion affects even the European Court of Human Rights, which goes along with the French neutrality reasoning against Islamic headscarves in state schools,<sup>6</sup> while at the same time going along with Italian reasoning in favour of Christian crucifixes in all state schools.<sup>7</sup>

Bias in favour of the majority culture tends to be implicit, especially in judgments, as judges generally do not make their underlying cultural assumptions explicit. In the context of the 'burqa ban', the judgment of the Belgian Constitutional Court on the compatibility of the ban with the Belgian Constitution is a telling example.<sup>8</sup> Those who are familiar with the dry and technical character of Belgian Constitutional Court judgments were surprised to find that the Court's reasoning in this judgment is based on a number of bold cultural statements.<sup>9</sup> Without reference to any authority, the Court claimed that 'individuality in a democratic society requires

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4 Yet some Christians consider it important to wear a cross or crucifix as a sign of their faith, and arguably European conceptions of 'decent' dress have been strongly influenced by Christianity.

5 Yet some Christians consider it important to follow certain food rules, e.g. to abstain from eating meat on Fridays.

6 ECtHR, *Akcas v. France* (admissibility decision), 30 June 2009 (Appl. no. 43563/08), ECtHR, *Bayrak v. France* (admissibility decision), 30 June 2009 (Appl.no. 14308/08), ECtHR *Gamaleddyn v. France* (admissibility decision), 30 June 2009 (Appl.no. 18527/08), ECtHR, *Ghazal v. France* (admissibility decision), 30 June 2009 (Appl. no. 29134/08).

7 ECtHR, *Lausi and others v. Italy* (Grand Chamber), 18 March 2011 (Appl.no. 30814/06).

8 Belgian Constitutional Court, judgment 145/2012 of 6 December 2012, to be found at [www.const-court.be](http://www.const-court.be).

9 Belgian Constitutional Court, judgment 145/2012 of 6 December 2012, para. B.21: English translation (EB): 'The individuality of each legal subject of a democratic society cannot be imagined without the visibility of his/her face, which is a fundamental element thereof. Taking into account the essential values it wanted to defend, the legislator was entitled to assume that circulation in the public sphere, which is naturally of interest to the community, of persons of whom that fundamental element of individuality is not visible, makes it impossible to create human relations, which are necessary for life in society. While pluralism and democracy include the freedom to express one's convictions, amongst other things by wearing religious symbols, the State should oversee the conditions under which those symbols can be worn and the consequences that the wearing of those symbols can have. Since hiding the face results in depriving the legal subject, a member of society, of any possibility of individualization through the face, while that individualization is a fundamental condition linked to his (sic) very essence, the prohibition on the wearing of such a garment in places accessible to the public, despite being the expression of a religious conviction, corresponds to a mandatory societal need in a democratic society'.

the visibility of the face', that 'people appearing in public without their face being visible make human relations in society impossible', and that 'individualization through the face is a fundamental condition linked to the essence of a person'.

These astonishing statements of a general and highly abstract nature can be traced back to the *travaux parlementaires* of the Belgian 'burqa ban'.<sup>10</sup> In particular they reflect statements by some Belgian MPs, who – borrowing from the French parliamentary debate on the same issue – referred to the French philosophers Emmanuel Levinas and Elisabeth Badinter, the latter of whom intervened before the Gerin Commission that prepared the French law.<sup>11</sup>

As far as Levinas is concerned, this is a serious distortion of his work.<sup>12</sup> The great philosopher did write about the face of the other as the basis of ethical interpellation, yet there is no indication that this was meant literally. Instead, it is generally interpreted as a way of referring to the presence of the other in our midst.<sup>13</sup> Levinas died in 1995, yet if he were alive, it is hard to imagine him supporting a burqa ban, as throughout his writings he always emphasized respect for the 'otherness' of others. So the Belgian Constitutional Court seems to have based its categorical statements about the central importance of a visible face for society on Belgian MPs' misinterpretation of a philosopher. As for Elisabeth Badinter, her statements before the Gerin Commission do not directly concern the essential importance of a visible face, yet they do provide explicit references to 'our' cultural context as the appropriate yardstick for the interpretation of minority cultural practice. She states that 'anyone can wear what she wants, but the face is not the body, and *in western civilization, there is no face covering*'.<sup>14</sup> With this statement, she situates women who wear a face veil outside of Western civilization, despite

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10 This is clear from the arguments of the Belgian government, as summarized in the judgment, which include explicit references to the *travaux parlementaires*: Belgian Constitutional Court, judgment 145/2012 of 6 December 2012, paras. B.4.2 and B.4.4.

11 GERIN 2010, at p. 333ff.

12 VRIELINK 2013, at p. 250ff.

13 BLOECHL (ed.) 2000; COHEN 1986.

14 GERIN 2010, at p. 334. It is to be noted that this is a gratuitous statement, which is moreover incorrect: One may think, for instance, of the white veil of a bride or the black veil of a widow.

the fact that they live in France, that many have French nationality and that they include a significant number of 'autochthonous' French women who have converted to Islam.<sup>15</sup> The French feminist philosopher continues her exclusionist framing amongst other things by stating that 'like Descartes, I am convinced that we should ply to the customs and traditions of the country in which we live'.<sup>16</sup> The reference to 'Western' culture is narrowed down to an interpretation of French culture, framed in opposition to British and American 'liberalism understood as unlimited freedom of expression'.<sup>17</sup> Badinter states in particular that the face veil is opposed to the principle of 'fraternité' (brotherhood), interpreting it as an absolute refusal to enter into contact with others and a refusal of reciprocity (seen without being seen) labelled as 'symbolic violence'.<sup>18</sup> These are gratuitous statements that do not bear any relation to the intentions or experiences of the women concerned. Indeed, empirical research shows that women who wear a face veil do not intend to withdraw from society and that – in the absence of a ban – they do indeed interact with others in society (school teachers, shopkeepers, neighbours, friends) in numerous ordinary ways.<sup>19</sup> When the basis of legal reasoning by law makers and judges is such a strongly exclusivist construction of the values of the dominant culture, it does not seem possible to do justice to minority human rights claims. With respect to the issue of equality reasoning, this illustrates the fact that inequality can be a feature of human rights reasoning as such.

## **2. Equality (and more) as a human right: the special position of emancipation rights**

Another point I want to make about equality reasoning in human rights concerns the special position of emancipation rights. It is common in human rights discourse to distinguish categories of human rights that share distinct characteristics, in particular civil and political rights and economic,

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15 BOUTELDJA 2011.

16 GERIN 2010, at p. 336.

17 GERIN 2010, at p. 337.

18 GERIN 2010, at p. 335.

19 On France, see BOUTELDJA 2011.

social and cultural rights. I submit that we should also distinguish a separate category of ‘emancipation rights’. These are rights intended to correct a legacy of structural discrimination against specific groups and to provide to members of such groups equal opportunities and equal enjoyment of their human rights. Concretely, these are women’s rights, children’s rights, the rights of ethnic and cultural minorities, the rights of persons with disabilities, LGBT rights....

What these have in common is that they do not play only (or even predominantly) in the vertical relations between individuals and the state, but that they present their main challenges in the horizontal relations among individuals in society. The realization of emancipation rights requires a cultural change that is focused, in particular, on the way we view members of that group. With respect to women, this is explicitly emphasized in CEDAW article 5 (a),<sup>20</sup> and with respect to persons with disabilities, it is expressed in detail in article 8 of the Convention on the Rights of Persons with Disabilities.<sup>21</sup> Both provisions aim at eliminating stereotypes. Eliminating stereotypes in human rights law is crucial to all emancipation rights: it is

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20 CEDAW art. 5 (a): States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

21 Article 8 CPD: 1. States Parties undertake to adopt immediate, effective and appropriate measures:

- a. To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities;
- b. To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life;
- c. To promote awareness of the capabilities and contributions of persons with disabilities.

Measures to this end include:

- a. Initiating and maintaining effective public awareness campaigns designed:
  - i. To nurture receptiveness to the rights of persons with disabilities;
  - ii. To promote positive perceptions and greater social awareness towards persons with disabilities;
  - iii. To promote recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market;
- b. Fostering at all levels of the education system, including in all children from an early age, an attitude of respect for the rights of persons with disabilities;
- c. Encouraging all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the present Convention;
- d. Promoting awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities.

about seeing children not only as vulnerable and lacking full capacity, but also as subjects with progressing capacity; and it is about opening up our views about what is a couple, or family life, and about opening up to a wide and diverse range of expressions of identity.

The fact that the realization of emancipation rights by definition requires cultural change, within majority as well as minority cultures, is important to keep in mind when discussing situations in which a practice of a cultural or religious minority is rejected by the majority on grounds of women's rights or LGB rights. The following question first arises: is this a case in which the minority culture should change, or is it a case in which the majority should accommodate diversity? Take the case of the orthodox protestant public servant who refuses to administer same-sex marriages. Should that be accommodated as the expression of a sincere religious belief? Or is it simply homophobia, which is always cultural and always requires cultural change? The European Court of Human Rights ruled that the United Kingdom was not obliged to accommodate this conscientious objection; yet ruling on the basis of the margin of appreciation, it did not exclude it either, so left the choice to the states concerned.<sup>22</sup>

If the conclusion at state level is that a minority culture should change, the next question is: how can that be brought about? And in particular: what is the role of the law in such a project of cultural change?

In what follows, the case of the so-called 'burqa ban' in Belgium will be used to illustrate a number of equality rights conflicts that may arise in this type of situation. For that purpose, the focus will be on the women's rights justification for the ban. It is to be noted, however, that the ban has been brought forward not only for reasons related to women's rights, but also for reasons related to the importance of communication in society as a matter of public order (cf. *supra* in the discussion about the Belgian Constitutional Court judgment) and as a matter of public safety.<sup>23</sup> The latter two justifications will not be discussed in what follows.

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22 ECtHR, *Eweida and others v UK*, 15 January 2013 (Appl.nos. 48420/10, 59842/10, 51671/10 and 36516/10) (on Ladele).

23 VRIELINK, OUALD CHAIB and BREMS 2013.

### 3. Equality versus equality

This section is focused on the competition between equality arguments on different sides of multicultural dilemmas. In the discussion of different types of such conflicts, reference will be made to an empirical study which we conducted among women who wear the face veil in Belgium.<sup>24</sup> In this qualitative study, we interviewed 27 women between September 2010 and September 2011. As the work of the legislator ‘caught up’ with the research, 14 women were interviewed before the adoption of the legal ban, 13 after its adoption. Since discussions about the ban were focused on the perceived need to make women stop wearing the face veil or to prevent them from starting to wear it, we also included women who had actually stopped wearing it, and women who were seriously considering starting to wear it. A total of 12 women we interviewed were wearing the face veil at that time; 10 had worn it but had stopped wearing it; 2 wore it occasionally (one of whom had worn it full time in the past), and 3 were considering starting to wear it. All three had already experimented with the face veil, either in Belgium or abroad. In addition we organized two focus groups in April and May 2012 – one in Brussels in French and one in Antwerp in Dutch, in which 9 women participated, 2 of whom had not been previously interviewed for this study. At an expert seminar in May 2012, the findings from the Belgian study were confronted with those of other researchers who conducted similar research on the Netherlands,<sup>25</sup> Denmark,<sup>26</sup> France<sup>27</sup> and the United Kingdom. While the research findings contradict widely held popular beliefs about women who wear a face veil, the findings in different countries are very similar and hence confirm each other.<sup>28</sup>

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24 BREMS et al. 2012.

25 MOORS 2009.

26 WARBURG 2009.

27 BOUTELDJA 2001.

28 The papers presented at the seminar have been published in BREMS (ed.) 2014.

### 3.1. *A face veil wearer's equality on grounds of gender versus her equality on grounds of religion – intersectionality and the insider perspective*

The most straightforward women's rights argument in support of face veil bans is one that invokes the rights of the women who wear it. In the parliamentary debates leading up to the ban in Belgium, such references can frequently be found.<sup>29</sup> Throughout this argument two central assumptions are being made. The first assumption is that most or all women wearing a face veil are forced to do so. In other words, that it is an inherently oppressive religious practice that forces women to cover up so as not to tempt men. The second assumption is that the ban will liberate these women from oppression. Our empirical research among women who wore a face veil in Belgium demonstrates that both assumptions are wrong. This is confirmed by empirical research among the same group in the Netherlands, France, Denmark and the UK. Before explaining why the assumptions are wrong, it is worth emphasizing why it is important to hear about the experiences of those women.

First, I refer to the teachings of feminist methodology, and in particular its emphasis on the validity of women's personal experience as a starting point. This is seen both as a means of realizing the emancipatory goal of feminist research and as the best way to understand the reality of oppression which outsiders who are part of the oppressive system cannot otherwise understand. It is submitted that insider experiences are a very important means for those who study the practices of marginalized and/or oppressed minorities – such as women who wear the face veil – whose number in Belgium was estimated to be a maximum of 270 out of a population of 11 million.<sup>30</sup>

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29 For a detailed analysis of the arguments in the Belgian parliamentary debates, see VRIELINK, OUALD CHAIB and BREMS 2013. For a detailed confrontation of the empirical findings with the parliamentary debates, see BREMS et al. 2014.

30 Before the ban, estimates of the number of women wearing the face veil in Belgium mentioned numbers from 200 to 270. The number of 270 is based on statements made by representatives of the *Centre d'Action Laïque* during the hearings on 13 November 2009 of the Gerin extraordinary parliamentary commission that examined the French legislative proposal (GERIN 2010, at p. 74). By contrast, the Centre for Equal Opportunities estimates that there are approximately 200 women wearing face veils in Belgium (DE WIT 2010).



In addition, I refer to the reality of intersectionality, i.e. the fact that individuals belong to several non-dominant or marginalized groups. Such individuals may experience a focus on their membership of one group as a misrepresentation of their experience. In their lives, it may actually be the interaction between different minority identities that leads to marginalization. It is submitted that doing justice to this reality of intersectionality requires a type of ‘crossroads-thinking’. In the case of women wearing a face veil, one should be able to simultaneously conceive, in a coherent manner, both the gender dimensions and the minority (or even the ‘minority within a minority’) dimensions of the situation. Or in legal terms, one should apply in an integrated manner both the women’s rights of the face veil wearer and her religious freedom as a member of a religious minority. How can that be done in a situation of an apparent conflict between the two? International human rights law does not have a standard procedure to solve situations of conflicting rights. It is submitted that in this type of intersectional conflict, where the rights associated with different aspects of an individual’s minority identity appear to conflict, the insider perspective is of crucial importance (even more so than for dealing with the rights of members of marginalized groups in general).<sup>31</sup> Compared to outsider perspectives, it may offer a different interpretative lens that throws a different light on the existence (or non-existence) of a conflict or that offers some clues for either the reconciliation of the competing rights or their prioritization. When the person at the intersection is capable and well informed, she is probably the only one who can assess the complex interactions between the competing rights and their relative weight in the case at hand in a grounded manner. It is submitted that in order to do real justice for real people, such assessments have to be grounded in reality.

Finally, I refer to the unique features of the legislative process leading up to the Belgian ‘burqa ban’. Belgian political culture in general has a tradition of extensive formal and/or informal consultations with civil society stakeholders; while this does not always result in the outcomes that these stakeholders (or some of them) desire, it generally helps law makers to have

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31 Cf. BREMS 2005.

a fairly good view of what the impact of new rules will be. Yet in this case, there are no representative organizations of face veil wearers and mainstream Muslim organizations have not taken up this cause. Moreover, at the time of legislating, there was no empirical material available on the situation of face veil wearers in Belgium.<sup>32</sup> Nor did the legislator show an interest in learning about this reality.<sup>33</sup> Since that time, however, empirical research on women wearing the face veil in Europe has become available for Belgium and several other countries. This offers an opportunity to review the assumptions of the legislator.

### 3.1.1. Reviewing the first assumption: the face veil is a practice of oppression as it is being forced upon women.

All available empirical research shows that this central assumption is erroneous. While the research does not allow one to conclude whether or not (and if so, how many) women are being forced to wear a face veil, it clearly shows that for a significant number of face veil wearers, the face veil is the result of an autonomous choice.<sup>34</sup> All interviewees describe the decision to start wearing the face veil as a well-considered and free decision, a personal trajectory of deepening and perfecting one's faith. In France and Belgium, nearly all face veil wearers were faced with strong negative reactions from their relatives and friends, sometimes even their husbands. These women generally see themselves and each other as 'strong' women. And in light of the constant harassment they face in public, this should not be surprising.

### 3.1.2. Reviewing the second assumption: the face-covering ban liberates oppressed women.

To the extent that the face veil is freely chosen, it is obvious that the ban cannot be considered emancipatory, as it denies women's autonomy rather

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32 Yet the legislators could have consulted the study by MOORS 2009 on the Netherlands.

33 A request to organize hearings only received one vote in the parliamentary committee. While there was some reference to expert opinion (second hand – i.e. a reference to experts who were consulted in the French legislative process), there was no basis in reality for the assumptions that guided the legislative work.

34 BREMS et al. 2012, at pp. 4-10.

than empowering it.<sup>35</sup> Moreover, research in France after the ban has documented the decline in the quality of life of the women concerned.<sup>36</sup> Many women are strongly attached to the face veil, and continue to wear it despite the ban, yet they avoid going out except by car. Hence, they experience a serious deterioration in their social life and their mobility. They have grown more dependent on their husbands, who now have to do all outdoor errands. And they suffer in particular in their role as mothers, as they can no longer accompany their children to school, bring them to their extracurricular activities, or enjoy outdoor recreation with them. This is true even for some of the women who stopped covering up as a result of the ban, as they feel uncomfortable in public without their veil.

### 3.1.3. Conclusion

Both central assumptions of the legislator appear to be false in the light of the experiences of face veil wearers. As a result, we are dealing with a false conflict. For the face veil wearer, there does not appear to be a conflict between her women's rights and her religious freedom: in the well-considered and autonomous choice to start and to continue to wear a face veil, both are exercised in harmony. This suggests that the need for cultural change among Islamic minorities toward women's rights will not be furthered by banning the face veil. And, in fact, the research shows that the ban not only does not help emancipation, but even works against it.

### 3.2. *A face veil wearer's equality on grounds of gender and religion as a threat to my gender equality – the issue of symbols*

A close reading of the debates on face veil bans reveals that the women's rights argument is not necessarily focused on the rights of the face veil

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35 While the European Court of Human Rights accepted France's face veil ban, it did not accept that it might be justified for the protection of women's rights: 'The Court takes the view, however, that a State Party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms.' (ECtHR, *S.A.S. v. France* (Grand Chamber), 1 July 2014 (Appl.no. 43835/11), para. 119.

36 BOUTELDJA 2013.

wearers. Regularly this is expanded to the rights of all women, for whom the face veil would be an offence. This resonates strongly in the reasoning of the Belgian Constitutional Court: 'even if the full veil is worn on the basis of a deliberate choice of the woman, gender equality justifies that the state resists the expression of a religious conviction through behaviour that cannot be reconciled with the principle of gender equality'.<sup>37</sup>

This is a women's rights argument that is not about the rights of minority women who wear the veil, but rather about the rights of majority women who are offended by the veil which they read as a message of gender inequality. From this angle, the face veil is banned not as a practice of women's oppression, but as a *symbol* of women's oppression.

Without even delving into the fact that from a free speech perspective, the banning of symbols can rarely be justified,<sup>38</sup> it is submitted that there are two other major problems with this line of reasoning.

In the first place, it relies on a strictly outsider interpretation of the face veil as a symbol. This outsider reading sees the face veil as a message to the world saying 'women should cover themselves', or even 'women should be submitted to men'. Yet for the women under the face veil it is not a message to the outside world.<sup>39</sup> It is a very personal aspect, a choice they make for themselves in their relationship to God. Proselytising is very far from these women's minds. If there has to be a message, it is certainly not a normative one. Also, if there has to be a message, it would not be about gender relations, but about religion. If the face veil has to be a symbol, for the face veil wearer that would be a symbol of religious devotion to God. At most, it could be called a symbol of chastity. But from chastity to gender inequality is a long stretch. In analysing the interviews with face veil wearers from a gender

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37 Belgian Constitutional Court, judgment 145/2012 of 6 December 2012, para. B.23: translation EB: 'Even if the wearing of a face veil results from a well considered choice by the woman, still gender equality, which the legislator rightly considers a fundamental value of democratic society, justifies the State resisting in the public sphere the expression of a religious conviction by behaviour that cannot be reconciled with that principle of equality between a man and a woman. As the Court noted in B.21, wearing a full veil that hides the face takes away from the woman, the sole addressee of that rule, a fundamental element of her individuality, which is necessary for life in society and for the creation of social relations.'

38 See VRIELINK 2014, at p. 184ff.

39 BREMS et al 2012, at p. 5.

perspective, we found a wide variety ranging from very conservative to quite progressive.<sup>40</sup> The large majority of the interviewees are housewives. For some women, this is the expression of a commitment to traditional gendered role patterns. Yet there are others for whom the life of a housewife is not their first choice; they dream of a society in which they would not have to choose between a career and a face veil. Some women express assertive emancipated views against traditional role patterns or against unequal gender practices in the Muslim community. Clearly the face veil is not an indicator of its wearer approving of male dominance, let alone of promoting it. With such a gap between insider and outsider interpretations, there appears to be little ground to consider the face veil a 'symbol' at all.

The second issue is the challenge of consistency. The 'liberal feminist' focus on women's autonomy is not the final word on the gender load of the face veil. From a more radical feminist angle, this is indeed an expression of male dominance; because it is covering, and because it only applies to women.<sup>41</sup> It may be argued that women who believe they freely choose to cover themselves, in fact suffer from 'false consciousness' as they have interiorized patriarchal norms. Yet this is one of many 'cultural' expressions of patriarchy. In the same sphere in the majority culture such expressions include women wearing sexy clothing, high heels or make-up, and shaving their armpits and legs. Eradicating such expressions of patriarchy is a valuable feminist project. In other words: there is nothing wrong with trying to get conservative Islamic women to stop covering up – or for that matter with trying to get some other women to cover up a little more, for the same reasons. But if this is a government project, it is important for it to be consistent, and to avoid singling out unpopular minority groups. In fact, the war on patriarchy will not get very far if it remains limited to the handful of face veil wearers while other equally patriarchal practices that are immensely more widespread remain unchallenged. So if the project is about rooting out patriarchy, it should target patriarchal majority practices as well. Does this mean we need to start banning high heels?<sup>42</sup> Rather, the absurdity of such a plan should

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40 BREMS et al. 2012, at pp. 23-31.

41 TARAMUNDI 2014, at p. 218ff.

42 BREMS 2012.

help to visualize what is wrong with banning freely worn face veils in the name of the battle against patriarchy. There must be better ways to realize anti-patriarchal cultural change. The pursuit of a radical feminist utopia need not be at the expense of plain liberal women's autonomy.

### *3.3. Equality hijacked for discriminatory purposes*

Thus far in this paper, the gender equality arguments in the face veil debates have been taken at face value as bona fide expressions of real concerns. Yet it is common knowledge that the move to ban face covering happens in a context of rising Islamophobia in Europe.<sup>43</sup> When discussing face veil bans, this context cannot be ignored. The very first bills to ban face veils were introduced in the Belgian Parliament by Vlaams Belang ('Flemish Interest'), a racist political party. This party regularly uses the image of the face veil in its Islamophobic campaigns, covering up a racist agenda under a pretense of promoting women's rights. This is a plain case of a deliberate abuse of the gender equality argument for a racist agenda.

Yet beyond such deliberate subversion, lawmakers are aware, or should be aware, that in the current Islamophobic context, such a measure will legitimize and encourage Islamophobia. This is self-evident, also for the women concerned. Yet it might also be documented empirically. The political discourse surrounding the ban – including by politicians from democratic parties – strengthens harmful stereotypes that equate Islam with fundamentalism, terrorism and backwardness. Moreover, research in Belgium and France suggests that the bans have emboldened ordinary citizens to show aggressive behaviour toward face veil wearers.<sup>44</sup> It is submitted that politicians who consider whether or not to adopt a face veil ban should carefully consider the potential impact of a ban on this Islamophobic context,

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43 AMNESTY INTERNATIONAL 2012.; EUROPEAN MONITORING CENTRE ON RACISM AND XENOPHOBIA 2006.

44 BREMS et al. 2012, at p. 17 ss; BOUTELDJA 2013, at p. 14ff.

and that courts ruling on the compatibility of such bans with human rights<sup>45</sup> should take the Islamophobic context very seriously in their reasoning.

#### 4. Conclusion

Trying to realize equality in cases of multicultural human rights claims is not easy. Some of the politicians who favoured a face veil ban were not really interested in any kind of equality. Yet others really took for granted that they were doing the right thing for women's rights. A reality check shows that they did not. In my opinion, the one important lesson to be learned from this concerns the crucial importance of the insider view; of taking into account the lived experiences of the persons who are affected by a rule, rather than building on unchecked assumptions.

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45 Cf. ECtHR, *S.A.S. v. France* (Grand Chamber), 1 July 2014 (Appl.no. 43835/11), para. 149: 'the Court is very concerned by the indications of some of the third-party interveners to the effect that certain Islamophobic remarks marked the debate which preceded the adoption of the Law of 11 October 2010 (...). It is admittedly not for the Court to rule on whether legislation is desirable in such matters. It would, however, emphasise that a State which enters into a legislative process of this kind takes the risk of contributing to the consolidation of the stereotypes which affect certain categories of the population and of encouraging the expression of intolerance, when it has a duty, on the contrary, to promote tolerance.'

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# Troubles concerning the ‘burqa ban’: reflections from an outsider

Rob Widdershoven

## 1. Introduction

This contribution is an updated and extended version of my comments on the keynote speech by Eva Brems, ‘Equality Trouble in Multicultural Human Rights Claims: the Example of the Belgian ‘Burqua Ban’, delivered by her at the Farewell Symposium entitled ‘Equality and Human Rights: Nothing but Trouble?’ for Professor Titia Loenen on 18 November 2013 in Utrecht. The contribution of Brems to this *Liber Amicorum* contains a slightly revised version of her speech.<sup>1</sup> To understand my reflections, the reader is advised to read Brems’ contribution first. The most important new fact which is included in my contribution is the judgment of the European Court of Human Rights of 1 July 2014 in the case of *S.A.S. versus France*, in which the Court found the French burqa ban to be not inconsistent with Articles 8 (the right to respect for private life) and 9 (the freedom of religion) of the ECHR.<sup>2</sup> This judgment fits quite well with my comments made at the Farewell Symposium.

This contribution reflects on three issues which are prominent in the burqa ban debate.<sup>3</sup> Section 2 deals with the tension between fundamental rights protection and democracy. In section 3 the focus is on the concept of national identity in relation to fundamental rights protection in both the ECHR and the European Union legal order. Section 4 reflects on the question whether – as Brems submits – the insider perspective of women wearing a burqa

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1 Hereafter: BREMS 2015.

2 ECtHR, *S.A.S. v. France*, 1 July 2014 (Appl.no. 43835/11).

3 By the way, I am aware of the fact that full-faced veiled women in Western Europe virtually never wear a ‘burqa’, but a ‘niqab’. Nevertheless, I use the term ‘burqa ban’ because the discussion has been framed as such.

should more or less be decisive when assessing the burqa ban in the light of fundamental rights. My main findings will be summarized in section 5.

In the title of this contribution I have labelled myself as an outsider. With this disclaimer I try to prevent, in advance, any possible criticism by fundamental rights insiders that my reflections are not new and are superficial. Indeed, I am not a fundamental rights expert and I am certainly not specialized in equality rights and the freedom of religion, fundamental rights which lie at the heart of the burqa ban debate. However, as a European administrative lawyer I do have some ideas about the issue which might be valuable for the discussion.

And, finally for those who are interested, where do I stand in the burqa ban debate? Personally I am not fond of burqas, but I am also against a burqa ban. Such a ban is not an effective solution for a minor problem which a self-confident society can deal with in a less intrusive way and which will – in my opinion – disappear as time goes by. At the same time, I do think that a state should have the right to introduce a burqa ban if the vast majority of the people are of the opinion that such a ban is essential for reasons which, as such, are legitimate.

## **2. Fundamental rights and democracy**

In her contribution Brems criticizes the decision of the Belgian Constitutional Court that the burqa ban is not unconstitutional because it can be justified by a pressing social need in a democratic society, because – very briefly – ‘individuality in a democratic society requires visibility of the face’.<sup>4</sup> I will not go into every detail of her criticism, but a point that I missed in her argument was the fact that the Belgian Constitutional Court was confronted with a law which had been approved by an almost unanimous vote in the Belgian Parliament. The same happened in France where the burqa ban was

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4 Belgian Constitutional Court, Judgment 145/2012 of 6 December 2012, cited in Brems 2015, section 1, and in ECtHR, *S.A.S. v. France*, 1 July 2014 (Appl.no. 43835/11), at para. 42.

also supported by almost every political party and was declared constitutional by the French Constitutional Council as well.<sup>5</sup>

Brems is not impressed by this huge democratic support for the burqa ban. On the contrary, this support is disqualified by labelling it as a bias of the dominant Christian majority culture against the non-dominant group of people with a non-Western background, and even as islamophobia in disguise.<sup>6</sup> In this argument democracy is more or less considered to be an ‘enemy’ of fundamental rights. In my opinion such labelling is in principle unwise and in the end is detrimental to the protection of fundamental rights.

If a large majority of the people – represented by almost all political parties from left to right – after years of discussion, at least in France, and on the basis of, as such, legitimate philosophical theories,<sup>7</sup> have a strong opinion about a topic such as burqas, even fundamental rights lawyers have to take this opinion seriously and should not place it outside the legal discussion by labelling it as irrelevant, biased et cetera. Fundamental rights are not an exclusive area for lawyers and (political) majority opinions as regards (the limitation of) fundamental rights are at least as valuable as those of lawyers even if they are also or primarily based on a political ideology and even if they do not follow the assessment scheme which lawyers have designed to decide on the possible limitations of fundamental rights.

Obviously, this does not mean that the majority political opinion should always prevail above the fundamental rights of minorities. But if a fundamental right – as in the case of the burqa ban, the freedom of religion and the right to respect for private life – can be restricted by the state on certain grounds ‘necessary in a democratic society’ and the justification for a limitation requires a balancing act, the political outcome of this balancing act is in my opinion an important fact. After all, it represents the opinion of the institution with the highest democratic legitimacy, the Parliament, as to what is necessary in a democracy. This outcome cannot be rejected or

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5 French Constitutional Council, Judgment no. 2010-613 DC of 7 October 2010, cited in ECtHR, *S.A.S. v. France*, 1 July 2014 (Appl.no. 43835/11), at para. 30.

6 BREMS 2015, sections 1 and 3.3.

7 In the French discussion reference was made to the French philosophers Emmanuel Levinas and Elisabeth Badinter. See BREMS 2015, section 2.

neglected by simply stating that there are some inconsistencies or weaknesses in the theories and visions which underpin the political outcome. After all, there are inconsistencies and weaknesses in every theory. If one wants to repeal a law that has been approved by an almost unanimous Parliament, one must have very strong arguments for this and I am not sure whether Brems provides such arguments. I will come back to this point in section 4.

As regards the balancing act between the fundamental rights of burqa wearers and the decisions of the French and Belgian Parliaments to ban the burqa, I favour the approach of the Belgian and French constitutional courts and of the European Court of Human Rights. When deciding on the burqa ban, at least the French and European courts availed themselves of legal opinions by authoritative advisors, such as the French Council of State and the Commissioner for Human Rights of the Council of Europe,<sup>8</sup> rejecting the introduction of a burqa ban. These opinions are not very surprising, because they are in line with the vision, shared by most lawyers (and I am one of them), that the law is an inadequate instrument for solving a societal problem such as the wearing of burqas. Probably many judges in the three courts personally shared the same view.

However, in spite of the wise and authoritative legal advice, the Belgian and French Parliaments decided differently and introduced the ban. Because of these parliamentary decisions, the situation changed dramatically and the balancing act between the rights of burqa wearers and the right of Parliament to restrict these rights was decided by all three courts in favour of the latter. Especially in the judgment of the European Court the reluctance to arrive at this result is indeed visible. At several places in the judgment reference is made to the wide 'margin of appreciation' that France enjoys in this matter and to the democratic process in society that has resulted in the burqa ban.<sup>9</sup>

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8 See for a summary of their opinions ECtHR, *S.A.S. v. France*, 1 July 2014 (Appl.no. 43835/11), at para. 20 (French Council of State) and para. 37 (Commissioner for Human Rights of the Council of Europe). By the way, also the Dutch Council of State delivered four negative opinions on four separate Bills before Parliament which concerned a burqa ban. See ECtHR, *S.A.S. v. France*, 1 July 2014 (Appl.no. 43835/11), at para. 49.

9 ECtHR, *S.A.S. v. France*, 1 July 2014 (Appl.no. 43835/11), for instance at paras. 129-131 and 154-158.

Moreover, in order to come to its decision the Court was even forced to ‘invent’ a new sub-ground for restricting the freedom of religion and the right to respect for private life, namely ‘the respect of minimum requirements of life in society’ or ‘living together’ that can be linked – at least according to the Court – to the legitimate restrictive aim of the ‘protection of the rights and freedoms of others’.<sup>10</sup>

Obviously, it is not difficult to criticize the judicial ‘creativity’ of the Court which is necessary to arrive at a result probably determined in advance. However, in my opinion the Court made a wise decision *not* to set aside the almost unanimous vote of democratically legitimized Parliaments. Even the common opinion among lawyers (and, again, I am one of them) that ‘protecting fundamental rights is first and foremost about the protection of vulnerable groups’<sup>11</sup> does not mean that the rights of these groups *always* have to prevail above democracy. In my opinion they should not, at least not in a case where the fundamental rights at stake are not absolute and may be restricted, and virtually all Members of Parliament are of the opinion that a certain measure is necessary in a democratic society. If lawyers do not take account of such vast majority opinions, I fear that Parliaments in future will not listen to lawyers when even more fundamental rights than those of the burqa wearers are at stake. Fundamental rights protection in general is not favoured by too many serious confrontations with democracy, because at the end of the day politicians are more powerful than lawyers. Or, to rephrase a Dutch proverb, if one wants to win the war (on fundamental rights) one sometimes has to accept defeat in an individual battle (in this case on the burqa ban).

### 3. Fundamental rights and national identity

My second reflection is about the importance of the concept of national identity in the fundamental rights debate. In this respect the question can be raised whether it might be possible that certain values which are considered by a large political majority of a state to be part of its national identity can

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10 ECtHR, *S.A.S. v. France*, 1 July 2014 (Appl.no. 43835/11), at para. 121.

11 Cf. GOLDSCHMIDT 2014, at p. 327.

in principle justify a limitation of fundamental rights, such as the freedom of religion and the right of respect for private life in the burqa ban cases. I pose this question because the judgments of the constitutional courts of France and Belgium and of the ECtHR, in which they approve of the burqa ban, are at least partly based on values connected to the national identity of Belgium and France, although they are neatly framed in the wording of the fundamental rights restrictions' assessment scheme. In France the court referred to the constitutional principles of freedom and equality, but there obviously exists a connection with the French *laïcité* principle. In Belgium the court referred to individuality which requires the face to be visible, a line of thinking which is more or less embraced by the ECtHR as well. Or, as the Dutch saying goes, national identity is the elephant in the courtroom. Everyone knows that it is prominent in the debate, although nobody explicitly refers to it.

Although I am not completely certain, I think that Eva Brems is not in favour of such value-based argumentation, because those values, based as they are on the national identity of a state, reflect by definition the dominant majority culture of a state and may therefore be detrimental to the fundamental rights of minorities. If this assessment is correct, it gives rise to two remarks.

First, as a European Union lawyer, I witness a possible incoherence as regards the role that national identity can play when discussing the protection of fundamental rights. As is probably well known, the Court of Justice of the EU has, in the case of *Melloni*, limited the possibility of the Member States to apply, in cases that fall within the scope of Union law, national fundamental rights that offer more protection than the Union equivalent. Such application is only possible if it does not compromise the 'primacy, unity and effectiveness' of Union law.<sup>12</sup> In the case of *Melloni* itself, the issue in question – whether the surrender from Spain to Italy of *Melloni*, who had been convicted in Italy *in absentia*, could be made conditional upon a

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12 Case C-399/11, *Melloni*, [2013]. See also Case C-617/10, *Akerberg Fransson*, [2013].



retrial – was completely determined by Union law.<sup>13</sup> Therefore Spain was not allowed to apply its national, more generous, fundamental right according to which such a possibility for a retrial was mandatory. In other cases, where Union law does not completely determine the situation, Member States might be offered more leeway in applying more generous fundamental rights in Union cases. Nevertheless, also in these cases such application can be scrutinized by the CJEU as to primacy, unity and effectiveness.<sup>14</sup>

The *Melloni* judgment, although not very surprising from an EU law perspective, has been criticized by many constitutional lawyers.<sup>15</sup> Interesting for the current debate is that many of them have now ‘embraced’ national constitutional identity as a possible alternative justification for a Member State to apply, in Union cases, at least those more generous fundamental rights that are part of the national identity of that Member State.<sup>16</sup> The basis for their recommendations is Article 4(2) TEU, which imposes on the Union the obligation to respect the national constitutional identity of the Member States. How the CJEU will respond to these recommendations remains to be seen. In my opinion the Court might be susceptible to them, at least in respect of those national fundamental rights that, according to a Member State, are undoubtedly part of its national constitutional identity. This would be a next step in its case law in which the Court has already accepted the possibility of national identity being a justification for a national derogation from a right to free movement.<sup>17</sup>

Returning to the burqa ban debate, the question can be raised whether it is consistent that lawyers favour the possibility that national identity is a

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13 Council Framework Decision 2002/584 of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (OJ L 190 p.1) as revised by Framework Decision 2009/299.

14 For instance Case C-617/10, *Akerberg Fransson*, [2013].

15 For instance SARMIENTO 2013; REESTMAN and BESSELINK 2013; BESSELINK 2014. Especially in Germany the reactions to *Melloni* and *Akerberg Fransson* have been quite fierce. See, for instance, the Internet Blog by Thomas Stadler, ‘Abschied von den Deutschen Grundrechten?’, available at: [www.internet-law.de/2012/01/abschied-von-den-deutschen-grundrechten.html](http://www.internet-law.de/2012/01/abschied-von-den-deutschen-grundrechten.html). See also the opinion of the Bundesverfassungsgericht stating that the *Akerberg Fransson* judgement is *ultra vires*, available at: [www.bundesverfassungsgericht.de/pressemitteilungen/bvg13-031en.html](http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg13-031en.html).

16 Cf. BOGDANDY and SCHILL 2011; BESSELINK 2010; TORRES PÉREZE 2013; PRESHOVA 2012.

17 Cf. Case C-36/02, *Omega Spielhallen*, [2004] ECR I-09609; Case C-208/09, *Sayn Wittgenstein*, [2010] ECR I-13693; Case C-391/09, *Runevic-Vardyn*, [2011] ECR I-03787.

justification for a higher level of fundamental rights, on the one hand, but may have their doubts as to the possibility that national identity might be a ground for limiting fundamental rights, on the other. In my opinion it is not. If national identity is accepted as a legal norm, it can in principle work in both ways.

My second remark concerns a warning. As a relative outsider I have the impression that fundamental rights lawyers do not become sufficiently engaged in the current discussions on national identity and fundamental rights. And if they do become engaged, they sometimes tend to exaggerate the possible inclusion of national identity as a ground of justification for limiting the fundamental rights of a minority group by claiming that this would lead to a tyranny of the majority. Or, they try to reconcile fundamental rights protection with national identity by claiming that social-cultural diversity – and thus the protection of minority rights – is (or should be) a part of national identity.<sup>18</sup> Obviously, nobody favours a tyranny of the majority and also in my opinion diversity is a hallmark of Western democracies, such as the Netherlands.

However, in some discussions – and the debate on the burqa ban is one of them – I do not believe that the tension between fundamental rights and national identity can be resolved by the win-win argument that national identity implies diversity. On the contrary, the burqa ban is based on a strong belief by a vast majority of citizens in Belgium and France that the burqa is fundamentally inconsistent with the national identity of their state and that these strong beliefs deserve to be protected by law. Of course, one can disqualify these beliefs as a biased view of the dominant and tyrannous majority. But in doing so, one more or less affirms the vision of somebody such as Thierry Baudet, who in the Dutch debate has quite successfully 'framed' the fundamental rights protection by the courts as an attack by the cosmopolitan lawyer elite against the values and national identity of the vast majority of ordinary citizens.

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18 See GOLDSCHMIDT 2014, at p. 328, referring to TJEENK WILLINK 2014.

So, in my opinion, fundamental rights lawyers should engage more in the current debate on national identity and fundamental rights. They should acknowledge the possibility that national identity might not only offer a justification for more fundamental rights protection, but sometimes for a restriction of the fundamental rights of a minority group as well.<sup>19</sup> In the burqa ban cases the constitutional courts of Belgium and France and the ECtHR have *de facto* accepted this possibility.

If this is accepted as a ground of restriction, in future certain questions have to be addressed such as under which circumstances national identity may prevail and who (Parliament or the judiciary) is entitled to determine what does and what does not belong to a country's national identity? Obviously, the answer to such questions will to a large degree depend on the circumstances of the case in question. However, I do defend the possibility that sometimes – for instance in the burqa ban cases – the opinion of Parliament may prevail. At the same time, I am of the opinion that the content of what constitutes national identity is not unchangeable. In practice the national identity of a state is constantly developing and the majority opinion of today may be quite different from the majority views of tomorrow. In the Netherlands one can witness such a change in the Black Peter discussion which is gradually developing from the view that 'Black Peter is black by definition' to 'a Clown Peter is also acceptable'. However, I do not expect that such a change will take place in the years to come in respect of the burqa discussion.

#### 4. The insider's perspective

In section 3 I expressed some doubts as regards Eva Brems' arguments against the burqa ban. The point of departure in her view are the personal experiences of women wearing a burqa – or the insider's perspective.<sup>20</sup> The empirical research by Brems and by others such as Annelies Moors in the Netherlands<sup>21</sup> from this internal perspective has shown that the assumptions on which the burqa ban is based – the burqa is oppressive as it is being

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19 Of course, neatly framed in the grounds of restriction of the ECHR, interpreted in the light of the wide margin of appreciation of the state.

20 Cf. BREMS 2015, section 3.1.

21 Cf. BREMS *et al.* 2012 and MOORS 2009.

forced upon the women concerned and the ban will liberate these women – are false according to the women concerned. Furthermore, Brems calls into question the symbolic function of the burqa ban, because for these women the wearing of a burqa has no symbolic function at all (it is their personal choice) and it certainly does not indicate that they approve of or promote male dominance. I have two remarks about this research.

In the first place, I am somewhat surprised by Brems' starting point that in emancipation matters the personal opinion of the group concerned should be decisive. In my perception – but, as stated in section 1, I am an outsider in these matters – the strength of the feminist movement has always been that it was not afraid to force institutions to adopt equal treatment between men and women, also when the women who were supposed to benefit from this actually rejected any feminist involvement.

This strategy was very clear in the Dutch SGP case,<sup>22</sup> in which a feminist NGO successfully forced the SGP (a Dutch orthodox Christian party), by means of judicial actions, to depart from its religiously inspired party rule that women could not be elected as representatives. This, although the women concerned rejected the action unanimously, either because they agreed with the party rule on religious grounds, or because they wanted to fight this battle themselves and not with the assistance of feminist outsiders. A more or less similar situation existed when the feminist movement favoured the policy of positive discrimination towards women, although many women who benefited from this policy did not agree with it, because they wanted to be assessed on the basis of their merits (and not of gender).

In my opinion the burqa case is quite similar to especially the SGP case. In both cases women of a minority group are, against their will, 'liberated' from a religiously inspired oppressive rule. In the SGP case (a part of) the feminist movement enhanced the liberation without taking into account the experiences of the SGP women. In the burqa case Brems and others do take account of the burqa wearers' experience and arrive at defending the rule.

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22 See on this matter, OOMEN, GUIJT and PLOEG 2012 and ECtHR, *Staatkundig Gereformeerde Partij v. The Netherlands*, 6 October 2010 (Appl.no. 58369/10).

To me this comes as a surprise. But perhaps I miss some essential differences between both cases.

My second question is concerned with the research itself. In the research by Eva Brems, and also in the research of the Dutch situation by Annelies Moors, the opinions of burqa-wearing women are mainly or exclusively derived from two groups of women,<sup>23</sup> namely Belgian and Dutch women who have converted to Islam and first or second generation women of Moroccan origin. Both groups have voluntarily chosen to wear a burqa and for both groups the findings of Moors and Brems – that the burqa is not oppressive and that it does not indicate that they approve of male dominance – are undoubtedly correct.

But do the opinions of these groups also reflect the situation and opinions of women who are religiously or culturally forced by a male-dominated culture to wear a burqa in Afghanistan, Pakistan, Saudi Arabia, Yemen, Somalia and so on? I truly doubt this. Nevertheless, some of the burqa-enforced women coming from these countries do live in the Netherlands and Belgium and others (or their husbands) might plan to come to our countries for whatever reason. And my rhetorical question is: would it not be a blessing for these women that our countries send a clear message to them and their husbands that they are welcome, but only if the woman is freed from her burqa? And, if this is not a blessing for the women concerned, perhaps it is for their daughters? I pose this question because the equality arguments in favour of a burqa ban – at least in my opinion – do not only or primarily aim at the situation of Dutch converts and first or second generation women of Moroccan origin, but to the potentially much larger group of women in the countries mentioned who are forced to wear a burqa.

I realize that this point of view might negatively affect the position of the Dutch converts and women of Moroccan origin who have voluntarily chosen to wear a burqa. However, the SGP judgment will probably have similar

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23 The group of women interviewed by Moors solely consisted of converts (60%) and women of Moroccan origin (40%). In the research by BREMS *et al.* 2012, section 1, the number is not completely clear, but 'most of' the 27 women interviewed were second generation immigrants of Moroccan origin and of the remaining group 'a few' were first generation Moroccan and 5 were converts.

consequences in the sense that a group of orthodox Christian women (and men) will not be able to exercise their right to vote as there is no party left that, in accordance with their religious vision, discriminates against women. And, do we really care about that?

## 5. Concluding remarks

On 1 July 2014 the ECtHR in the case of *S.A.S. versus France* decided that the French burqa ban was consistent with the freedom of religion and the right to respect for private life. In my opinion this is a wise decision. Not because I am personally in favour of a burqa ban, but because I do think that a state should have the right to introduce it if – as was the case in France and Belgium – the vast majority of the people are of the opinion that such a ban is essential for reasons which are, as such, legitimate. Although I adhere to the opinion that protecting fundamental rights is first and foremost about the protection of minorities, this does not mean that minority rights have to prevail over and above democracy by definition. Sometimes – and the burqa ban case provides a good example – democracy prevails, also because the ban reflects the national identity of the states (and the peoples) concerned.

I do not think that my contribution will change the opinion of Eva Brems. This was also not my intention, because her strong and well-founded opinion is very welcome in the societal and academic debate. Furthermore, I am also quite certain that Titia Loenen will not agree with everything I have stated in the foregoing.<sup>24</sup> Nevertheless, Titia, I hope that my contribution to the debate is still welcome and may provide some inspiration in your current and future activities at Leiden University. Titia, thanks for your great efforts for the benefit of Utrecht University in the past and I wish you a great deal of success in Leiden.

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24 As a member of a Dutch expert committee which advised the government on the legal possibilities for a burqa ban, she was of the opinion that a ban, only aimed at Islamic full-face veils, was contrary to the freedom of religion. Cf. VERMEULEN *et al.* 2006.

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# The individual case and the general rule

Jeroen Kiewiet<sup>1</sup>

## 1. Introduction

When I worked in Utrecht I discussed with much pleasure in the course on jurisprudence (Algemene rechtsleer) Titia Loenen's article 'Recht en het onvervulbare verlangen naar individuele gerechtigheid'.<sup>2</sup> In this article Loenen calls law – with a term borrowed from Kees Schuyt – a 'tragic hero'. This tragic hero succumbs to the enormous pressure exerted by a society that has too high expectations of legal solutions, expectations that the law can never fulfil. This idea appeals to me. I think she is right that too much is expected of the legal system. The expectations are often sky-high in the individual's search for *total justice*.<sup>3</sup> The claims of individuals towards the state are formulated as *rights*, and the law should be there to compensate all of the individual's mishaps.

I was surprised by Loenen's distinct position that differentiation is not always best, but that the general rule should more often be adhered to. Loenen advocates the virtue of the *generality* of rules instead of differentiation and doing justice to the individual case. This is a clear focus on a rule-oriented perspective: cases are judged *equally* by applying the same set of rules; everyone has, from a legal perspective, the same rights.<sup>4</sup> The same rights are therefore applied *equally*. This formality can be contrasted with a conception of equality, which is concerned with the *result* of equal treatment in reality.<sup>5</sup> Being naïve or maybe even prejudiced I would have expected that Titia Loenen, as an expert in legal gender studies, would focus on how in reality

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1 I am grateful to the anonymous peer reviewers and Marjolein van den Brink for their comments and suggestions. Special thanks to Charlotte Mol for fine-tuning my English.

2 LOENEN 1996.

3 Loenen took this term from FRIEDMAN 1986, at p. 23. LOENEN 2010b, at p. 323.

4 In the literature, the distinction between rule and result-oriented equality is often called equality in a formal and material sense. This distinction is elaborated by LOENEN 2010a, at p. 274.

5 LOENEN 2010a, at p. 274.

men and women come to unequal results. Because of the dominance of the legal system which is formal and rule-based, rules may be equally applied to men and women but the implicit reference point or dominant standard behind these rules are male-biased.<sup>6</sup> Instead Loenen promotes a stronger focus on applying rules *without* differentiating on the level of the individual. She is thereby rowing in a different direction than advocates of the gender and law movement normally do.<sup>7</sup> This surprised me, and triggered me to review her arguments in more detail.<sup>8</sup>

Loenen's proposed solution to prevent the 'tragedy of law' is to put more emphasis on *general* categories within *general* provisions and less emphasis on individual cases. Let me be frank, I was not immediately convinced of this solution. What I find problematic is that this formal treatment according to general categories can lead to the situation that the individual case is not in focus while the larger emphasis on general categories does not seem to fulfil a moral value in itself. To put it quite bluntly: also a band of robbers can exercise their power through general rules.<sup>9</sup> Slavery, sex discrimination, or racial segregation can be all in accordance with general provisions.<sup>10</sup> I discuss

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6 The concept of a *dominant* or *implicit* standard is explained by Loenen in LOENEN 2010a, at pp. 294-295.

7 WESTERMAN 2003, at p. 9: 'Deze theoretici [beoefenaren van *genderstudies* en bij multiculturalisten] ontwaren in het zo bekritiseerde regelgeleide en formele redeneren een bij uitstek mannelijk, of zo men wil westers paradigma, dat geen plaats biedt aan het anderszijn, maar integendeel alles van het mannelijk of, zo men wil, westerse dominante model wil gelijkmaken. Algemeenheid verschijnt in deze theorieën als machtsinstrument van de dominante groep. Daarvoor in de plaats zou moeten komen een particularistisch getint differentiatiedenken (...) dat recht doet aan het unieke en aan dat wat mensen van elkaar onderscheidt.' ('These theoreticians [practitioners of *gender studies* and for multiculturalists] perceive in the, much criticized, rule-guided and formal reasoning, an eminently masculine, if you like, Western Paradigm that provides no possibility for otherness, but on the contrary wants to uniformize everything of the male or, if you like, Western dominant model. Generality appears in these theories as an instrument of power of the dominant group. To replace this there should be a particularistic tinted differentiation thinking (...) which does justice to the unique and that what separates people from each other.') Footnote excluded.

8 Just to be clear: the concept of equality as such is not the topic of this essay. My essay is on the generality of rules and the relationship with individual cases, and not on analysing the concept of equality.

9 In this essay I often speak of *general rules* which in itself is a pleonasm: *rules* per definition are *general* otherwise they would not be rules but just decisions. But *general rules* is an established expression in the field.

10 TAMANAHA 2004, at p. 93.

this doubt in the first part of my essay in which the moral value of generality will be scrutinised.

In the second and third parts of the essay I will try to prove why the generality of rules *does* matter by means of two arguments provided by Loenen in her article. In the second part I will discuss Loenen's argument regarding the division of power, more precisely the relation between the judge and the legislator, which is compromised by focusing too strongly on individual cases. I will show that the generality of rules is also of major significance in constitutional law in the discussion on the concept of statutes. In the third part I discuss Loenen's appeal to solidarity as an argument *not* to focus too much on individual cases. Finally, I will discuss whether my hesitation with regard to the *prima facie* lack of any moral value of generality has been overcome by these two arguments.

## 2. The moral relevance of generality

From a *moral* perspective it seems to be absolutely clear that *all* individual circumstances should be accounted for in the judge's verdict. Joseph Fleuren and Thomas Mertens stress the importance of doing justice to the individual case. They argue that because of the generality of rules of law the competence of judges to deviate from the general rule is implied in exceptional cases. As Aristotle remarked, it is impossible, and not even desirable, for the legislator to foresee every possible individual case.<sup>11</sup> Therefore, it is up to the *judge* to come to equitable verdicts at all times.<sup>12</sup> In rare cases, which were not

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11 Loenen also refers to this quote from Aristoteles: LOENEN 1996, at p.123.

12 FLEUREN and MERTENS 2012, at p. 86: 'Wanneer de wetgever immers geen acht slaat en behoeft te slaan op wat zelden voorkomt, dan moet een andere instantie dat wel doen indien zoiets zeldzaams zich voordoet. Het ligt in de lijn van de filosofie van Aristoteles dat deugdzame burgers en goede bestuurders en ambtenaren in dergelijke (...) tot een redelijke oplossing proberen te komen, *ook al strookt die niet met een strikte toepassing van de wet*. Maar als dit niet lukt, dan is het woord aan de rechter. (...) uiteindelijk is het oordeel *onlosmakelijk verbonden met een weging van de concrete omstandigheden*.' ('When the legislature does not take notice or needs to take notice on what occurs seldomly, then another authority will have to do so if the exceptional case arises. It is in line with Aristotle's philosophy that virtuous citizens and good administrators and officials (...) endeavour to come to a reasonable solution, *even though it is not consistent with the strict application of the law*. But if they do not succeed, then it is up to the judge. (...) ultimately the judgement is *inextricably linked to a balancing of the circumstances at hand*.'.) Emphasis added.

explicitly foreseen by the legislator, the judge is allowed to differentiate from the general rule if applying the rule would lead to an inequitable result.<sup>13</sup> In fact, according to Fleuren and Mertens, a judge *should not* apply the general rule in cases that would lead to an inequitable result.

Fleuren and Mertens' focus on an equitable outcome in the individual case is quite attractive. Is bringing justice in all cases the purpose of a just legal system? Yet, Loenen's focus on generality takes her in the opposite direction. Philosophically a link between Loenen's demand for *generality* can be linked with Immanuel Kant's demand for *universality* in his Categorical Imperative: 'Act only according to that maxim whereby you can, at the same time, will that it should become a universal law.'<sup>14</sup> Kant's Categorical Imperative demands a twofold *universality*: the *maxim* itself is a personal *rule* and therefore general and it must be again *generalisable* to become a universal law. Unfortunately, this Kantian approach still does not provide an answer to the question of what *moral value* is connected to generality. In modern ethics the Kantian approach is often criticised because it is too *rigorous* or *formalistic*.<sup>15</sup> Kant's focus on the ethical duty itself without taking the consequences into account is nowadays viewed as being untenable.<sup>16</sup>

Another problem, more practical than philosophical, that arises from the general character of rules concerns the necessary categorisation of rules that leads to either over- or under-inclusiveness. For example the minimum age of 18 years for drinking alcohol.<sup>17</sup> The *purpose* of this rule is to avert the bad effects of alcohol on young people's physical constitution. It is a good idea not to start drinking alcohol at a young age because of the damage to one's physical development. But there may be minors who reach the stage of physical adulthood much earlier, while some 18-year-olds might not yet be physically mature enough to consume alcohol, without damage to their

13 FLEUREN and MERTENS 2012, at pp. 73-87.

14 KANT 1993, at p. 30.

15 In the German philosophical discussion Kant is criticised because of his *rigorous* position. Westerman speaks instead of Kant's *formalism*.

16 WESTERMAN 2003, at p. 7.

17 Tamanaha mentions the example of a minimum driving age of 16. That is not the best example of over- or under-inclusiveness because the requirement of a driving test which is an objective test to see whether people are mature enough to drive a car alleviates the potentially too strict categorisation. TAMANAHA 2004, at p. 81.

development. Therefore, the *purpose* of the rule – preventing minors from physical damage – is not always realised.

The moral value of the generality of rules is a philosophical challenge. In itself, generality – *formal equality* – has little to do with justice.<sup>18</sup> Although we may say that the equal treatment of equal cases is a means to achieve justice, it seems unlikely that equal treatment can be *equated* with justice. Being treated equally according to a general rule does not mean that the treatment is just.<sup>19</sup> This entirely depends on *categories* that are imposed. These categories might not be morally justified according to contemporary understanding. Therefore, it boils down to developing criteria that concern the *content* of the law and to ask ourselves which categorisations are morally justified. Despite the difficulty of defending Loenen's position from a philosophical point of view, there may be an argument from constitutional law doctrine, as discussed in the next section.

### 3. Constraints from constitutional law

#### 3.1. Division of powers

Loenen's other arguments as to why the generality of rules is of importance are derived from the *division of powers*.<sup>20</sup> Two specific lines of argumentation can

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18 The emptiness of the principle of formal equality is demonstrated by Hans Kelsen in: KELSEN 1973. Kelsen explicitly attacks Kant's position, at p. 18-19: 'They [the concrete examples with which Kant attempts to illustrate the application of his categorical imperative] are in no sense derived from the categorical imperative, as the theory makes out, for nothing can be derived from such an empty formula. (...) But every precept of any given social order is consistent with this principle, for it says no more than that a man should act in accordance with general norms.' Also Peter Westen demonstrates the emptiness of formal equality in WESTEN 1982.

19 ROSIER 2010, at p. 58 footnote 8: 'Gelijke gevallen gelijk behandelen is een zuiver formeel beginsel. Het zegt niets over de inhoudelijke criteria die men moet gebruiken om vast te stellen of gevallen wel of niet gelijk zijn.' ('Treating like cases alike is a purely formal principle. It does not say anything about the substantive criteria that must be used to determine whether or not cases are equal.') Also HART 1994, at p. 159: 'Treat like cases alike' must remain an empty form. To fill it we must know when, for the purposes in hand, cases are to be regarded as alike and what differences are relevant.' Criticism of this statement can be found in WESTEN 1990, at p. 225.

20 Fleuren and Mertens discuss – partly implicitly – the constitutional position of the judge in paragraphs 3 and 4 (at pp. 80-84), in which they discuss Article 11 Wet algemene bepalingen (General Provisions Act) and the *contra legem* effect of reasonableness and fairness ('redelijkheid en billijkheid') and general principles of law.

be discerned within Loenen's argument of the division of powers. The first is that legal-political discussion in *parliament* is a fundamentally better forum to decide on questions of justice than the judges' chambers ('*raadkamer*').<sup>21</sup> Judges always decide on a case to case basis. Their legal ruling is restricted to the case presented to them. I think this is an argument that makes *judicial activism* problematic. Drafting law for controversial cases must be a result of an exchange of *political opinions*, for which parliament is the most suitable forum.

Loenen's second argument is the *dependency* which is created by making the individual dependent on the decision of the judge to allow an appeal to reasonableness and fairness ('*redelijkheid en billijkheid*') or to apply a hardship clause. In situations of hardship clauses the state can play the role of the Great Benefactor, giving citizens privileges which were not foreseen by the rule.<sup>22</sup> But, an appeal to reasonableness and fairness also makes the persons involved in the case dependent on the judge to decide. The legislator does nothing more with a statutory provision than providing a general proposal on how to decide cases; the judges are now in the position to overrule such proposals at all times. According to Loenen, that disturbs the traditional checks and balances between the legislator and the judiciary.

Fleuren and Mertens take a completely different position. As mentioned, they argue in favour of the judge and his unique position to do justice in individual cases. The argument of Fleuren and Mertens not only presupposes that the judge is capable of fulfilling his task properly, but it is also a normative position on the *desirability* of putting the judge in the position to bring justice to individual cases. Loenen is quite sceptical as to letting the judge to decide what an equitable outcome is in every case, as it would imply that the judge can always decide what the law requires. Fleuren and Mertens, on the other hand, have no issue with this implication.

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21 LOENEN 1996, at p. 136.

22 LOENEN 1996, at p. 128: 'Hardheidsclausules versterken die positie van afhankelijkheid, ook als zij worden toegepast in voor de burger begunstigende zin; de staat werpt zich op als de Grote Weldoener, die gunsten kan verlenen waarin de regels eigenlijk niet voorzien.' ('Hardship clauses strengthen the position of dependence, even if they are used in a favourable manner for the citizen; the state acts as the Great Benefactor, who can grant favors for which the rules actually do not provide.').

Since Paul Scholten (1875-1946) Dutch jurisprudential doctrine has the tendency to focus on decisions in individual cases. The consequence of that tendency is that the judge is put on a pedestal, as it is only the judge who is competent to make the *jump* from the abstract rule to the concrete verdict.<sup>23</sup> Therefore, it is always the judge who gives his interpretation on statutory provisions and the verdict must be legitimised by the judge's individual *conscience*.<sup>24</sup> For Scholten, justice plays a role in *every* decision: 'no step in law is taken without posing consciously or unconsciously the question of justice.'<sup>25</sup> According to him, even when decisions seem to follow logically from rules of positive law these rules are *applied* by the judge because they do not conflict with what the judge perceives as justice. Thus the *personal* aspect of the judge's decision is an important aspect of Scholten's theory.<sup>26</sup> The position of Fleuren and Mertens also comes very close to that of Scholten.<sup>27</sup> I think that it is difficult to draw a general conclusion concerning this debate regarding the position of the judge towards the legislator. Many constitutional lawyers would agree with Loenen's argument that controversial issues should be mainly decided in parliament instead of by the courts. Also her critique of the individual's dependency on individual judges' willingness to be lenient or grant exceptions is convincing. However, Dutch political practice is different: many controversial cases are no longer decided in parliament because clear political majorities and political consensus are often lacking.

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23 SCHOLTEN 1974, at p. 74.

24 SCHOLTEN 1974, at pp. 134-135.

25 Quoted by: BROUWER 2004, at pp. 49-50.

26 BROUWER 2004, at p. 49. Brouwer links this to the doctrine of Personalism by Scholten's friend Ph.A. Kohnstamm.

27 FLEUREN and MERTENS 2012, at pp. 73-87 conclude their article with the following statement (at p. 87): 'De rechter moet voorkomen dat het niet zozeer de billijkheid is die corrigeert, maar het billijkheidsgevoel van de individuele rechter of raadkamer.' ('The judge must prevent that it is not so much equity which corrects, but the feeling of fairness of the individual judge or the court.')

Thus, the legislature adopts vague and imprecise provisions, leaving the difficult decisions to the courts.<sup>28</sup>

To summarise the positions discussed, two strands can be discerned in the current debate: the high esteem of the judge and his capability to come up with an equitable solution in every individual case, on the one hand, and, on the other, authors like Loenen who clearly doubt the possibility and the desirability to put the judge in the position to decide on important controversial matters.

### 3.2. *The twofold concept of a statute*

The essence of a rule is its *generality*,<sup>29</sup> which must be viewed in contrast to a particular command. This concept is the basis of the *rule of law* or *rechtsstaat*. It means that legal authority is exercised by *rules*, not decrees. In this subsection I discuss this conception of the role of rules from the point of view of constitutional law, which is not expressed by Loenen, but which I consider to be of importance in defence of her position.

The core of the Dutch *rechtsstaat* concept is the notion of the concept of a statute. A formal and material conception of a *statute* is distinguished. This twofold concept of a statute has been the traditional *core* of the Dutch *rechtsstaat* concept. As I will demonstrate, in this *rechtsstaat* concept the *generality* of rules is regarded as a fundamental safeguard against *arbitrariness*. Therefore, it is the procedural *form* of the law, the enactment of statutes according to the legislative procedure, that possibly restricts arbitrariness.

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28 Take, for example, the case of the regulation of euthanasia in the Netherlands. GRIFFITHS, BOOD and WEIJERS 1998, at p. 87: 'The legal vacuum created by the deliberate pace of political decision-making has been filled by the courts, which have accepted the task of reconciling the conflict between the explicit prohibition of euthanasia and assistance with suicide in the Criminal Code and the increasingly apparent fact that these MBSL are widely practiced and enjoy general public support. In a sense, the courts have thereby usurped the constitutional role of the legislature, but the latter has not protested. On the contrary, the Government itself (which in a parliamentary system is directly answerable to the legislature) has frequently and openly made use of the courts to secure legal development. And Parliament itself has exhibited only respect for what the courts have done.'

29 Rules are not an exclusive subject for *legal* scholarship. Also philosophical or sociological research on rules is carried out, for example the philosophical meaning of following a rule in Saul Kripke's interpretation of Ludwig Wittgenstein's discussion of teaching mathematical series (SOLUM 1999, at pp. 493-494) or sociological theories on rule-following behaviour (E.g. GRIFFITHS 2003).



A statute in the *material* sense is every statute that is *general* and *abstract*. Neither the *addressees* nor the *cases* in which the statute will be applied are predetermined. In addition, the statute has an external effect: it binds citizens and therefore is not meant to regulate only the government itself.<sup>30</sup> These *material* criteria determine whether a statute has the quality of a material statute. In contrast, *formal* statutes are defined by the procedural realisation. Every statute containing a legal action that is a product of the legislative process as described in the Constitution is a statute in the formal sense.<sup>31</sup> The striking point now is that a *formal* statute is not necessarily a *material* statute as well. A *formal* statute regulating – for example – permission for the King, or his successors to the throne, to marry<sup>32</sup> does not have the character of a *material* statute because it is *not* general and abstract. It only concerns *one* situation – the parliamentary approval of the proposed bride of the heir to the throne – on one occasion, thus it is merely a formal statute.

The typical example of a non-material, yet *formal* statute was the budget act, conceptualised by the German constitutional law scholar Paul Laband in 1870. Following the wish of Otto von Bismarck, the participation of parliament was required regarding, as Michael Stolleis calls it, ‘the most sensible part of the modern state.’<sup>33</sup> Of course, because of the lack of generality and abstractness this budget act could not be considered to be a regular – *material* – statute. But to ensure the involvement of parliament in deciding on the budget, the *form* of a statute was required, instead of just an act of government.<sup>34</sup>

Two major arguments figure in this discussion on the constitutional admissibility of merely *formal* statutes. The first one is rooted in the doctrine of law of the *Enlightenment*. This doctrine entails that law should be solely composed of statutes as the highest expression of the *general will* – *volonté générale* – of the people. An example is the Constitution (*‘Staatsregeling’*) of the Batavian Republic, in which, according to Article 5, ‘the statute is the

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30 DE BLOIS (ed.) 2010, at pp. 99-106.

31 In the Dutch Constitution statutes are the product of the procedure prescribed in Articles 81-88 Grondwet.

32 Article 28, clause 3, Grondwet.

33 STOLLEIS 1992, at p. 370. My translation.

34 Typically a Koninklijk Besluit (Royal Decree) in Dutch constitutional law.

will of the total societal body, expressed by the majority of citizens or their representatives.’<sup>35</sup> Kant’s generality requirement is also echoed here.<sup>36</sup>

In documents like the Constitution of the Batavian Republic the spirit of the French Revolution is reflected. *Equality before the law* was first and foremost a way for the bourgeoisie to gain access to public offices and secure ownership. The privileges of the nobility and clergy were abandoned completely. A law which consists of a set of general provisions was the perfect tool to accomplish this purpose through legal means. Böhrling still adhered to this Enlightenment concept of a statute as a *material* general and abstract rule;<sup>37</sup> statutes ought to express the people’s general will. In this Böhrling followed Jean-Jacques Rousseau’s concept of *volonté générale*.

Böhrling’s second argument concerns legal certainty. The essence of the legality principle for Böhrling is to prevent arbitrary acts of government.<sup>38</sup> The conception of *rechtsstaat* which Böhrling embraces is government by *general and abstract rules*. In his ‘new concept of the *rechtsstaat*’ (*‘nieuwe rechtsstaatgedachte’*) Böhrling demands that all acts of government are brought under general rules.<sup>39</sup> The key example is the Meerenberg case from

35 Article 5 Staatsregeling van 1798 (Constitutional Rules for the Batavian People 1798): ‘De wet is de wil van het geheele maatschappelyk lichaam, uitgedrukt door de meerderheid of der burgeren of van derzelver vertegenwoordigers. Zy is hetzy beschermende of straffende gelyk voor allen. Zy strekt zich alleen uit tot daaden, nimmer tot gevoelens. Alles wat overeenkomt met de onvervreemdbare regten van den mensch in maatschappy, kan door geene wet verboden worden. Zy beveelt, noch laat toe, hetgeen daarmede strydig is.’ (‘The law is the will of the total societal body, expressed by the majority of citizens or their representatives. The law is either of protective or punitive equality for all. It extends only to acts, never to feelings. Everything which corresponds to the inalienable human rights in society, may be prohibited by no law. It bans, and does not allow, anything which is in conflict with this.’).

36 Article 6 Staatsregeling van 1798 is an expression of Kant’s Categorical Imperative and the biblical *Golden Rule*: ‘Alle de pligten van den mensch in de maatschappy hebben hunnen grondslag in deze heilige wet: doe eenen ander niet, hetgeen gy niet wenscht dat aan u geschiede, doe aan anderen, ten allen tyde, zoo veel goeds, als gy in gelyke omstandigheden van hun zoudt wenschen te ontvangen’. (‘All the duties of man in society have their foundation in this holy law: do not do unto others what you do not want others to do unto you, do unto others, at all times, as much good as you would wish to receive from them in similar circumstances.’).

37 Surprisingly enough BÖHRLING and LOGEMANN 1966, at pp. 22–24, refer on these pages to Carl Schmitt’s elaboration in *Constitutional Theory* (at pp. 138–147) on this – according to Schmitt – ‘liberal-democratic’ *rechtsstaat* conception of a statute.

38 VAN OMMEREN 2009, at p. 63.

39 BÖHRLING and LOGEMANN 1966, at p. 17.

1879 in which the Crown was considered to lack the authority to enact on its own – without parliamentary consent – a general regulation prescribing penalties for specific criminal offences.<sup>40</sup> A contemporary problem is the increasing *delegation* of legislative powers. The link between the parliamentary statute and a concrete act of government has in many cases become really thin.<sup>41</sup>

For a long time the purely formal statute has been criticised as being at odds with the principles of the *rechtsstaat*. Even half way into the 20<sup>th</sup> century, Böhrlingk claimed that the Dutch Constitution prescribed a *material* concept of a statute, thereby criticising the practice of budget acts, royal marriage acts, etc.<sup>42</sup> Böhrlingk was, as Van Ommereen correctly points out,<sup>43</sup> in a minority position regarding the claim that the Dutch Constitution (*Grondwet*) prescribes a *material* concept of statutes. This shows the controversial character of this topic.

From a legal certainty perspective, the *generality* of rules is not a purpose as such, but a safeguard against light-hearted limitations of the rights and legal expectations of citizens.<sup>44</sup> The generality of the rule *forces* the legislator to design a statute which can be imposed on all those whom the law addresses. In this sense *generality* is not promoted because of a desire for equal treatment, but to limit arbitrary law-making. Citizens' rights

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40 Hoge Raad 13 January 1879, *Rechtspraak van de Week* 4330. In Hoge Raad 22 juni 1973, *Nederlandse Jurisprudentie* 1973, 386 (*fluoridering*) it was decided that the delegation of far-reaching authorities – *de facto* forcing civilians to accept an intrusion (in this case: fluoride in drinking water) – should always be based on a parliamentary statute.

41 This was already noticed by constitutional lawyers in the 1920s but it is still an ever increasing problem which is located mainly in the elaborate route of the adjudication of public authorities.

42 BÖHRLINGK and LOGEMANN 1966, at p. 51: 'wetgevers niet bevoegd bij wet in formele zin [...] andere regels te maken dan naar buiten werkende algemene regels.' ('legislators are not competent by an act of parliament [...] to create *different* rules than outward functioning general rules.') It must be noted that the book was finished earlier than its publication in 1966 because of the sudden death of Böhrlingk in 1958.

43 VAN OMMEREN 2009, at pp. 60-65.

44 A good example can also be found in Article 19, first clause, of the German Constitution (*Grundgesetz*): 'Soweit nach diesem Grundgesetz ein Grundrecht durch Gesetz oder auf Grund eines Gesetzes eingeschränkt werden kann, muß das Gesetz *allgemein* und nicht nur für den Einzelfall gelten.' ('Where, under this Basic Law, a fundamental right can be limited by law or pursuant to a law, the law must apply *generally* and not just for an individual case.') Emphasis added.

and liberties cannot be limited by an ad hoc decree but must always be based on a pre-established general rule. In this sense the classic expression of the *rule of law* is ‘government of laws, not men’ – as formulated by John Adams in the Massachusetts Constitution. This expression is in the first place directed at eliminating the tyrannical sovereign monarch (‘not men’),<sup>45</sup> and in the second place prohibiting decrees (‘of laws’) historically ordained by the sovereign monarch but later on also by holders of political office.<sup>46</sup> The famous administrative and constitutional law scholar Léon Duguit later expressed it as:

‘The law can be bad, unjust, but this danger is reduced to a minimum because of its general and abstract composition. The protective character of the law, indeed, its *raison d’être* itself, lies in its general character.’<sup>47</sup>

The *generality* of rules is an essential part of the *rechtsstaat* or the *rule of law*; it prevents arbitrary – *ad hoc* – lawmaking. The *form* of the law, its enactment according to the constitutional procedure by the legislature, requires *generality* and therefore universality. General rules bind the state to its own rules, thereby enhancing the *predictability* of the law. Legal certainty in the sense of the predictability and foreseeability of the law can only be conceived of in a system of general rules. The generality of rules is a requirement of the *rechtsstaat* that should still be taken very seriously; in view of the aggravating complexity of the legal system with its articulated legal norms and delegation of authority, the principle of the generality of rules is permanently in danger.

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45 As in the famous words of John Locke, *Second Treatise of Government*, Section 202 of Chapter XVIII in Book II: ‘Wherever law ends tyranny begins.’

46 In the 19<sup>th</sup> century constitutional law was mainly engaged with the reduction of the political power of the sovereign monarch. At the start of the 20<sup>th</sup> century many constitutional theorists commenced an attack on the ‘will theory’ of constitutional law. In this theory the will of the monarch was law, as clearly expressed in John Austin’s Command Theory in his *The Province of Jurisprudence Determined*. HART 1994, Hart’s Chapters II-IV of *The Concept of Law* are a rejection of Austin’s Command Theory.

47 DUGUIT 1923, at p. 97; *Traité de Droit constitutionnel*, vol. II, 1923, at p. 145. I quoted this translation in English from SCHMITT 2008, at p. 196.

#### 4. Solidarity

Loenen stresses in her article the paradox in her position: ‘it is in each individual’s interest that it is not always sought to do justice in the individual case. After all, it is in the interest of each citizen that the general rules are applied, even in situations when the application leads to inequitable results in his/her case, as without this generality society cannot function properly’<sup>48</sup> (translation JK). According to Loenen ‘society cannot function properly’ without the ‘generality of rules’, because unlimited demands and expectations striving for ‘total justice’ may be harmful to other citizens’ rights and interests. This is difficult to refute. The human freedom to act is always constrained by *social* limitations. The mere fact of living together in the same space implies that we are limited by others when we wish to satisfy our demands. When demanding a certain good we can always be confronted with another person who wishes the same good. Freedom, therefore, is necessarily *limited* by rules. The *point* of having law at all lies in this limitation of freedom.

But I suspect that Titia Loenen takes the argument one step further. For Loenen ‘living together means giving and taking.’<sup>49</sup> In order to allow society to ‘function properly’ freedom is not only restricted due to necessity, but it also demands *reciprocity* among members of society. Solidarity is the set of ties that bind people in society together;<sup>50</sup> this is based on *reciprocity*.<sup>51</sup> It is

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48 LOENEN 1996, at p. 134: ‘Bovendien is het, hoe paradoxaal dat wellicht ook klinkt, evenzeer in ieders *individuele* belang dat er niet altijd gestreefd wordt naar recht doen aan het individuele geval. Iedere burger heeft immers belang bij algemeenheid van regels die toegepast worden, ook al valt toepassing soms voor hem/haarzelf onbillijk uit, aangezien de samenleving anders niet goed kan functioneren.’ (Moreover it is, however paradoxical as it may sound, just as much in everyone’s individual interest that there is not always strived to do justice in the individual case.’)

49 LOENEN 1996, at p. 134: ‘Samenleven betekent geven en nemen.’

50 LOENEN 2010b, at p. 307: ‘[...] [K]an solidariteit worden gefundeerd in het bewustzijn van mensen dat zij voor een menswaardig bestaan afhankelijk zijn van anderen. Solidariteit lijkt dan meer een eis van redelijkheid en wederkerigheid: mensen kunnen niet zonder elkaar.’ (‘[...] can solidarity be founded in the consciousness of people that for a dignified life they are dependent on others. Solidarity then appears to be more a requirement of reasonableness and reciprocity: people cannot live without one another.’)

51 I speak explicitly of *solidarity*, based on *reciprocity*, to distinguish this from solidarity as *altruism* in which reciprocity is not present.

a matter of giving and taking. Not only of tokens, like gifts,<sup>52</sup> but also of helping of each other and caring for each other.

Helping and caring as expressions of solidarity have largely become a task of the government.<sup>53</sup> It is thus *externally* organised solidarity, which is organised outside the immediate relationship between the people involved. Durkheim would call it *mechanical* – as opposed to *organical* – solidarity.<sup>54</sup> Think of medical care, retirement, unemployment, etc. The reciprocity that characterises solidarity is now hidden in the relation between taxpayers funding these social arrangements, on the one hand, and, on the other, benefactors of these collective arrangements. The distribution of social services is primarily made by the government as an intermediary. The link of solidarity is no longer directly visible: the one delivering (a taxpayer) does not see the result (someone receiving extensive medical care). The one who is receiving help and care cannot do anything in return for the one who has helped him because there is no concrete person or group delivering solidarity, but only the abstract group of taxpayers.

Understandably, the benefactors do not recognise that as a matter of fact they in turn are supported by their fellow citizens. From the viewpoint of solidarity the obligation to do something in return for the help received is still there. But people receiving help and care from the state often do not see it that way. For them it is a *right* which is owed to them by the state, and the state is obliged to deliver ‘total justice’.<sup>55</sup> Expectations regarding the help and care that the state can offer everyone to achieve a good standard of living are sky-high, but it is mostly forgotten that solidarity is still a matter of giving *and* taking, and not only a matter of taking by people who claim to have a right to a high standard of social arrangements. This *a*-symmetry is the core of Loenen’s critique of the arrangement of solidarity by the state.

In my understanding the problem with the state organisation of solidarity as perceived by Loenen is that in the long run it does not achieve its goal of a society in which people are really living together, in the sense of

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52 The classic example is gift exchanges (the Kula ring) among the inhabitants of the islands of the Trobriand Islands, described by Bronislaw Malinowski in *Argonauts of the Western Pacific* 1922.

53 Described in detail by LOENEN 2010b, at pp. 312-327.

54 LOENEN 2010b, at p. 308.

55 LOENEN 2010b, at p. 323. Titia took this term from FRIEDMAN 1986, at p. 23.

helping each other and caring for each other. State-organised solidarity has, on the contrary, made solidarity itself quite unpopular, but a society without solidarity is an empty and meaningless one. As Loenen points out, the popularity of personal freedom has grown, at the expense of the most vulnerable and marginalised people in society, which is the ‘true crisis of the welfare state’.<sup>56</sup> The greatest challenge to present-day society is the question as to how or by what state-organised solidarity can be replaced.

In my opinion, in the discussion on solidarity the generality of rules is relevant in two ways. First, general rules may be regarded as the expression of solidarity; they can express certain common goals of a society. For example, the constitutional provisions on social security are expressions of these common goals.<sup>57</sup> These constitutional provisions are expressions of largely shared values in society. But they are not only expressions of these values; they also function as guidelines for the development of new legislation. Secondly, the generality of rules expresses an *abstract* choice between interests. It is not the interests and position of the parties in a specific case that are considered, as in a judge’s decision. This *abstract* balancing of interests in statutes by the legislature reflects what solution is best for society as a whole. We are reminded of Aristotle’s remark that it is impossible, and not even desirable, for the legislator to foresee every possible individual case; it is a duty for the legislature to come up with *general* rules, and to have the judge to come up with concrete decisions in individual cases. But judges should be reluctant to put their decisions in place of the general balancing of interests by the legislature. Judges are not equipped with the instruments, such as departmental staff, to review the general effects of their decisions, and it is very questionable if politically controversial decisions should be made by judges instead of the legislature in view of the democratic legitimacy of the judiciary. If people understand the concept of solidarity as reciprocity properly, it makes sense to sometimes *refrain* from claiming one’s right in court, because then the *a*-symmetry of only taking and not giving back is recognised. Therefore, in

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56 LOENEN 2010b, at p. 326.

57 Expressed in Article 19 (clause 1: ‘It shall be the concern of the authorities to promote the provision of sufficient employment.’) and Article 20 (clause 1: ‘It shall be the concern of the authorities to secure the means of subsistence of the population and to achieve the distribution of wealth.’) Grondwet.

many cases, the abstract choice between the interests of the legislator should be respected instead of seeking individual justice.

## 5. Conclusion

The generality of rules is a tricky legal theoretical topic. On the one hand, it is very hard to phrase a solid philosophical argumentation. A moral approach seems to demand a focus on doing justice to the *individual case* and not on generality. On the other hand, lawyers and legal scholars know that the generality of rules *does* matter. In her article 'Recht en het onvervulbare verlangen naar individuele gerechtigheid' Titia Loenen takes a position in favour of the generality of rules and I think with good reason. She draws attention to the danger that a shift within the balance of powers is inevitable when citizens become dependent on the courts to decide systematically whether a deviation from the rule is required because of reasonableness and fairness.

However, the constitutional law argument regarding the division of powers can be expanded, as I have tried to show in this essay. The essence of the generality of rules in the conception of *rechtsstaat* or the *rule of law* is to rule out *ad hoc* legislation. The traditional *rechtsstaat* doctrine requires statutes to be general and abstract rules. Constitutional legal scholars, notably Böhrling, have advocated sticking to a concept of a *material* statute. The core of his argument is still attractive and gives us an argument to embrace the generality of rules as much as possible: it is a safeguard against *ad hoc* regulation because it limits infringements on citizens' rights or interests by demanding the generality of the rule.

I think that Titia Loenen is actually concerned with the foundations of solidarity in our society. Her article can be interpreted, as I have shown, as a warning. Citizens claim a *right* to support and care from the state, which has almost monopolised solidarity. Thus, citizens have become dependent on the state, while at the same time their expectations of the level of social arrangements are sky-high. They demand 'total justice' from the state, while the taxpayers are really providing the funds for these social arrangements. Reciprocity, as the core of solidarity, is no longer in the picture; those receiving help and care do not feel any obligation towards the state, and those paying



for that help and care see a state-dependent group that is demanding 'total justice'.

Loenen sees the biggest challenge nowadays as providing solidarity with a new foundation, which avoids a restoration of the older arrangements of solidarity in families and religious communities. The gains of being free from these institutions are clear; these institutions were oppressing for the free development of individuals. What would be a good replacement for these institutions? In recent years the welfare state has increasingly been dismantled, for instance regarding social and unemployment benefits. Altogether society has undeniably taken a turn to a more egocentric mentality of taking care of one's own business first. The competition among people in the workplace and on the job market is increasing. The welfare state with its over-institutionalised arrangements no longer exists, but at the same time alternative social arrangements, based on a different form of solidarity, have not yet been formed.

What will be the demands on the legal system in the coming decades? The 'tragic heroism' of law probably no longer lies in the expectations of citizens towards the social welfare state. But the expectations towards the legal system have not yet been relinquished. Illustrations of such expectations can be found in criminal law with its increasing focus on the victim, and in the expected benefits of *regulating* previously hardly regulated agencies like financial institutions or public housing co-operations. Titia Loenen's appeal for the generality of rules has demonstrated to me that abstract rules can serve as a means to achieve a prudent legal system, not based on *ad hoc* rules.

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## Part II

### Equality as a human right



# Third-country nationals and discrimination on the ground of nationality: article 18 TFEU in the context of article 14 ECHR and EU migration law: time for a new approach

Evelien Brouwer and Karin de Vries

## 1. Introduction

Equality is a core element of citizenship: to be a citizen means to be entitled to equal treatment with other citizens. Yet the power of states to define and grant the status of national citizenship is still considered to be one of the pillars of national sovereignty. This entails the power to differentiate between a state's own nationals and foreigners with regard to their rights and legal protection. In this sense citizenship is, as Bosniak put it, 'soft on the inside but hard on the outside'.<sup>1</sup> However, the power of states to treat foreigners differently from nationals is increasingly limited by international human rights law, including the right to non-discrimination in Article 14 of the European Convention on Human Rights (ECHR). As De Schutter points out, the prohibition of discrimination on the grounds of nationality is emerging as a general principle of international and European human rights law.<sup>2</sup>

Within the law of the European Union (EU), Article 18 of the Treaty on the Functioning of the European Union (TFEU) prohibits discrimination on the basis of nationality, within the scope of the treaties (the TFEU and the Treaty on the European Union, TEU). With regard to EU citizens this provision is inclusive: it ensures equal treatment for EU citizens in other Member States and plays a key role in enabling free movement and giving substance to EU citizenship. However, Article 18 TFEU seems to be also

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1 BOSNIAK 2006, at p. 4.

2 DE SCHUTTER 2009, at p. 78.

exclusive, in the sense that it is interpreted, by the EU Court of Justice (CJEU), as not applying to third-country nationals (TCNs). Thus, where the right to equal treatment is concerned, the ‘soft on the inside, hard on the outside’ character of citizenship appears to be reproduced at the EU level. At the same time, viewed from a national perspective, Article 18 TFEU functions to grant one group of foreigners (EU citizens living in Member States other than their own) a privileged status compared to other foreigners (TCNs).<sup>3</sup> This difference in treatment between EU citizens and TCNs has been accepted in several cases by the European Court of Human Rights (ECtHR), on the ground that the differential treatment of foreigners and EU citizens residing in the same Member State was justified because of ‘the special legal order of the EU’.

Yet, also at the EU level, equal treatment clauses have been included in the body of EU migration law regulating the conditions for entry and the legal status to be granted to TCNs. Although none of these provisions are unlimited or absolute, they indicate that unequal treatment of TCNs is no longer self-evident. Moreover, in 2014 in the judgment of *Dhabhi v. Italy* the ECtHR found that an Italian family allowance scheme, which treated TCNs less favourably than EU workers, violated Article 14 ECHR in combination with 8 ECHR.<sup>4</sup> Whereas, in earlier cases, the ECtHR had already granted TCNs equal treatment with the respondent state’s own nationals, the judgment in *Dhabhi* explicitly addresses the position of TCNs compared to EU workers as a privileged category of foreigners.

These developments raise the question of to what extent the apparently limited scope of Article 18 TFEU – only EU citizens are covered – still fits the broader body of European law, in particular EU migration law and the ECHR. This contribution seeks to answer this question through an examination of existing instruments and case law of the European courts on the equal treatment of TCNs. It does not argue that the equal treatment of TCNs is always called for. However, it asks whether differential treatment

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3 This differentiation also implies a privileged status for EU citizens compared with EU nationals who have not left their ‘own’ country, also known as reverse discrimination. However, this differentiation, which results from the material scope of EU law rather than the personal scope of Art. 18 TFEU, will not be dealt with in this contribution.

4 ECtHR, *Dhabhi v. Italy*, 8 April 2014 (Appl.no. 17120/09).



of TCNs should not in principle be covered by Article 18 TFEU and be subject to the requirement of a reasonable and objective justification, also taking into account that this right to non-discrimination has been included in Article 21 (2) of the Charter on Fundamental Rights of the EU.<sup>5</sup> This question is particularly relevant with regard to EU policy and legislation in the area of immigration (Articles 77-80 TFEU), which essentially address the legal position of TCNs. However, other instruments of EU law, such as the Framework Decision on the European Arrest Warrant (EAW) 2002/584 or the Data Protection Directive 95/46/EC also involve the legal position of TCNs and might trigger the question of equal treatment based on nationality.<sup>6</sup>

In section 2 we examine ECtHR case law to see how differential treatment of foreigners and in particular differences in treatment between EU citizens and TCNs are dealt with by the ECtHR. Next, in section 3 we explore the meaning of the right to non-discrimination based on nationality in EU law. Taking into account the shift in emphasis which took place in EU policy with regard to the equal treatment of TCNs since 1999, we give a short overview of how in different instruments of EU migration law, the rights to non-discrimination and equal treatment have been incorporated. In this section we also mention recent developments in the case law of the CJEU which indicate that there may be room for a broader interpretation of Article 18 TFEU. Finally, we argue that it is time to (re)consider the meaning of Article 18 TFEU for TCNs.<sup>7</sup>

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5 See GROENENDIJK 2012. Dealing earlier with the scope of former Art. 12 TEC: HUBLET 2009 and (in Dutch) BOELES 2005, at p. 500 ff.

6 Below, we only deal with this question with regard to the EAW, for the subject of data protection and non-discrimination of TCNs we refer to BROUWER 2011 and her (Dutch) annotation to the judgment of the CJEU, Case C-524/06, *Huber v. Germany* [2008], JV 2009/110, at pp. 515-532.

7 In this contribution we focus on discrimination based on nationality and will not deal with the right of non-discrimination on grounds of racial or ethnic origin as protected in Art. 14 ECHR but also in Directive 2000/43 (Racial Equality) and Directive 2000/78 (Employment Equality). The meaning of the non-discrimination clauses in these Directives for TCNs has been extensively dealt with in: MORANO-FOADI and DE VRIES 2012.

## 2. Differential treatment of EU citizens and TCNs in ECtHR case law

### 2.1. *Dhabbi v. Italy: equal access to family benefits for EU workers and TCNs*

In *Dhabbi v. Italy*, the ECtHR was asked whether an Italian family benefits scheme discriminated against the applicant (a Tunisian national) on the grounds of his nationality.<sup>8</sup> The scheme provided for financial aid for large families with low income and was available to Italian nationals and EU citizens from other Member States, but not to lawfully resident TCNs such as the applicant. The ECtHR found that the Italian authorities' decision to deny family benefits to the applicant violated the prohibition of discrimination (Art. 14 in conjunction with Art. 8 ECHR). It stated that the applicant had been working and residing lawfully in Italy and had paid contributions to the National Institute for Social Security (*Istituto Nazionale della Previdenza Sociale*) in the same way as workers from EU Member States. The applicant's exclusion from family benefits was therefore exclusively based on the fact that he was not a national of an EU Member State. The ECtHR maintained that a difference in treatment based exclusively on the grounds of nationality requires very weighty reasons in order to be justified and that the budgetary arguments put forward by Italy did not constitute a sufficient justification.<sup>9</sup> *Dhabbi v. Italy* is not the first case in which the ECtHR decided on the unequal treatment of TCNs compared to EU citizens or to a Member State's own nationals. Article 14 ECHR prescribes that the rights and freedoms set forth in the Convention shall be secured without discrimination. The ECtHR has consistently interpreted this provision as requiring that differences in treatment in otherwise similar situations are prohibited unless

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8 ECtHR, *Dhabbi v. Italy*, 8 April 2014 (Appl.no. 17120/09).

9 ECtHR, *Dhabbi v. Italy*, 8 April 2014 (Appl.no. 17120/09), at para. 53. The Court's reasoning here shows an interesting parallel with CJEU case law on sex discrimination in the field of social security, where budgetary reasons are also not accepted as justifying (indirect) differential treatment between men and women. See, for example, Case C-343/92, *Roks and others v. Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and others*, [1994] ECR I-00571, at para. 38. Thanks to Susanne Burri for drawing our attention to this.

they are reasonably and objectively justified.<sup>10</sup> Article 14 covers differences in treatment on a listed number of grounds as well as ‘other status’. Whereas Article 14 only applies to differences in treatment falling within the ambit of a Convention right, Article 1 of the Twelfth Protocol (1 P12) to the ECHR extends protection against discrimination to ‘any right set forth by law’, thus all rights granted by national law.<sup>11</sup> Although Articles 14 and 1 P12 ECHR do not mention nationality or immigration status as discrimination grounds, only ‘national origin’, ECtHR case law makes clear that differential treatment of foreigners compared to nationals or of different categories of foreigners falls within the scope of the Convention.<sup>12</sup> Such differential treatment thus requires a reasonable and objective justification, the existence of such justification being assessed in the last instance by the ECtHR.

In earlier case law the ECtHR often appeared to be very lenient towards differences in treatment between EU citizens and TCNs. In its well-known judgment in *Moustaquim v Belgium*, it stated in general terms that differential treatment of EU nationals and TCNs was reasonably and objectively justified because the EU (then the EC) constituted a ‘special legal order’.<sup>13</sup> Simultaneously, however, the ECtHR developed a line of case law in which differences in the treatment of lawfully resident TCNs compared to a state’s own nationals have been strictly scrutinised. The following subsections discuss both elements in the Court’s case law. Subsection 2.5 analyses how *Dhabhi* fits in with earlier judgments of the ECtHR.

## 2.2. The expulsion cases: *Moustaquim* and *C. v. Belgium*

The case of *Moustaquim* concerned the expulsion of a Moroccan national from Belgium on public order grounds. Abderrahman Moustaquim, who arrived in Belgium at the age of one and obtained legal residence, was deported at the age of twenty following convictions for a range of criminal

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10 Standing case law since *Belgian Linguistic Case*: ECtHR, *Case ‘Relating to certain aspects of the laws on the use of languages in education in Belgium’ v. Belgium*, 23 July 1968 (Appl.no. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64).

11 However, this Protocol has been ratified by a limited number of EU Member States, see the Treaty Office of the Council of Europe: [www.conventions.coe.int](http://www.conventions.coe.int).

12 See the case law discussed in paras. 2.2–2.4.

13 ECtHR, *Moustaquim v Belgium*, 18 February 1991 (Appl.no. 12313/83), at para. 49.

offences. In addition to the expulsion a ten-year entry ban was imposed. Moustaquim's parents and siblings lived in Belgium and he claimed that his deportation violated his right to family life as protected by Article 8 ECHR. In addition, he claimed that the deportation constituted discrimination against him on the grounds of his nationality because a juvenile delinquent with Belgian nationality or the nationality of another EU (then EC) Member State would not have been expelled. The ECtHR found that Moustaquim could not be compared to Belgian nationals because 'the latter have a right of abode in their own country and cannot be expelled from it; this is confirmed by Article 3 of Protocol No 4 [ECHR]'.<sup>14</sup> As regards the preferential treatment of nationals of other EU Member States, the ECtHR held that 'there is objective and reasonable justification for it, as Belgium belongs, together with those States, to a special legal order'.<sup>15</sup> The ECtHR thus found that, unlike Belgian nationals, nationals of other EU Member States were in a situation comparable to that of TCNs because, like TCNs, they were not *a priori* excluded from deportation. However, the difference in treatment was justified by the 'special legal order' constituted by the EU: the fact that Belgium had agreed with other states to grant each other's nationals favourable treatment in migration matters did not imply that it had to do the same for nationals of states not involved in the agreement. This part of the judgment was confirmed five years later in *C. v. Belgium* which concerned similar facts.<sup>16</sup> The ECtHR again stated that the difference in treatment was justified because the EU Member States formed a 'special legal order', this time adding that the EU had 'in addition, established its own citizenship'.<sup>17</sup>

### *2.3. Preferential treatment of EU citizens in other situations: Bigaeva and Ponomaryovi*

Since *Moustaquim* and *C. v. Belgium*, the ECtHR has occasionally referred to the issue of preferential treatment of EU citizens as compared to other foreigners, also in situations not concerning expulsion. In *Bigaeva v. Greece*

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14 ECtHR, *Moustaquim v. Belgium*, 18 February 1991 (Appl.no. 12313/83), at para. 49.

15 ECtHR, *Moustaquim v. Belgium*, 18 February 1991 (Appl.no. 12313/83), at para. 49.

16 ECtHR, *C. v. Belgium*, 7 August 1996 (Appl.no. 21794/93).

17 ECtHR, *C. v. Belgium*, 7 August 1996 (Appl.no. 21794/93), at para. 38.

the applicant was a Russian national who at the time of the judgment had lawfully lived in Greece for 16 years.<sup>18</sup> She had attended university in Athens and obtained a Greek law degree, but was eventually denied admission to the Greek bar because she did not meet the condition, stipulated in the Greek legislation in force at the time, of having Greek nationality or the nationality of another EU Member State. The ECtHR found a violation of Article 8 ECHR (the right to private life) taken alone, but dismissed the complaint of nationality discrimination (Arts 14 and 8 ECHR). It began by stating that differences in treatment concerning access to a particular profession generally do not fall within the scope of Article 14. In this case, having already found a violation of Article 8, the ECtHR did not have a choice but to find Article 14 applicable as well.<sup>19</sup> However, it held that it fell within the margin of appreciation of the Greek authorities to decide that lawyers had to have Greek nationality or the nationality of another EU Member State. The ECtHR took into account that the profession of a lawyer, although a liberal profession, involves the exercise of certain public functions relating to the administration of justice. The Greek authorities were therefore granted a large area of discretion to regulate this field.<sup>20</sup>

The case of *Ponomaryovi v. Bulgaria* concerned two Russian teenagers who were living in Bulgaria and were excluded from secondary education because they could not pay the required school fees.<sup>21</sup> Under the Bulgarian National Education Act the applicants had to pay sums equivalent to € 800-1300 per year, whereas school enrolment was free of charge for Bulgarian nationals and for certain categories of foreigners including, *inter alia*, holders of a permanent residence permit and minor children of EU migrant workers. The latter exemption had been included to implement EEC Council Directive 77/486 on the education of children of migrant workers when Bulgaria joined the

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18 ECtHR, *Bigaeva v. Greece*, 28 May 2009 (Appl.no. 26713/05).

19 It is long-standing ECtHR case law that Art. 14 ECHR applies to differences in treatment that fall within the ambit of a substantive convention right (e.g. ECtHR, *Burden v. the United Kingdom* (Grand Chamber), 29 April 2008 (Appl.no. 13378/05), at para. 58). Given that the refusal to admit Bigaeva to the bar had been found to violate Art. 8, there could be no doubt that the facts of the case fell within the ambit of that provision.

20 ECtHR, *Bigaeva v. Greece*, 28 May 2009 (Appl.no. 26713/05), at para. 40.

21 ECtHR, *Ponomaryovi v. Bulgaria*, 21 June 2011 (Appl. no. 5335/05).

EU.<sup>22</sup> Taking into account the importance of the right to education, which is directly protected by the ECHR, the ECtHR found that Bulgaria had discriminated against the applicants on the grounds of their nationality and immigration status and had violated Article 14 in conjunction with Article 2 First Protocol ECHR. However, the ECtHR also noted in general terms that states may restrict access to ‘resource-hungry public services – such as welfare programmes, public benefits and health care by short term and illegal immigrants, who, as a rule, do not contribute to their funding’. It continued to say that a state may also ‘in certain circumstances, justifiably differentiate between different categories of aliens residing in its territory. For instance, *the preferential treatment of nationals of Member States of the European Union [...] may be said to be based on an objective and reasonable justification, because the Union forms a special legal order, which has, moreover, established its own citizenship*’ [emphasis added].<sup>23</sup> The ECtHR thus confirmed its reasoning in *Moustaquim* and *C. v. Belgium*, to which it also referred.

It follows from the *Bigaeva* and *Ponomaryovi* judgments that preferential treatment of EU citizens as compared to TCNs can be justified in other contexts than expulsions or even migration policy. Although it is clear from *Ponomaryovi v. Bulgaria* that states have a considerably smaller margin of appreciation where access to (primary and secondary) education is concerned, the ECtHR accepts that under certain circumstances EU citizens may receive favourable treatment as regards access to public benefits. Nevertheless, TCNs who are long-term lawful residents of the host state are often entitled to equal treatment with the nationals of those states. This is discussed in the following section.

#### *2.4. Equal treatment of TCNs compared to a state’s own nationals: the social security cases*

The cases discussed above show that the ECtHR has sometimes readily accepted differential treatment on the grounds of nationality where this treatment resulted from the application of EU law. At the same time,

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22 ECtHR, *Ponomaryovi v. Bulgaria*, 21 June 2011 (Appl. no. 5335/05), at para. 32.

23 ECtHR, *Ponomaryovi v. Bulgaria*, 21 June 2011 (Appl. no. 5335/05), at para. 54.

however, the ECtHR established a line of case law holding that differences in treatment based exclusively on the ground of nationality can only be justified by ‘very weighty reasons’. This was first decided in the well-known judgment of *Gaygusuz v. Austria*, concerning the access of a Turkish national to unemployment benefits.<sup>24</sup> Gaygusuz was not eligible for benefits due to his foreign nationality and claimed discrimination on the grounds of national origin. Unlike in *Moustaquim* and *C. v. Belgium*, the ECtHR found that Gaygusuz, who had long-term residence in Austria, could be compared to nationals of that state. In this regard, the ECtHR pointed out that Gaygusuz was lawfully resident in Austria, had worked there and had contributed to the unemployment insurance fund in the same capacity and on the same basis as Austrian nationals.<sup>25</sup> Therefore, and in the absence of a sufficient justification for a difference in treatment, the ECtHR found that he should have been entitled to receive emergency unemployment assistance on an equal footing with Austrian nationals.

In subsequent judgments the ECtHR confirmed that differences in treatment based exclusively on nationality require very weighty reasons to be justified. The case of *Koua Poirrez v. France* concerned an Ivory Coast national who had been adopted by a French national at the age of 21.<sup>26</sup> His application for an allowance for disabled adults was denied on the grounds that he did not have French nationality or the nationality of a state having signed a reciprocity agreement with France. The ECtHR held, in contrast with the *Moustaquim* judgment, that France could not give preferential treatment to its own nationals and/or nationals of countries with which a reciprocity agreement had been signed and found a violation of Article 14 in conjunction with Article 1 First Protocol ECHR.<sup>27</sup> It did so also in the case of *Luczak v. Poland*, concerning a French national who was denied access to the Polish Farmers’ Social Security Fund.<sup>28</sup> Like in *Gaygusuz v. Austria*,

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24 ECtHR, *Gaygusuz v. Austria*, 16 September 1996 (Appl.no. 17371/90), at para. 42.

25 ECtHR, *Gaygusuz v. Austria*, 16 September 1996 (Appl.no. 17371/90), at para. 46.

26 ECtHR, *Koua Poirrez v. France*, 30 September 2003 (Appl.no. 40892/98).

27 ECtHR, *Koua Poirrez v. France*, 30 September 2003 (Appl.no. 40892/98), at para. 49. While it is possible that the Court’s decision was influenced by the applicant’s disability (disability being a prohibited discrimination ground), no mention of this is made in the judgment.

28 ECtHR, *Luczak v. Poland*, 27 November 2007 (Appl.no. 77782/01).

the ECtHR stressed that Luczak was permanently resident in Poland, had previously been affiliated to the general social security scheme and paid contributions to the farmers' scheme.<sup>29</sup> The ECtHR took into account several other considerations, including that Luczak had been left without any social security cover and that the government had not convincingly shown that the applicant's exclusion from the farmers' scheme served the general interest.<sup>30</sup> The case of *Andrejeva v. Latvia* concerned a former national of the Soviet Union who had lived in Latvia since the age of 12 and had obtained lawful residence there as a 'permanently resident non-citizen' after the Soviet Union's demise.<sup>31</sup> The periods she had spent working outside Latvia had not been taken into account in the calculation of her pension benefits, while this would have been the case if she had had Latvian citizenship. The ECtHR agreed with the applicant that this difference in treatment violated Article 14 together with Article 1 First Protocol. The ECtHR stressed that the applicant was stateless and therefore did not have stable legal ties with any state other than Latvia.<sup>32</sup> Like in *Koua Poirrez*, the ECtHR dismissed the Latvian government's argument that the calculation of periods of employment abroad was a matter to be addressed through bilateral agreements and stated that 'by ratifying the Convention, the respondent State undertook to secure to 'everyone within [its] jurisdiction' the rights and freedoms guaranteed therein. Accordingly, in the present case the Latvian State could not be absolved of its responsibility under Article 14 of the Convention on the ground that it is not or was not bound by inter-State agreements on social security with Ukraine and Russia.<sup>33</sup>

Lastly, *Fawsie v. Greece* and *Saidoun v. Greece* concerned applicants who had been granted refugee status in the respondent state.<sup>34</sup> These cases again concerned the denial of a family allowance, which was reserved for Greek nationals and refugees of Greek origin and later also for nationals of other

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29 ECtHR, *Luczak v. Poland*, 27 November 2007 (Appl.no. 77782/01), at para. 49.

30 ECtHR, *Luczak v. Poland*, 27 November 2007 (Appl.no. 77782/01), at paras. 52 and 59.

31 ECtHR, *Andrejeva v. Latvia* (Grand Chamber), 18 February 2009 (Appl.no. 55707/00).

32 ECtHR, *Andrejeva v. Latvia* (Grand Chamber), 18 February 2009 (Appl.no. 55707/00), at para. 88.

33 ECtHR, *Andrejeva v. Latvia* (Grand Chamber), 18 February 2009 (Appl.no. 55707/00), at para. 90.

34 ECtHR, *Fawsie v. Greece*, 28 October 2010 (Appl.no. 40080/07); ECtHR, *Saidoun v. Greece*, 28 October 2010 (Appl.no. 40083/07).



Member States belonging to the EU or the European Economic Area (EEA). The allowance aimed to address the demographic predicament faced by Greece. However, the ECtHR, again requiring very weighty reasons for the difference in treatment, was not persuaded that the demographic aims pursued by Greece justified the exclusion of TCNs. Interestingly, the fact that benefits were also granted to EU and EEA nationals was not seen by the ECtHR as a legitimate differentiation stemming from the ‘special legal order’ of the EU, but as an indication that it was not necessary to restrict the circle of beneficiaries to Greek nationals.

### *2.5. Return to Dhabhi: equal treatment for EU citizens and TCNs?*

The previous subsections analysed ECtHR case law to see how the ECtHR deals with differences in treatment between EU citizens and TCNs. Subsections 2.2 and 2.3 showed that the ECtHR allows such distinctions in certain situations, including the expulsion of lawfully resident aliens for public order reasons, access to the profession of a lawyer and access to ‘resource-hungry public services’. In *Moustaquim, C. v. Belgium* and *Ponomaryovi* the ECtHR specifically stated that the preferential treatment of EU citizens could be justified by the fact that the EU constitutes a ‘special legal order’ with its own citizenship. Meanwhile, subsection 2.4 showed that on other occasions the ECtHR left no or very little room for states to differentiate on the grounds of nationality and required very weighty reasons for such differentiations to be justified. In several cases (e.g. *Koua Poirrez*) the ECtHR expressly dismissed the argument that equal treatment could be limited to the nationals of states with which the respondent state had concluded bilateral agreements, whereas in *Fawsie* and *Saidoun* the inclusion of EU and EEA nationals in the benefit scheme was used by the ECtHR as support for its finding that it was not necessary to limit the scheme to Greek nationals.

In the *Dhabhi* case, discussed at the beginning of this section, the ECtHR found a violation of Article 14 because the difference in treatment between TCNs and EU nationals was not based on a sufficient justification. Does this mean that such differences in treatment can no longer be justified on the ground of the EU being a ‘special legal order’, as the ECtHR held in earlier

cases? Looking at the broader body of ECtHR case law, it appears that the Court relied on the ‘special legal order’ argument in cases where there was no obligation, under Article 14 ECHR, to grant TCNs equal treatment *with the state’s own nationals*. In such cases, where states are allowed to differentiate between foreigners and their own nationals, they may also differentiate between different categories of foreigners and hence grant preferential treatment to EU citizens from other Member States (e.g. they may grant benefits to EU citizens shortly upon their arrival or regardless of meeting certain income standards while TCNs would have to first obtain long-term or unconditional residence). On the other hand, the case law discussed in subsection 2.4 shows that there are situations where foreign nationals must be granted treatment which is equal to the state’s nationals. In such cases, unless EU citizens are granted preferential treatment even compared to the state’s own nationals (so-called ‘reverse discrimination’), equal treatment will have to be ensured for nationals, EU citizens and TCNs alike. It appears from the case law that an important factor weighing in favour of treating foreigners on a par with nationals is long-term lawful residence.<sup>35</sup> However, the case for equal treatment is also stronger where the applicant is stateless or has refugee status.<sup>36</sup> Moreover, the room for differentiation appears to depend on the nature of the right at stake: in *Moustaquim*, which concerned expulsion, the ECtHR accepted that the applicant was treated differently from EU nationals, although he had been lawfully resident since the age of one. On the other hand, in *Ponomaryovi* the margin of appreciation for the state was narrow (partly) because the right to education was at stake.<sup>37</sup>

35 See also ECtHR, *Niedzwiecki v. Germany*, 25 October 2005 (Appl.no. 58453/00) and ECtHR, *Okpisz v. Germany*, 25 October 2005 (Appl.no. 59140/00).

36 See ECtHR, *Andrejeva v. Latvia* (Grand Chamber), 18 February 2009 (Appl.no. 55707/00), ECtHR, *Fawsie v. Greece*, 28 October 2010 (Appl.no. 40080/07); ECtHR, *Saidoun v. Greece*, 28 October 2010 (Appl.no. 40083/07) (discussed in 2.4). See also ECtHR, *Bah v. the United Kingdom*, 27 September 2011 (Appl.no. 56328/07), at paras. 45 and 47.

37 It is not clear to what extent the residence status of the applicants played a role in *Ponomaryovi*: although they did not have lawful residence at the time of the difference in treatment, they had been long-term lawful residents of Bulgaria until they turned 18. In ECtHR, *Anakomba Yula v. Belgium*, 10 March 2009 (Appl.no. 45413/07), the ECtHR found a violation of Arts 14 and 6 ECHR, despite the applicant’s unlawful residence status, because of the importance of the right involved.

Concerning the judgment in *Dhabbi*, it remains unclear why the ECtHR chose to use EU nationals as the comparator instead of (only) Italian nationals who, as it appears from the facts of the case, were also entitled to the family allowance at stake. Nevertheless in *Dhabbi*, as in *Gaygusuz* and *Luczak*, the ECtHR stressed that the applicant had held a residence and work permit, had been insured by the National Institute for Social Security and had paid contributions in the same way as employees who were nationals of an EU Member State. The ECtHR added that the applicant was not a short-term or irregular migrant and could not be excluded from family benefits on those grounds.<sup>38</sup>

### 3. EU law and the principle of non-discrimination based on nationality

#### 3.1. Equality clauses in EU migration law: Tampere and beyond

Within the EU framework, EU citizens and their family members (including TCNs) have a strong legal position which finds its origin in the principle of freedom of movement and the rights laid down in Directive 64/221, later replaced by the Citizenship Directive 2004/38.<sup>39</sup> With the definition of EU citizenship in the Maastricht Treaty and the following case law of the CJEU, the protection of EU citizens, with its current legal basis in Article 20 TFEU, became closely connected to their nationality. This means, as explained above, that EU citizenship may function as the sole justification for the differentiation between EU citizens and TCNs residing in Member States. Early instruments of asylum and migration law in the EU, adopted between 1990 and 1999, were generally aimed at controlling and preventing migration and thus strengthened this 'divide' between EU citizens and non-EU citizens. In the Tampere Conclusions of 1999, including the five-year programme for a common immigration policy, the Member States underlined for the first time the importance of fair and equal treatment of legally residing TCNs in the EU.<sup>40</sup> According to these conclusions, long-

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38 ECtHR, *Dhabbi v. Italy*, 8 April 2014 (Appl.no. 17120/09), at para. 52.

39 Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ L 158 p. 77).

40 Tampere European Council, 15-16 October 1999, Presidency Conclusions SN 200/99.

term resident TCNs should be granted rights ‘as near as possible’ to those of EU citizens to ensure their integration in the EU. This goal of giving legally residing TCNs rights which are ‘comparable’, respectively ‘as near as possible’, to those enjoyed by EU citizens was laid down in the preambles to Directive 2003/86 on Family Reunification and Directive 2003/109 on long-term resident third-country nationals.<sup>41</sup> Although the importance of non-discrimination and the right to equality for TCNs has been emphasized in later EU policies,<sup>42</sup> the Tampere goal of giving TCNs rights equal to those of EU citizens seems to have been abandoned. Or in the words of Carrera: ‘the excitement about the potentials of the Tampere Programme gradually became a shared nostalgia’.<sup>43</sup>

Where initially the purpose of equal treatment was clearly connected to the protection of human rights or fair treatment of TCNs, in more recent instruments the EU legislator applies the right to equal treatment more as a tool to attract highly-skilled migrant workers or researchers.<sup>44</sup> In other words, the goal of strengthening the position of those ‘within’ the EU changed into the goal of attracting a selected group of migrants from ‘outside’ the EU. Furthermore, the equality clauses which have been included in the different EU instruments leave the Member States with a wide discretionary power.<sup>45</sup> Especially within the area of social security and social benefits, we see that EU laws, either by vague definitions, or references to national laws, allow Member States to limit the scope of protection of equality. For example, Article

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41 Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ L 251 p.12), at recital 3, and Directive 2003/109 of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ L 16 p. 44), at recital 2.

42 See for example the European Commission, *European Agenda for the Integration of third country nationals*, 20 July 2011, COM (2011) 455, at point 8.

43 See CARRERA 2014, at p. 153.

44 See for example, Art. 14 of the Blue Card Directive, Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (OJ L 155 p.17), Art. 12 of the Single Permit Directive, Directive 2011/98/EU of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (OJ L 343 p.1), and recital 15 of the Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research (OJ L 289 p. 15).

45 MORANO-FOADI and DE VRIES 2012, at p. 36 ff.

11 (1)(d) of Directive 2003/109 on long-term resident TCNs includes a right to equal treatment in the fields of social assistance and social protection but Article 11 (4) grants the Member States a discretionary power to limit such equal treatment to ‘core benefits’. This discretionary power was limited by the CJEU in the judgment *Kamberaj*, where it emphasized that a derogation from the right of equal treatment in this field should be interpreted strictly, in order to safeguard the rights of TCNs to ‘social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources’ as protected in Article 34 of the EU Charter on Fundamental Rights.<sup>46</sup> The CJEU, however, did not answer the preliminary question of the Italian court which specifically addressed the meaning of Article 21 (2) in the Charter on the right to non-discrimination based on nationality, thereby avoiding, as such, a clear interpretation of the right to equality for long-term residents.<sup>47</sup> But also EU laws on ‘economically attractive migrants’, such as the Blue Card Directive 2009/50 on highly qualified workers, include a wide discretionary power with regard to the implementation of its equality clauses.<sup>48</sup> First, the Blue Card Directive only ensures full equal treatment with regard to payment between nationals of the Member States and EU Blue Card holders ‘when they are in a comparable situation’. Second, the rights of Blue Cardholders to study and to obtain maintenance grants and loans, and procedures for obtaining houses may be limited. Third, except for the freedom of association for workers and employers and the right of mutual recognition of qualifications and certificates, the right to equal treatment of a Blue Card holder may be restricted if he/she moves to a second Member State.

Considering the principle of equality in practice, reports of the European Commission establish that equality clauses have been implemented very

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46 Case C-571/10, *Kamberaj v. Istituto per l’Edilizia sociale della Provincia autonoma di Bolzano and others*, [2012], RV 2012, no. 38, annotation Groenendijk, at paras. 86, 91. The case dealt with the differential treatment of an Albanian national in Italy with regard to social benefits for housing, and the question whether this was contrary to Article 11 (1) (d) Directive 2003/109 of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ L 16 p. 44).

47 See DE VRIES 2013.

48 Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (OJ L 155 p.17), see at recital 16.

differently by the Member States. For example, in the report of 2011 on the application of Directive 2005/71 on TCN researchers, the Commission found that only five countries incorporated in their national laws exactly the same wording provided by the Directive, whereas 17 countries made use of general anti-discrimination laws, prohibiting discrimination only on the grounds of sex, or racial and ethnic origin.<sup>49</sup> In the report on the implementation of the Blue Card Directive, the Commission refers to a 'variation of the scope of application' of the equal treatment provisions by the different Member States.<sup>50</sup> Also with regard to Directive 2004/83 or the Qualification Directive on the protection of refugees and beneficiaries of international protection, the European Commission concluded in 2010 that equal treatment provisions were not or only partially implemented.<sup>51</sup> On the other hand, the reports of the Commission also establish that sometimes Member States grant TCNs equal treatment, even if this is not provided in EU law. For example, in the report on the Students Directive 2004/114, the Commission points out that some Member States grant students the same rights as their own nationals, even if this Directive does not include an equality clause.<sup>52</sup>

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49 Commission Report on the application of Directive 2005/71/EC on a specific procedure for admitting third-country nationals for the purposes of scientific research, COM (2011) 901, 20 December 2011, at p. 7.

50 Commission Communication on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, COM (2014) 287, 22 May 2014, at p. 9.

51 Directive 2004/83 of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ L 304 p.12). See the Commission Report on the application of directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, COM (2010) 314, at p. 14.

52 Commission Report on the application of Directive 2004/114/EC on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, COM (2011) 587. Both Portugal and Spain used Art. 24 of this Directive, which allows Member States not to take into account the time during which the student has resided in their territory for the purpose of granting further rights to TCN students, granting these persons the same economic, social and civil rights as Portuguese citizens, respectively granting social security rights under the same conditions as Spanish nationals.

### 3.2. *Article 18 TFEU and TCNs: case law of the CJEU*

Considering the differentiated and fragmented approach with regard to the right of equality of TCNs in EU law, the question arises whether in these situations a general EU right to non-discrimination can or should be applied. In 2000, the EU Member States adopted their own catalogue of human rights in the Charter on Fundamental Rights of the European Union. This Charter, which became binding in 2009, when the Lisbon Treaty came into force, includes a right to non-discrimination on the basis of nationality in Article 21 (2). This article provides for the same text as Article 18 TFEU (or the former Article 12 TEC) and prohibits any discrimination on grounds of nationality ‘within the scope of application of the Treaties, and without prejudice to any special provision contained therein’. According to one group of authors, Article 18 TFEU (and Art. 21 (2) of the Charter) only extends to EU nationals and cannot be applied to TCNs, referring to the fact that this article finds its origin in Article 12 of the EC Treaty, the scope of which was limited to EU citizens.<sup>53</sup> The inclusion of this non-discrimination clause in part 2 of the TFEU under the title ‘non-discrimination and citizenship of the Union’ implies, according to these authors, that it applies to EU citizens only. Other scholars, supporting the view that Article 18 TFEU does extend to TCNs, argue in the first place that the general non-discrimination clause in Article 19 TFEU (which clearly applies to TCNs) has been included in the same section as Article 18 TFEU and therefore it cannot be held that the title ‘non-discrimination and citizenship of the Union’ is to be read as limiting the scope of the provisions within this section.<sup>54</sup> They also point out that exactly the same text of Article 18 TFEU has been included in Article 21 (2) the Charter and that this provision, just as the whole Charter except for Title V on the citizenship rights of EU nationals, does not differentiate between EU

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53 See WIESBROCK 2010, at p. 167.

54 See MORANO-FOADI and DE VRIES 2012, at p. 23.

and non-EU nationals.<sup>55</sup> The explanatory memorandum of the Charter only mentions that Article 21 (2) is based on the former Article 12 EC.<sup>56</sup> Until now, the CJEU has not provided clarity on the meaning of Article 18 TFEU. In 2009, in the *Vatsouras* judgment, the CJEU stated that Article 12 EC (now 18 TFEU) only concerns situations in which a national of one Member State would suffer discriminatory treatment in relation to nationals of another Member State solely on the basis of his/her nationality and ‘is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries’.<sup>57</sup> The conclusion in *Vatsouras* seems to support the limited interpretation of the first group of authors; however, it should be underlined that this judgment dealt with the legal situation before the entry into force of the Lisbon Treaty and the EU Charter on Fundamental Rights. Furthermore, it is important to note that in the *Vatsouras* case, Article 18 TFEU was invoked by an EU citizen who was excluded from social benefits which were solely granted to nationals of non-EU countries being asylum seekers with a temporary residence permit in the host Member State. This differential treatment between EU citizens and asylum seekers finds its basis in international law obligations protecting refugees and asylum seekers.<sup>58</sup> Therefore, instead of differentiation based on nationality, this case concerned in our view a legitimate differentiation between statuses. In 2013, in the judgment *Radia Hadj Hamed*, the CJEU was less explicit on the limited meaning of Article 18 TFEU.<sup>59</sup> Dealing with differential treatment between legally residing TCNs and the nationals of a Member State with regard to the granting of family benefits, the CJEU held that Article 18 TFEU could not be applied ‘as it stands’ to a situation where a TCN is in possession of a residence permit in a Member State, pointing to the background of Article 18 TFEU which concerns Union citizenship.

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55 Art. 21 (2): ‘Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.’

56 Note from the Praesidium, Charte 4473/00 Convent 49, Brussels 11 October 2000. These explanations have no legal value and are only intended to clarify the provisions of the Charter.

57 Case C-22/08, *Vatsouras v. Arbeitsgemeinschaft Nürnberg*, [2009] ECR I-04585, at para. 52.

58 See SLINGENBERG 2014.

59 Case C-45/12, *Radia Hadj Ahmed v. Office national d’allocations familiales pour travailleurs salariés*, [2013], at para. 41.



Using the wording ‘as it stands’ (in German: ‘nicht ohne Weiteres’; French: ‘telle quelle’; Dutch: ‘niet zonder meer’) the CJEU seems to indicate that Article 18 TFEU could apply to TCNs, but only if their situation is covered by EU law. In this case, the CJEU found that the person invoking Article 18 TFEU (and Articles 20 and 21 of the Charter) did not fall within the categories of persons protected by EU law: neither the mother nor her daughter, for whom she applied for family benefits, fell within the scope of Directive 2004/38 or Regulation 1612/68 or of Directive 2003/109.<sup>60</sup> In the following section, we address two judgments of the CJEU (and of one of a national court) which, even if the CJEU did not apply Article 18 TFEU to TCNs, in our view show how this provision could be relevant to determining the legal position of TCNs in areas not covered by the existing equal treatment clauses.

### 3.3. *Lopes da Silva: article 18 TFEU, integration and the European Arrest Warrant*

The judgment in *Lopes da Silva* deals with the implementation of Framework Decision 2002/584 on the European Arrest Warrant (EAW).<sup>61</sup> This case did not concern migration law, nor the position of a TCN. However, what we intend to point out here is that the reasoning of the CJEU as to why Article 18 TFEU could be invoked by an EU citizen with regard to the execution of an arrest warrant seems to be also applicable to legally residing TCNs. The question raised in *Lopes da Silva* concerned the optional non-execution clause in Article 4(6) of the Framework Decision which allows Member States to refuse to execute an arrest warrant where the requested person ‘is staying in, or is a national or a resident of, the executing Member State’. *Lopes da Silva*, a Portuguese citizen residing at the time of the EAW in France, claimed that as France did not surrender its own nationals, his extradition to Portugal should be refused equally on the basis of Article 18 TFEU. The CJEU found that although Article 4(6) allows limitations to the optional clause to refuse to surrender a national or resident of the executing state, Article 18 TFEU

60 Case C-45/12, *Radia Hadj Ahmed v. Office national d’allocations familiales pour travailleurs salariés*, [2013], at para. 54.

61 Case C-42/11, *Lopes Da Silva*, [2012].

prohibits a Member State from excluding automatically and absolutely from its scope ‘nationals of other Member States who are staying or resident in its territory, irrespective of their connections with it’. The CJEU emphasized the role of national courts with regard to the refusal of surrender ‘to examine whether, in the main proceedings, there are sufficient connections between the person and the executing Member State – in particular family, economic and social connections – such as to demonstrate that the person requested is integrated in that Member State, so that he is in fact in a comparable situation to that of a national’.<sup>62</sup> In other words, the CJEU does not use the status of EU citizenship as such as the basis for equal treatment between nationals of different Member States, but the (family, economic and social) connections of the person concerned with the host country, which factors are to be assessed by the national courts in each individual case.<sup>63</sup>

Even if the CJEU has not yet ruled on this matter, in 2013 a Dutch court applied Article 18 TFEU to a long-term resident TCN whose surrender was requested by another Member State on the basis of an EAW.<sup>64</sup> The reasoning of the Amsterdam court is admirably simple: as TCNs fall within the scope of the Framework Decision on the EAW, Article 18 TFEU, in combination with the exclusion clause, should be applied to them. In the words of the court: ‘in the area of freedom, security and justice, which the EU intends to be, it would be incongruous (translated from Dutch: ‘ongerijmd’, EB, KdV) that in the field of judicial cooperation EU law would on the one hand allow Member States to limit the rights of persons residing within their territory irrespective of their nationality, and on the other hand would not allow a claim based on the right to non-discrimination of persons without the nationality of a Member State’.

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62 Case C-42/11, *Lopes Da Silva*, [2012], at paras. 52-58.

63 Whereas the freedom of movement was explicitly referred to by the CJEU in the case of Case C-123/08, *Wolzenburg*, [2009] ECR I-09621, at para. 48, and by AG Mengozzi in the opinion for the *Lopes da Silva* case (Case C-42/11, *Lopes Da Silva*, [2012], at para. 48), to justify the necessity of the non-discrimination of EU citizens with regard to the refusal of the EAW execution, in the *Lopes da Silva* judgment itself the CJEU did not refer to the freedom of movement at all and only used the argument of integration in the light of Article 18 TFEU. See further on the status of EU citizens, VAN EIJKEN 2014.

64 District court of Amsterdam, 23 July 2013, accessible via [www.rechtspraak.nl](http://www.rechtspraak.nl): ECLI:NL:2013:4914.

### 3.4. *Commission v. the Netherlands: comparability and proportionality*

In *Commission v. the Netherlands*, the CJEU addressed the question of whether the administrative charges to be paid by non-EU citizens for the issuing of residence permits in the Netherlands were in accordance with Directive 2003/109 on long-term resident TCNs.<sup>65</sup> Although the Commission did not invoke the application of Article 18 TFEU, it compared the national rules applying to TCNs to those applying to EU citizens, in order to support its argument that the rules applying to TCNs were disproportional and therefore unlawful. The Commission argued that, taking into account the goals of Directive 2003/109, respectively Directive 2004/38, the administrative charges to be paid by TCNs and EU citizens must be comparable. Being seven to 27 times higher than those imposed on EU citizens, the Commission found that the Dutch charges on TCNs were disproportionate and would hinder the exercise of their rights under Directive 2003/109. In its judgment, the CJEU confirmed that the administrative charges applied by the Netherlands to long-term resident TCNs were excessive and disproportionate. Unlike the Commission, the CJEU only compared the charges applied by the Dutch authorities to TCNs to those applied to Dutch citizens. Like the Commission, however, the CJEU applied a non-discrimination test which could have been based on Article 18 TFEU. Finding that the Dutch charges applied to TCNs were disproportionate compared to those applied to nationals and liable to create an obstacle to the exercise of the rights conferred by Directive 2003/109, the CJEU found it was no longer necessary to examine the Commission's argument with regard to the comparability between the Directive 2003/109 and Directive 2004/38.<sup>66</sup>

## 4. Conclusion

The prohibition of discrimination on the ground of nationality is gaining importance as a norm of international and European (human rights) law. Whereas, for EU citizens, the prohibition of nationality-based discrimination

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65 Case C-508/10, *Commission v. the Netherlands*, [2012], at paras. 45-49.

66 Case C-508/10, *Commission v. the Netherlands*, [2012], at paras. 77-78.

is a core element of EU law, through Article 14 ECHR and secondary EU law this norm is gradually being extended to TCNs. The question raised in the introduction to this article was whether, given these developments, it is time to (re)interpret Article 18 TFEU so as to apply also to TCNs. Such an interpretation would allow TCNs to rely on this provision where they are treated differently on account of their nationality in any area falling within the scope of the EU treaties.

It was shown in subsection 2.2 that the ECtHR has occasionally accepted differences in treatment between EU citizens and TCNs because of the EU being a 'special legal order'. In these cases, the ECtHR accepted that certain (non-discrimination) rights granted by EU law were reserved for EU citizens and not extended to TCNs. Article 14 ECHR thus does not oblige the EU, or the Member States, to expand the protection of Article 18 TFEU to TCNs. Nevertheless, Article 14 ECHR itself may stand in the way of differences in treatment between a state's own nationals and foreign nationals, be they EU citizens or TCNs. Article 18 TFEU was originally intended to enable the free movement of EU citizens in the context of economic integration and, later, EU citizenship. However, the incorporation in the Union's legal order of fundamental rights protection and the principle of non-discrimination (as reflected in Article 2 TEU and in Article 21 of the Charter) would support a broader understanding of this provision, expanding its protection to situations where nationality-based discrimination presents an obstacle to the enjoyment of equality and fundamental rights (including the right to family life, data protection, and the right to effective remedies) by TCNs.

Such an approach to Article 18 TFEU would not imply that all differences in treatment between TCNs and nationals of the Member States would henceforth be prohibited. The discussion of ECtHR case law in section 2 shows that Article 14 ECHR applies to differential treatment based on nationality but that such differences in treatment do not amount to prohibited discrimination if based on a reasonable and objective justification. If Article 18 TFEU were to apply to TCNs, the approach of the ECtHR could serve as guidance for its application at least in those fields that are also covered by the ECHR. This would also not require all TCNs, regardless of their legal status, to be granted free movement and (EU) citizenship

rights in the same way as EU nationals. The aim of European integration and reciprocity between the Member States could still justify preferential treatment by those Member States of each other's citizens, as compared to TCNs. However, if Article 18 TFEU were to apply this would allow national courts and the CJEU to always assess whether such a justification is relevant to the differential treatment at hand. A more consistent and uniform approach with regard to the application of the non-discrimination principle to TCNs is also necessary to enhance mutual trust between Member States, which is one of the underlying pillars of the cooperation within the field of asylum, migration and criminal law.<sup>67</sup>

Finally, the judgments discussed in section 3 provide some indications that the CJEU may be ready to apply Article 18 TFEU in cases involving TCNs, whereas at least one Dutch court has already done so. Also, the *Lopes da Silva* judgment illustrates (see 3.3) that the equal treatment of EU citizens with a Member State's own nationals may be based on reasons that are equally pertinent to the fair treatment of TCNs, which is one of the objectives of the EU's immigration policy (Article 79 TFEU). The application of Article 18 TFEU may lead to a more consistent approach in this regard, but also with regard to the implementation by Member States of current non-discrimination clauses in EU migration law.

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67 See the CJEU in Case C-187/01 and 384/01, *Gözütok and Brugge*, [2003] ECR I-01345 dealing with the EAW and in Case C-411/10 and 493/10, *NS v. SSHD*, [2011] ECR I-13905 dealing with the Common European Asylum System.

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# A tale of two boys

Matthijs de Blois

*'Educate a child according to his path, ...'*<sup>1</sup>

## 1. Introduction

Two boys: one in Amsterdam and one in London. Their parents applied for their sons to be admitted to orthodox Jewish secondary schools: the *Maimonides Lyceum* in Amsterdam and the *JFS* (formerly called the *Jews' Free School*) in London. In both cases the boys were not admitted because they did not comply with standards applied by the schools. The boys were not considered to be Jewish according to the *Halacha*, the Jewish law, as applied by the Boards of the schools. This position was in conformity with guidelines of the rabbinical authorities concerned. The reasons were similar. Both boys were sons of a mother who was not considered to be Jewish according to orthodox Jewish standards. Their mothers, both married to Jewish husbands, had a non-Jewish (Roman Catholic) background. They had both converted to Judaism under the auspices of non-orthodox rabbis. These conversions were considered not to be valid by orthodox standards. Because their mothers were not considered to be Jewish, the boys were not Jewish either. According to Jewish law one is Jewish if one's mother is Jewish. This is the so-called *matrilineal test*. Alternatively, one may become Jewish by conversion to Judaism. The boys themselves had not converted. The parents did not acquiesce in the decisions of the school authorities. They resorted to the courts. In both cases they went all the way through the national judicial system, up to the highest courts in both countries. On 22 January 1988 the Dutch Supreme Court ruled in the *Maimonides* case that the School Board was entitled to follow its admission policy because it was based on a consistent application of the rules derived from the religious foundation of the school.<sup>2</sup> The Supreme Court of the

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1 Mishlei/Proverbs 22:6.

2 HR 22 January 1988, ECLI:NL:HR:1988:AD0151, *Netherlands Yearbook of International Law*, Vol. XXII 1991, p. 410 (Maimonides); *NJ*, 891 m.n. E.A.A.; *NJCM-Bulletin: Nederlands tijdschrift voor de mensenrechten*, Vol. 13, No. 3, 1988 3, pp. 214-220, m.n. Reiner de Winter. See also DE BLOIS 2007.

UK, on the other hand, concluded on 16 December 2009, by majority, that the admission policy of the *JFS* qualified as direct racial discrimination, contrary to the Race Relations Act 1976.<sup>3</sup> In this contribution I will reflect on the background of these different outcomes and tentatively explore some possible explanations, while realizing that, without inside information, it is impossible to come up with clear evidence for any of the options. I have thought of three possible ‘explanations’. Maybe the contradictory outcomes are simply the consequence of the differences between the applicable legal standards. Another possibility is that the differences in the historical backgrounds of the freedom of religion and education in both countries have played a decisive role. Finally, the developments in the Western world as to the relationship between law, society and religion in the period between 1988 and 2009 could have been the reason why the outcomes in the *Maimonides* and the *JFS* cases are diametrically opposed to each other. We will see.

## 2. Legal standards

### 2.1. *Maimonides*

In the *Maimonides* case the father of the boy concerned (Aram) held that the Board of the school, by not admitting his son, had acted unlawfully in terms of the central tort provision of the Civil Code (at that time Article 1401). In that connection he referred to several national and international provisions against discrimination: Article 1 of the Dutch Constitution, Articles 3 and 14 of the European Convention on Human Rights (ECHR) and Article 3 (b) of the Convention against Discrimination in Education.<sup>4</sup> Next to that he also invoked Article 2 of the First Protocol. This provision obliges the State, in the exercise of its functions in relation to education, to respect the right of parents to ensure that the education and teaching of their children is in conformity with their own religious and philosophical

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3 *R (on the application of E) v. The Governing Body of JFS and the Admissions Appeal Panel of JFS and others* [2009] U.K.S.C. 15. See also WEILER 2010; KIVIORG 2010; SCHWARZ 2010; MCCRUDDEN 2011; ORDENE 2012; PETTY 2014.

4 The text of the Convention against Discrimination in Education was adopted by the General Conference of the UNESCO on 14 December 1960. It entered into force on the 22<sup>nd</sup> of May 1962. The Netherlands has been a State party since the 25<sup>th</sup> of June 1966.



convictions. Initially the claimant held that the admission policy was based on a racial distinction. This claim was rejected by the court of first instance (the President of the Amsterdam District Court). An appeal against this finding was dismissed by the Amsterdam Court of Appeal, having regard to the fact that descent is not exclusively decisive for the determination of the Jewishness of a person, because according to orthodox standards conversion is also possible. The claimant did not lodge an appeal in cassation against this part of the judgment on appeal. The Supreme Court concluded that ‘it has therefore been established as common ground between the parties that there has been no discrimination on the ground of race in the present case.’<sup>5</sup> This, notwithstanding the fact, referred to by the Advocate General in this case, that on behalf of the claimant in the oral proceedings before the Supreme Court the accusation of racial discrimination was repeated. Apart from the specific reference to racial discrimination, the claimant held that the School, by not admitting his son, had acted unlawfully against him, because he, as a parent, had the fundamental right to have his son follow the Jewish education he considered suitable for him. The other party in the conflict, the Foundation that had established the *Maimonides* Secondary School, also invoked human rights provisions: Article 23 (freedom to provide education) and Article 6 (freedom of religion) of the Constitution, as well as Article 27 of the International Covenant on Civil and Political Rights (ICCPR) (the rights of minorities). This last provision did not play any role in the final judgment of the Supreme Court. In that judgment, next to Articles 23 and 6 of the Constitution, also Article 9 ECHR (freedom of religion) was applied. The focus in the procedures before the Dutch courts was the conflicting claims based on the freedom to provide education, the freedom of religion and the equality principle. In other words, the legal framework of the Dutch case is a collision of human rights. In the judgment of the Court of Appeal and also in the Opinion of the Advocate General in the procedure before the Supreme Court, the balancing of the relevant rights was decided in favour of the claimant. Arguments in favour of tipping the balance were the affinity of the father with Judaism, his interest to have his son follow education at the

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5 Para. 3.1.3 of the *Maimonides* judgment.

*Maimonides* school, the fact that there was no other orthodox Jewish school which could serve as an alternative and, finally, the fact that there were many other youngsters from the Liberal Jewish synagogue who were admitted to the school (because their mothers were considered to be Jewish). The final outcome of the case was, however, a decision by the Supreme Court in favour of the *Maimonides* Secondary school. This was because, first, the rights of parents to ensure that the education and teaching of their children is in conformity with their own religious and philosophical convictions (Article 2 of Protocol 1 and Article 23 of the Constitution) do not have horizontal effect. These rights only impose a duty on the State, while they do not create enforceable rights against a private institution, such as the school. Next to that, the Court observed that, in view of the freedom of religion, the right to provide education according to religious or other beliefs in Article 23 of the Constitution weighs so heavily that the board of the school had the right to refuse the admission of a child, in conformity with the religious criteria applied by it. That was so, even if the parents have a strong and reasonable preference for the education provided by the school, and the school is the only one providing education of this kind. The Court made only a proviso for 'exceptional circumstances', which did not occur here.<sup>6</sup>

## 2.2. *JFS*

The legal context of the *JFS* case is different. It is a judicial review procedure, initiated by the father of the boy concerned (M.), against the authorities of the *JFS*, which focused on the complaint that the *JFS* had been guilty of racial discrimination in terms of the Race Relations Act 1976. It was submitted that applying the matrilineal test implied discrimination on the basis of ethnic descent and, by that, racial discrimination, either direct or indirect. The opposite view was that the school applied religious, not racial criteria and therefore did not discriminate on racial grounds. Or, in case the submission of indirect discrimination was accepted, this was justified, because the school used proportionate means to achieve a legitimate goal. The majority of the Justices of the Supreme Court of the UK concluded that there was direct

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6 Para. 3.6 of the *Maimonides* judgment.

racial discrimination, because, in the words of Lord Philips, the President of the Court, the matrilineal test ‘focuses on the race or ethnicity of the woman from whom the individual is descended.’<sup>7</sup> He therefore concluded that this test ‘is a test of ethnic origin. By definition, discrimination that is based upon that test is discrimination on racial grounds under the Act.’<sup>8</sup> The President seems to have realized the consequences of his approach, because his conclusions were preceded by the remark that the outcome may indicate that there may be a defect in the law on discrimination. He also gave the assurance that ‘Nothing that I say in this judgment should be read as giving rise to criticism on moral grounds of the admission policy of JFS in particular or of the policies of Jewish faith schools in general, let alone as suggesting that these policies are “racist” as that word is generally understood.’<sup>9</sup> Titia Loenen aptly observed in this connection: ‘Apparently, he felt the need to distinguish the clear ‘wrong’ of racism from less objectionable distinctions on racial grounds. If anything, it shows the particular sensitivity of framing religious issues in terms of race.’<sup>10</sup> And Weiler rightly held that ‘[i]t is not every day the Chief Rabbi of Britain, Sir Jonathan Sacks, is found by the Supreme Court of the United Kingdom to be guilty of racial discrimination, but that is what happened in the recent Jewish Free School (JFS) case.’<sup>11</sup> Lord Philips represented the majority view. A minority of two Justices rejected the allegation of racial discrimination forthwith. Lord Rodger refuted the idea of racial discrimination because of the ethnic background of the boy by pointing at an appropriate comparator. In this case that would be a boy whose mother also had an Italian and Catholic background. If that mother would have been converted to Judaism under the auspices of an orthodox rabbi, he could have been admitted without any problem. This shows, according to Lord Rodger, that the criterion is religious (which is permissible for faith schools) and not racial.<sup>12</sup> Also Lord Brown observed that the differential treatment concerned ‘is plainly on the ground of religion

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7 Para. 41 of the *JFS* judgment.

8 Para. 45 of the *JFS* judgment.

9 Para. 9 of the *JFS* judgment.

10 LOENEN 2012, at p. 485.

11 WEILER 2010.

12 Para. 229 and 230 of the *JFS* judgment.

rather than race.<sup>13</sup> Two other Justices concluded that there was a case of – unjustified – indirect discrimination. The legal debate before the English courts was limited to an interpretation of the relevant provisions of the Race Relations Act. The only question was whether or not the admission policy could be qualified as racial discrimination. The possible human rights of the defendant were not seen as rights which, as a matter of fact, should be taken into account as counterbalancing interests. The religious freedom issues involved only indirectly informed the choices made by the Justices, who had to decide on the interpretation of the Race Relations Act. Lord Rodger, for example, remarked that ‘[t]he majority’s decision leads to such extraordinary results, and produces such manifest discrimination against Jewish schools in comparison with other faith schools, that one can’t help feeling that something has gone wrong.’<sup>14</sup>

### 2.3. Comparison

At first sight one might be inclined to think that the Dutch approach, focusing on the balancing of the relevant human rights, was indeed more likely to be in favour of the school. The legal issue in *Maimonides* was directly identified as an issue of colliding fundamental rights. The interests of both sides could be taken into account on an equal basis. On the other hand, in the English case, the legal framework was limited to the application of the Race Relations Act, more specifically to the question of whether or not there was a case of racial discrimination. In a case of direct discrimination, which according to the majority of the Justices of the Supreme Court was found in the *JFS* case, there was no room for balancing opposing rights or interests. That, one may think, made it easier to come to the conclusion that there was no room for the admission policy. That would be an easy explanation for the different approaches. However, as has been shown, also the balancing exercise could have led to a decision against the school, as is exemplified by the judgment of the Amsterdam Court of Appeal and the Opinion of the Advocate General. And also, the quest for a correct interpretation of

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13 Para. 245 of the *JFS* judgment.

14 Para. 226 of the *JFS* judgment.

the relevant provision of the Race Relations Act could have resulted in a decision in favour of the school, as is clear from the minority judgments in the Supreme Court of the UK. In other words, it is arguable that the legal framework, as such, cannot have been a decisive explanation for the different outcomes.

### 3. State faith schools

We probably have to dig a little deeper and to focus on the constitutional background of both legal systems concerned, especially on the relationship between the realms of politics and religion. The explanation may possibly be found in the differences between the Netherlands and the United Kingdom as to the traditional approaches to faith schools in the constitutional structure of the State, having regard to the relationship between Church and State.

#### 3.1. *The Netherlands*

The Netherlands, traditionally, had no official State Church. However, in the days of the Republic the Reformed Church was considered to be a privileged Church, which meant *inter alia* that in principle membership of this Church was a prerequisite for appointment as a public official. People outside the privileged Church, such as Roman Catholics, Mennonites and Jews, were, relatively speaking, better off in the rather tolerant Republic than in other European countries in the 17<sup>th</sup> and 18<sup>th</sup> centuries, although there was certainly not a case of equal treatment. That was only introduced after the Dutch ('Batavian') version of the French Revolution. The equal protection of citizens irrespective of their beliefs was to a great extent preserved after the Restoration which followed the departure of the French in 1813, although at that time there was, as yet, no separation of 'Church' and State. This was the result of the thorough adaptation of the Constitution in 1848. Gradually the separation of 'Church' and State became stricter, without, however, adopting the strong version prevailing in the United States or the ideology of secularity of the State, which is included in the French Constitution. The Dutch system has been qualified as a system of pluralistic cooperation.<sup>15</sup> It allows

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15 See BROEKSTEEG 2014, at p. 50.

for the manifestations of religions in the public sphere, not only individually, but also collectively. Traditionally, in Dutch society there were many collectivities which on the basis of religious or other ideological principles were active in society, claiming *sphere sovereignty* against the State. The Dutch state has always been willing to support (also financially) denominational institutions that are active in various social sectors, prominently in the field of education, while observing the principle of non-discrimination between various religions or other non-religious beliefs.

This brings us to the relationship between the State and the denominational schools. In the development of the Dutch constitutional traditions in the field of democracy and human rights, as from the 19<sup>th</sup> century onwards the relationship between faith schools and the State was a central issue. As from the beginning of the 19<sup>th</sup> century the education of children became increasingly the concern of the government. Many (mainly Christian) believers were not satisfied with the imprint of (moderate) Enlightenment ideals on public education.<sup>16</sup> Their ideal became a school, based on religious principles, and free from any ideological control by the State. The freedom to establish private denominational schools was recognized in the Constitution in 1848. In practice, however, that was initially only an opportunity for the wealthy few. Therefore the so-called 'school struggle' focused, from then onwards, on financial support by the State for the denominational schools. It was seen as an injustice that parents, who wanted to send their children to a denominational school, had to pay double for education, compared to parents who opted for public schools. They not only had to pay for public schools via taxation, but next to that they had to support the private school from their own means. Eventually, in 1917, the 'school struggle' came to an end with the introduction of constitutional provisions which, next to the freedom of education along denominational lines, guaranteed financial support by the State for both public and private schools on an equal basis. This dual system of public and private schools is still the foundation of the Dutch – rather unique – educational system. It includes primary and secondary schools and some institutions of higher education with a great

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16 For Jewish schools special arrangements were made as from 1817. See RIETVELD-VAN WINGERDEN and MIEDEMA 2003.

variety of denominational identities, such as Roman Catholic, Protestant, Jewish, Evangelical, Reformed, Islamic, Hindu and Anthroposophical. There has been for a long time, until recently, a fairly general acceptance of a high degree of autonomy of denominational schools as to the contents of the education, the appointment of teachers and the admission of pupils, all in the light of the religious or philosophical orientation of the school. In a sense the State is kept at a distance, although it may impose conditions of a qualitative nature on the education, provided the denominational identity of the school is respected. The judgment of the Supreme Court in the case of *Maimonides* fits nicely within this approach. The Court meticulously examined whether the – fixed – admission policy was based on grounds derived from the religious foundation of the school. That was the case. The school was based ‘on the *Torah* and the *Halacha*’,<sup>17</sup> while the school refused, as a matter of policy, children ‘who were not in its view Jewish on religious grounds derived from the *Halacha*.’<sup>18</sup> It concluded that, having regard to Articles 6 and 23 of the Constitution and Article 9 of the European Convention, the school was free to follow this fixed policy based on religious grounds, notwithstanding the strong and reasonable preference of the parents. In other words, it is not the State (whether or not in a judicial guise), but the board of the school which decides. This idea of restrictions on the authority of the State vis-à-vis entities based on religion or belief is traditionally relatively strong in the Dutch constitutional order, which has so far also refrained from the formulation of an official ideology, or a civil religion, which is not uncommon in other modern Western democracies (think of France or the US).<sup>19</sup>

### 3.2. *United Kingdom*

The United Kingdom is quite a different case. From the 16<sup>th</sup> century onwards the Reformation in England took shape by the separation of the English Church from the Roman Catholic Church. The Church of England, with a liturgy more akin to Catholicism and a doctrine similar to Calvinistic

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17 Para. 3.1.1 of the *Maimonides* judgment.

18 Para. 3.1.2 of the *Maimonides* judgment.

19 See WALZER 1997, at pp. 76-80.

Protestantism, was created and the English Sovereign became the 'Defender of the Faith and Supreme Governor of the Church of England', which he or she remains to this very day. In other words: the Church of England was and is the Established Church or State Church. The State still has a say in internal Church affairs, such as the appointment of bishops or the text of the Book of Common Prayer. Those outside the Church of England (Roman Catholics, Protestant Dissenters) initially faced brutal persecution and later severe restrictions. Gradually, especially after the Glorious Revolution (1688), their situation improved and they could live and worship quietly. As of the second half of the 17<sup>th</sup> century, Jews were cautiously granted permission to settle in the Kingdom again (after their expulsion in 1290). A real equality between citizens of different faiths in most aspects of life had to wait until the 19<sup>th</sup> century, however. All this was brought about without the revolutionary sharp divide between old and new, which has been a common feature of the developments in many continental European States, following the example of the French Revolution. The British development, on the other hand, gradually went in the direction of religious freedom, while preserving the Established Church. As a consequence there was never a barrier between the spheres of the religious and the political, which for example is clearly distinguishable in the Netherlands, even if it is not as strict as in France. All this was also reflected in the field of education. Education was initially primarily provided by Churches and religious (Christian) societies. When the State became gradually involved in education, in terms of financing and control, the religious schools were incorporated into the system. There was no need for a 'school struggle' to ensure the public funding of denominational schools. The relationship with the State varied according to the degree of Government control and the corresponding extent of the financial support by



the State: voluntary controlled, voluntary aided, or a special arrangement.<sup>20</sup> The religious schools could preserve their religious character, while at the same time being part of the national educational system. That is exemplified by the *JFS*, which is a voluntary aided school. Other religious schools, not belonging to the three categories mentioned, opted for the status of a completely private and independent school, without State support. Against this background it is understandable that the debate on the admission policy of faith schools, which are incorporated in the national school system, is not primarily conducted in terms of the delimitation of the authority of the State and the board of the denominational school respectively. The British approach therefore significantly differs from the Dutch system based on Article 23 of the Constitution. The intertwining between 'Church' and State is so common a feature of the British constitutional order that interference with a school's authority in the admission of pupils is not unusual, even if the policy is based on religious standards explicitly adopted by the school. For centuries the State was accustomed to rule over the Church, so why not rule over faith schools? The Church subjected to regulation by the State is a Christian Church, and for centuries those who ruled over this Church were themselves Christians, and it was assumed that they did not impose standards which were foreign to the Church. Nowadays, however, that common religious identity of 'Church' and State should no longer be taken for granted. It has been held that the majority of the members of the Supreme Court, by outlawing the typically Jewish admission policy, imposed standards on the school which were more akin to those applied by Christian schools, where it is not descent but the practising of a religion that is the criterion. It is precisely on this point that Weiler focuses his criticism; 'What is troubling about the Majority is its sheer incomprehension and consequent intolerance

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20 See on the school system the excellent survey by WADFORD 2000. In a publication of the Department of Education the different types of denominational schools are characterized as follows: 'Voluntary aided school: Maintained by LEA [= Local Education Authority], with a (generally religious) foundation which appoints most of the governing body. Governing body generally responsible for admissions. Voluntary controlled school: Maintained by LEA, with a foundation which appoints some (but not majority) of the governing body. LEA generally responsible for admissions. Special agreement school: Maintained by LEA, with a foundation (generally religious) which appoints majority of governing body. Governing body generally responsible for admissions.'

of a religion whose self-understanding is different than that of Christianity. Their anthropological reading of ethnicity is suitable in the circumstances for which the Race Relations Act was intended. But when the law makes an exception for religion and the religion in question is Judaism, it should be understood on its own terms, not on Christian (or, more precisely, Protestant) terms.<sup>21</sup>

### 3.3. *Comparison*

By comparison it can be concluded that indeed the legal system in the Netherlands more than in the UK allows for respect for the self-understanding of a religion on its own terms, at least in the field of education. This difference between the Dutch and the British approaches to both the constitutional relationship between ‘Church’ and State, and more in particular between School and State, may therefore be helpful in explaining the difference in the outcome of both court cases.

## 4. 1988-2009

There is, however, a third possible explanation. Between the judgments in the cases of *Maimonides* and the *JFS* more than twenty years had elapsed. These days this is a long period of time with regard to developments in the field of social values in general and of the law in particular, at least in the Netherlands and the United Kingdom. Two related developments seem to be illustrative of the rapid changes in the field of social values and the law in the period between 1988 and 2009. The first is that secularism has arguably become stronger in this period. Secondly, it is likely that the primacy of the principle of equality over religious freedom has been more widely accepted.

### 4.1. *Secularism*

To begin with *secularism*. It is, first of all, useful to clarify this concept. It has to be distinguished from the notion of *secularity*, which means the separation between the secular and the sacred, which finds its expression

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21 WEILER 2010.

in the institutional separation between ‘Church’ and State and the respect for religious freedom. It should also be differentiated from the sociological concept of *secularization*, which refers to the decline of the role of religion in society, due to the process of modernization, although it helps us to understand the popularity of the idea of secularism.<sup>22</sup> That brings us to *secularism*. This term refers to an ideology, which aims at the restriction of religion to the private realm.<sup>23</sup> This, far from being a neutral stance towards religion in society, has been defined ‘as an ideology [that] denotes a negative evaluation towards religion and might even be appropriately seen as a particular “religious position” in the sense that secularism adopts certain premises *a priori* and canvasses a normative (albeit negative) position about supernaturalism.’<sup>24</sup> Secularism is an idea which has been recognised within Western culture since the days of the Enlightenment, initially prominent within intellectual circles. Since the 1960s it has become more and more prominent, undoubtedly because of the general social trend of secularization, which resulted in a rapid decrease in not only church attendance but also in religious beliefs as such. This had important consequences for social values, for example in the fields of sexuality and personal relations, which were previously for many people determined by religious precepts. The principle of moral autonomy, or, in other words, individual self-determination, has become for many people the ultimate standard, instead of, let us say, the Ten Commandments. The growing resistance against the moralization of society by organized religion can be seen as the expression of the popularity of the ideology of secularism. This development was already strong in and before 1988. It did not fail to have its effects on the law, both in the Netherlands and the UK: one only has to think, for example, of the legalization of abortion (in the UK in 1968, in the Netherlands in 1984). It is submitted here that the trend of secularization and the related popularity of secularism became even stronger in the period between 1988 and 2009. And again this is reflected in the field of the law. A prominent example is matrimonial law. In 1988 the law in any part of the world, including the West, defined

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22 See on secularization as a sociological concept: RIESEBRODT 2014.

23 See for the distinction between secularity and secularism DE GAAY FORTMAN 2008, at pp. 58-59.

24 Quotation from WILSON 1991, at p. 196; BOYLE 2004, at p. 14.

marriage as a relationship between a man and a woman, in accordance with the tenets of all the main religions and world views. In 2001 the Dutch legislature wrote world history by recognizing same-sex marriages. Gradually many other states followed. UK law accepted same-sex partnerships from 2004 onwards and in 2014 the full same-sex marriage. This acceptance illustrates the prevailing secularism, as the traditional concept of a marriage in law had been rooted in widespread religious views of marriage. That is the case, notwithstanding the fact that some liberal religious denominations in recent years have recognized same-sex marriages. The idea of secularism does not conflict with religious freedom if this latter concept is interpreted in a narrow sense, such as the freedom to attend religious ceremonies or prayer at home. If it includes, however, the right to manifest one's religion in (social) behaviour in the public sphere, then there may be tension between secularism and the manifestation of a religious belief. This is exemplified by the legal battles fought by those who invoke their religious freedom, in order to protect them against losing their jobs as a registrar of marriages when they have conscientious objections against solemnizing same-sex marriages.<sup>25</sup>

It has to be added that the process of secularization presents not the whole picture of the development of religion in Western society and the idea of secularism has never been without opposition. It has been observed that since the late 1970s we can identify the resurgence of the traditional religions in the Western world.<sup>26</sup> Examples are the politicization of the evangelicals in the US, the success of *Solidarnosc* in Poland, supported by the Roman Catholic Church, and the rise of religious nationalism in Israel. There are no indications, however, that the resurgence of the traditional religions prevailing in the Western world has so far been forceful enough to turn the tide of secularization and the influence of secularism in the field of law significantly.

That is eventually also true for another development that initially proved a challenge to the prevailing trend of secularization and the popularity of the

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25 See on this the Advice of the Dutch Commission on Equal Treatment: *Commissie Gelijke Behandeling Advies 2008-04 'Trouwden? Geen bezwaar!'* and the judgment of the (English) Court of Appeal in the case of *Ladele v London Borough of Islington* [2009] EWCA Civ 1357.

26 RIESEBRODT 2014.

idea of secularism. I am thinking of the immigration in the Western world, especially in Europe in the 1970s and 80s, of many adherents of Islam, which changed the picture to a certain extent. Initially, a popular answer was the idea of multiculturalism, which stressed the importance of a policy to prevent discrimination against immigrants, and to respect their religious and cultural otherness.<sup>27</sup> This ideal has been to a certain extent at odds with the idea of secularism. It is safe to assume that secularism was directed primarily against traditional religions in Western societies (mainly Christianity, but also Judaism). Multiculturalism was however mainly about the acceptance of other religions, such as Islam, which also had a long tradition, but were 'new' in Western society. It was not always without difficulties that they were able to enjoy the benefits of the freedom of religion, but at least they could successfully refer to existing standards in this field. And they could also benefit from the traditional approach to human rights, which took these rights to be of equal value. After 9/11, however, multiculturalism was looked upon more critically. So-called Western values – primarily of a secular brand – were assumed to be threatened. They were therefore invoked to oppose the recognition of the religious rights of minorities from other cultural backgrounds. Think of the debates on Islamic headscarves,<sup>28</sup> but also the religious slaughtering of animals.<sup>29</sup> The last example illustrates that the criticism of multiculturalism not only affected 'new' religions, but also a religion which has been present in the Western world for centuries (Judaism).

#### *4.2. Prioritizing of equality over religious freedom*

The second trend, related to secularism, is the prioritizing of equality over religious freedom. This has become stronger and stronger since 1988. Instead of seeing all human rights having equal value, there is a tendency to give priority to the right to equal treatment over the right to religious freedom. While the right to equal treatment has been part and parcel of human rights protection from its beginning, it is by now seen by some as a standard that should take precedence over other human rights. Against the background of

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27 McCrudden 2011, especially at pp. 201-205.

28 Loenen 2012.

29 Lerner and Rabello 2006; de Blois 2014.

secularism this is understandable. If there is no longer a common opinion as to the sources of the ultimate values, which were traditionally embodied in a widely shared religious worldview, the notion remains that whatever may be of value should at least be obtainable or accessible on an equal basis. The formal nature of the principle of equality fits nicely within a society which no longer has a shared idea of the good. That implies that the right to equality, as the highest human rights standard, prevails over all other rights, including the freedom of religion. An even more radical stance is that religion as such, especially in its orthodox form, is a threat to human rights in general and the right to equal treatment in particular. It has been observed that 'the fundamental tenets of monotheistic religions are at odds with the basis of human rights doctrine'.<sup>30</sup> Therefore sometimes the question is posed whether or not religious freedom should be recognized as a human right at all.<sup>31</sup> Even if this question is answered in the affirmative, the view of some is that the right to equal treatment prevails over other human rights, such as the freedom of religion. The Human Rights Committee, for example, held in its General Comment 28 on the equality between men and women without qualification that: 'Article 18 [ICCPR: freedom of religion] may not be relied upon to justify discrimination against women by reference to freedom of thought, conscience and religion'. Without further ado this Committee declares that the prohibition of discrimination prevails over the freedom of religion.<sup>32</sup> This is illustrative of a tendency which sees religion as subordinate to the ideal of equality. A similar approach can be discerned in European discrimination law, where religious groups that do not accept the secular ideals of equality are restricted in applying their own moral standards in institutions that participate in society, such as in the field of education, health care and charity. They are seen as exceptional and therefore have to invoke exception clauses in order to preserve their ethos within their institution. An example of such a clause is Article 4 paragraph 2

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30 RADAY 2003, at p. 668.

31 See for example VAN OOIJEN et al. 2008.

32 Titia Loenen referred to this General Comment in her annotation of the judgment of the The Hague District Court of 7 September 2005 in the case of the orthodox Christian political party SGP, that on religious grounds held that women could not stand for election on behalf of this party. See LOENEN 2005, at pp. 1121-1122.

of Directive 2000/78 of the Council of the European Union, establishing a general framework for equal treatment in employment and occupation.<sup>33</sup> The complex and reticent formulation of this provision is illustrative of the limited room left to religious organizations to function according to their own ethos in society. Also within the national jurisdictions concerned we see similar trends.

### 4.3. Comparison

So far I have reflected on developments in Western society and legal practice, epitomized as secularism and the priority of equality over religious freedom. It is not difficult to conclude that in this light the judgment in the *Maimonides* case might be considered to be 'outdated', even if it would still be seen as the guiding precedent in Dutch law when it comes to the admission policy of denominational schools.<sup>34</sup> The Dutch Supreme Court allowed for the priority of religious standards, as determined by religious bodies, independent from the State, over a claim based on the prohibition of discrimination. On the other hand, the *JFS* judgment, in coming to the opposite conclusion, nicely fits the new developments. The Supreme Court of the UK gave an extensive interpretation to the prohibition of racial discrimination, which overruled the tenets of religious law, as interpreted by a religious body. Secular standards were held to prevail over religious law. The legal rules concerned were about

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33 'Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground. Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.'

34 In a judgment of 24 July 2007 the Amsterdam Court of Appeal applied the *Maimonides* ruling in a case on the admission of a pupil to an orthodox reformed college. See DE BLOIS 2008.

the elimination of discrimination. The idea of the protection of a religious minority did not outweigh the interest in upholding the secular standard set by the majority. Therefore the sketched developments in society and in the law, common to the Western world as such, make sense as an explanation for the differences between the two judgments.

## 5. Concluding remarks

Why do judgments in similar cases differ as to their outcome? For those of us who were not part of the bench in these cases the answer can only be speculative. Judges do have a considerable discretionary power, which will make the outcome of a court case always, or at least very often, unpredictable.<sup>35</sup> So it will be impossible to provide decisive evidence for an explanation as to why a court came to a specific conclusion. Nevertheless, the question remains an intriguing one, especially in cases where issues of colliding human rights principles are at stake. That is definitely so in the almost identical cases of the admission of the two boys to Jewish schools in respectively the Netherlands and the United Kingdom. I have explored three possible explanations. The first one, the different legal standards applied by the Supreme Courts involved, does not seem to provide a convincing answer, having regard to the fact that it was possible in both cases to develop a strong legal reasoning for an opposite outcome. Part of the explanation can be derived from the differences between the two legal systems concerned as to the relationship between the realms of religion and politics, specifically in the field of education. In that perspective both judgments fit their own constitutional environment. Finally, arguably, the difference between the outcomes in the *Maimonides* and the *JFS* cases has to be understood in the light of developments in society and the law between 1988 and 2009 which are characteristic of the whole Western world. From the perspective of pluralism and respect for religious minorities these developments may deserve a critical appraisal. But that is a topic for another article.

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35 Cf. DE BLOIS 1994.



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# Keep the faith: the CJEU as a co-guardian of religious freedom

Hana van Ooijen

## 1. Introduction

It takes faith for someone to work on equality and human rights as long as Professor Loenen has done. With all their complexity and controversy, these two elusive concepts continue to evoke difficult questions. This given brought Professor Loenen and others to organise a seminar in 2009 bearing the appropriate title ‘Human rights: a site of struggle over multicultural conflicts’.<sup>1</sup> Religious freedom is a subject which is illustrative of this struggle. In Dutch society, one of the factors which has enhanced the debate on religion is the influx of religions other than Christianity.<sup>2</sup> Such an influx has ensued from decolonisation and immigration and entails objective as well as subjective changes. It has changed the factual (religious) composition of the population, but it has also impacted on the perception of and ideas about religion.<sup>3</sup>

Much has been written about the changes within Dutch society which the introduction of new religions has brought about. Formerly unknown religious dress is worn, most prominently the Muslim headscarf, which stirs debate on the extent to which religious dress in the public sphere should be allowed (or banned, depending on the perspective taken).<sup>4</sup> The same

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1 As a result of the seminar, a special edition of the Utrecht Law Review was published: LOENEN, VAN ROSSUM, and TIGCHELAAR 2010.

2 Cf. VAN OOIJEN 2012, at p. 22.

3 For the past ten years at least, an increasingly suspicious stance towards notably Islam can be discerned. This stance was borne out by political events which were not necessarily related but seemed part of a general tendency. The politician Geert Wilders and his continuous fierce, hostile attitude towards Islam has had a notable effect, see also VAN OOIJEN 2012, at p. 38.

4 Especially face veils have met with reluctance. There have been several bills to ban the face veil in public, but none of these bills has yet been turned into legislation. See for a description of the debate and legislative developments, OVERBEEKE and VAN OOIJEN 2014.

holds true for new forms of conscientious objection, such as the refusal to shake hands, as a manifestation of the faith-based desire to avoid physical contact with the ‘other sex’. In any event, the debate has mostly centred on the ripples which new religious manifestations cause in the fabric of Dutch society in the context of employment, schools and other contexts of social interaction. This contribution shifts the focus to a stage prior to the settlement of migrants in society: the immigration stage.

When an immigrant enters the Netherlands to seek asylum, his religion or belief can be germane to his asylum application. After all, in some (unfortunately, still too many) countries, religion or belief can be a ground of persecution or severe discrimination. Accordingly, a person can run the risk of being subjected to ill-treatment or even torture when he is returned to his country of origin. The challenge in the asylum procedure is the proper assessment of this risk. Because asylum matters fall within the sphere of EU competence, several EU instruments regulate minimum standards in the asylum procedure, such as the Qualification Directive (2004/83/EC) and the Asylum Procedures Directive (2005/85/EC).

On 5 September 2012, the Court of Justice of the European Union (‘CJEU’) issued a ruling<sup>5</sup> in which it provided clarification on the Qualification Directive. The judgment was generally regarded as a hallmark for the recognition of religious freedom by the CJEU in the field of migration. There are three remarkable elements of the ruling which are also recurrent in Professor Loenen’s research : i) the increasing importance of the CJEU for human rights in Europe, ii) the role of the state in assessing religion or belief, and iii) the relation of religious freedom with other human rights. In this note, the ruling and its (possible) implications are discussed in two parts. The first part describes the judgment, the second part offers some reflections on the possible implications of the judgement.

More specifically, in the first section, a summary of the ruling and the essential considerations of the CJEU are presented. Subsequently, the increasing importance of the CJEU for human rights in Europe is addressed, with reference to key considerations of the ECtHR on religious freedom.

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5 In Cases C71/11 and C99/11, *Bundesrepublik Deutschland v. Y and Z*, [2012].

In the fourth section, the role of the state is discussed. The CJEU illustrates how the attitude of the state towards religion in the asylum procedure differs from the approach usually taken by the state to qualify a violation of religious freedom. Finally, this contribution touches on how the judgement underscores the relation between religious freedom and other human rights.

## 2. The judgment

The CJEU handed down the judgment at the request of the German Federal Administrative Court (*Bundesverwaltungsgericht*, the ‘German Court’). The case which the German Court referred for a preliminary ruling concerned a dispute between the German immigration authorities (*Bundesamt für Migration und Flüchtlinge*) and two Pakistani nationals who had applied for refugee status in Germany. These nationals were active members of the Ahmadiyya community. This Islamic reformist movement meets with fierce opposition from the Sunni Muslim majority in Pakistan. The religious activities of the community, including conversion activities, are severely restricted by the Pakistan Penal Code. As a consequence, Ahmadiyya may not profess their faith publicly without those practices being liable to be considered blasphemous, a charge which is punishable, according to the provisions of that code, to a sentence of imprisonment or even the death penalty.<sup>6</sup>

The CJEU was asked for a clarification of the Qualification Directive (‘Directive’) which, simply stated, contains provisions on qualifying persons as refugees.<sup>7</sup> More specifically, the reference addressed Articles 2(c) and 9(1)(a) of the Directive<sup>8</sup> which concern the definition of a refugee and of

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6 Cf. Opinion of the Advocate General, delivered on 19 April 2012, in Cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v. Y and Z*, [2012], at para. 2.

7 Article 1 states: ‘The purpose of this Directive is to lay down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted’.

8 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or Stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ L 304 p. 12); addendum (OJ 2005 L 204 p. 24).

acts of persecution respectively. The latter provision defines a threshold of seriousness for acts in order to qualify as an act of persecution:

‘1. Acts of persecution within the meaning of Article 1 A of the Geneva Convention must:

(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms;’

The CJEU found it appropriate to deal with the first two questions together and summarised the questions as follows:

‘49. Is Article 9(1)(a) of the Directive to be interpreted as meaning that any interference with the right to religious freedom that infringes Article 10(1) of the Charter may constitute an “act of persecution” within the meaning of that provision of the Directive and must a distinction be made between the “core areas” of religious freedom and its external manifestation?’

In answering this question, the CJEU first reiterated the definition of a refugee who must have a well-founded fear that he will personally be subject to persecution for at least one of the five reasons listed in the Directive and the Geneva Convention, one such reason being that person’s ‘religion’. The CJEU remarkably<sup>9</sup> stated that interference with religious freedom may be so serious that it can be regarded as constituting persecution. That said, the CJEU hastened to put this statement into perspective by emphasising that this does not mean that any interference will amount to such persecution. Accordingly, measures which are imposed in accordance with the limitation

9 It was remarkable because this line of reasoning uses an analogous reasoning: after all, the right to religious freedom is not one of the non-derogable rights mentioned in Article 15(2) ECHR. Instead, the CJEU stated that ‘interference with religious freedom may be so serious *as to be treated in the same way* as the cases referred to in Article 15(2) of the ECHR, to which Article 9(1) of the Directive refers, by way of guidance, for the purpose of determining which acts must in particular be regarded as constituting persecution.’ (emphasis added), Cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v. Y and Z*, [2012], at para. 57.

clauses cannot qualify as persecution, and nor can acts which are simply not sufficiently serious. Following this proviso, the CJEU made another remarkable observation by stating that the distinction between the so-called *forum internum* and *forum externum* of religious freedom<sup>10</sup> is not pertinent to qualifying interferences with religious freedom as acts of persecution.<sup>11</sup> Limitations on religious manifestations can also be considered as acts of persecution, at least when such limitations are sufficiently serious. The third question basically pertains to the extent to which a person can be asked to observe self-restraint in practising his religion:

‘If a refugee intends on his return to his country of origin, to perform religious acts which will expose him to danger to his life, his freedom or his integrity, is his fear of persecution then still well-founded within the meaning of Article 2(c) of the Directive? Or can he be expected to give up the practice of such act?’<sup>12</sup>

According to the definition in Article 2(c) of the Directive, the qualification of fear as well-founded is essential for the consideration of an asylum seeker as a refugee.

“‘refugee” means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, *religion* [...], is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country [...]' (*emphasis added*)

The answer of the CJEU to this question adds a significant dimension to the protection of refugees. After all, the recognition that a person has a well-founded fear of being persecuted on grounds of religion would carry little weight if it would go hand in hand with the requirement to simply give up

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10 It is discussed *infra*, but here is a quick explanation of these concepts: the former concerns the absolute freedom of thought, the latter pertains to the freedom to act on his religion or belief.

11 Cf. Cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v. Y and Z*, [2012], at para. 62. The CJEU refers to the *forum internum* as the ‘core areas’.

12 Cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v. Y and Z*, [2012], at para. 45.

a religion in order to remove the risk of persecution. The Court was crystal clear on this point:

‘79. [...] The fact that he could avoid that risk by abstaining from certain religious practices is, in principle, irrelevant.

80. [...] In assessing an application for refugee status on an individual basis, those authorities cannot reasonably expect the applicant to abstain from those religious practices.’

In sum, the ruling of the CJEU has established that interferences with religious freedom can amount to acts of persecution. Furthermore, states cannot require applicants to refrain from religious practices in order to minimise their risk of persecution. The purport of this judgment cannot easily be overrated. It is significant that the CJEU has pronounced on religious freedom in this context, since it is not traditionally the human rights guardian in the European area. The next section addresses the increasing role of the Court in the human rights area.

### 3. The two courts

It has always been a daunting exercise not to confuse the two courts on European soil; every once in a while, news reports erroneously write about the European Court of Human Rights (‘ECtHR’), when discussing a judgment of the CJEU, and vice versa. There – arguably – used to be a clear distinction between the two courts, which was partly evident from their names. While the ECtHR sprang from high ideals and was thus meant to oversee the compatibility of domestic law with human rights, the CJEU was connected mainly to the *raison d’être* of the European Union: securing greater peace and prosperity for its Member States by limited economic integration.<sup>13</sup>

Obviously, this distinction is too black and white to hold true in the first place. Moreover, contemporary developments have blurred the distinction. As part of the general extension of the competences of the EU, the CJEU is increasingly stepping into the area which was primarily considered the domain of the ECtHR. For instance, by adopting the so-called Equality

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13 Cf. e.g. DE BÚRCA 2013.



Directives,<sup>14</sup> the EU has created significant instruments to combat discrimination.<sup>15</sup> Because equality is intrinsically intertwined with human rights, the CJEU increasingly deals with issues such as religious freedom and racism. Thus, through the Directives, the EU and the CJEU gain influence in areas of employment and immigration, and in so doing, a growing say in human rights issues.<sup>16</sup> The question arises how the advancement of the CJEU in the human rights area can be reconciled with the line of ECtHR case law and the other way around for that matter.<sup>17</sup> In general, the consistency between the case law of the two courts remains the subject of scrutiny.<sup>18</sup> Several statements in the CJEU judgment show how the CJEU in this case aligns with the ECtHR case law.<sup>19</sup> That said, the judgment also offers clues which may give rise to future discrepancies.

The initial considerations of the CJEU show an alignment in taking other international law conventions into account, notably the Geneva Convention, but also ‘other relevant treaties’.<sup>20</sup> It follows that the Directive should be interpreted as being consistent with the rights enshrined in the Charter of Fundamental Rights of the EU (the ‘EU Charter’).<sup>21</sup> The CJEU noted explicitly that the right to religious freedom as enshrined in Article 10(1)

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14 Including the Employment Equality Directive (2000/78/EC), the Racial Equality Directive (2000/42/EC), and the Gender Equality Directives (2014/13/EC and 2006/64/EC).

15 Cf. SPEEKENBRINK 2012.

16 The increasing influence of the CJEU on human rights in Europe also figures in the research of Professor Loenen, cf. LOENEN 2012, at p. 303ff. Further, the topic is central to her work as a professor at the University of Leiden, cf. her inaugural lecture LOENEN 2013.

17 A comprehensive question which has already been addressed in quite a number of publications, e.g. the dissertation by Spreekenbrink, SPEEKENBRINK 2012. See also the edition of *Utrecht Law Review*, LOENEN, VAN ROSSUM, and TIGCHELAAR 2010.

18 E.g. MARTINICO and POLICINO 2012 and BUSBY and ZAHN 2014.

19 Such alignment between the two courts does not always occur, see BURRI 2013.

20 This is the open term employed in Article 78(1) TFEU: ‘The Union shall develop a common policy on asylum [etc.], [which] must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.’

21 See Cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v. Y and Z*, [2012], at para. 48: ‘The Directive must, for that reason, be interpreted in the light of its general scheme and purpose, and in a manner consistent with the Geneva Convention and the other relevant treaties referred to in Article 78(1) TFEU. As is apparent from recital 10 in the preamble thereto, the Directive must also be interpreted in a manner consistent with the rights recognised by the Charter.’

of the EU Charter corresponds to Article 9 ECHR.<sup>22</sup> Considering the similarity in the wording of the texts of the two provisions, this finding is in itself not too surprising. In the same vein, the following consideration of the CJEU resounds with (admittedly, a very short part of) the formula which the ECtHR uses when reciting its general principles of Article 9 ECHR.

‘Freedom of religion is one of the foundations of a democratic society and is a basic human right.’

This sentence is often the prelude to the more extensive and high-minded observations of the ECtHR in Article 9 cases:

‘freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.’<sup>23</sup>

Notwithstanding these solemn words, religious freedom is not envisaged as an absolute right. On the contrary, just as the fundamental importance of religious freedom has long been recognised, so has the possibility of limitations to that freedom long been accepted. Again, the ECtHR employs a standard wording:

‘Article 9 does not protect every act motivated or inspired by a religion or belief.’<sup>24</sup>

22 See Cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v. Y and Z*, [2012], at para. 56: ‘The right to religious freedom enshrined in Article 10(1) of the Charter corresponds to the right guaranteed by Article 9 of the ECHR.’

23 See e.g. the judgment in ECtHR, *Eweida and others v. United Kingdom*, 15 January 2013 (Appl. nos. 48420/10, 59842/10, 51671/10 and 36516/10), at para. 79. This formula goes back to the first significant judgment of the ECtHR on Article 9: ECtHR, *Kokkinakis v. Greece*, 25 May 1993 (Appl.no. 14307/88).

24 E.g. The case of ECtHR, *Leyla Sabin v. Turkey* [GC], 10 November 2005 (Appl.no. 44774/98), at para. 105.

Evidently, the ECtHR issues its judgments regarding the question whether measures of Contracting States impinge on religious freedom without grounds of justification. In contrast, the CJEU judgment should be seen in the context of the prohibition of non-refoulement and the risk of persecution. The CJEU also observes that the protection of religious freedom is limited:

‘58. However, that cannot be taken to mean that any interference with the right to religious freedom guaranteed by Article 10(1) of the Charter constitutes an act of persecution [...].’

It is at this point that the approach of the CJEU clearly starts to differ from the one of the ECtHR. The phrase of the ECtHR reflects the dichotomy which operates for the conceptualisation of religious freedom: the *forum internum* and the *forum externum*. Whereas the former concerns the absolute freedom of thought, the latter pertains to the freedom to act according to one’s religion or belief.<sup>25</sup> It is according to this dichotomy that religious freedom and its limitations are assessed. In the judgment of the CJEU, however, religious freedom is looked at from the perspective of it being the ground for persecution. Indeed, it can be seen that the CJEU deems the common dichotomy to be irrelevant:<sup>26</sup>

‘62 For the purpose of determining, specifically, which acts may be regarded as constituting persecution within the meaning of Article 9(1) (a) of the Directive, it is unnecessary to distinguish acts that interfere with the “core areas” (“forum internum”) of the basic right to freedom of religion, which do not include religious activities in public (“forum externum”), from acts which do not affect those purported “core areas.”’

As a consequence, the CJEU will not so much look at which dimension of religious freedom is allegedly interfered with, but rather at ‘the nature

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25 See e.g. VAN OOIJEN 2012, at p. 97.

26 The opinion of the Advocate General is also outspoken on this point, and contains some interesting, more extensive, observations, Opinion of the Advocate General, delivered on 19 April 2012, in Cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v. Y and Z*, [2012], at para. 39 ff.

of the repression inflicted on the individual and its consequences'.<sup>27</sup> The different perspective of the CJEU leads to another compelling observation made in the final two considerations regarding questions 1) and 2). This observation concerns the significance of what the CJEU labels a subjective factor: the importance which an individual attaches to a particular religious practice. According to the CJEU, this importance should be given weight by the state in assessing the risk of persecution, even if such practice does not 'constitute a core element of faith for the religious community concerned'. The CJEU continues by underscoring that the Directive is meant to offer protection to 'forms of personal or communal conduct which the person concerned considers to be necessary *to him*' (emphasis added). In concluding that such forms of conduct refer to 'those 'based on ... any religious belief' and to those prescribed by religious doctrine, namely those 'mandated by any religious belief"', the CJEU leaves no doubt that not only mainstream religious manifestations can be a ground for persecution, but also the manifestations which are not necessarily generally known and accepted. This is a generous interpretation by the CJEU of the protection offered by the Directive. While the ECtHR also adheres to a broad definition of religion or belief, the Court's seeming willingness to grant protection to individual manifestations reveals a slight contrast with the view of the ECtHR, cited above on, for instance, manifesting the Christian faith by wearing a cross.<sup>28</sup>

#### 4. The role of the state

Another interesting aspect of the judgement concerns the role of the state in assessing religion. In paragraph 70 of the judgment, the CJEU referred to the risk assessment which the state must make pursuant to the Directive. It concerns risks of persecution, in this case for religious reasons. As discussed in the previous section, this assessment concerns objective and subjective

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27 See Cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v. Y and Z*, [2012], at para. 65, deriving from Opinion of the Advocate General, delivered on 19 April 2012, in Cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v. Y and Z*, [2012], at para. 52.

28 It also brings to mind the struggle of the UK government with Ms. Eweida who insisted that wearing a cross was part of her religion, while this is not necessarily recognised by the majority as a necessary religious manifestation. ECtHR, *Eweida and others v. United Kingdom*, 15 January 2013 (Appl.nos. 48420/10, 59842/10, 51671/10 and 36516/10).

factors. What does not explicitly transpire from the judgment is that the assessment necessarily entails an evaluation of the asylum account. After all, findings regarding a person's religion or belief and the ensuing risk of persecution need to be based, at least to a certain extent, on the facts. In the Dutch asylum procedure, the establishment of the facts is entwined with the (assessed) credibility of an asylum account. In cases of conversion, a clear line of case law can be discerned as to how the immigration authorities carry out a standard assessment. The Dutch Raad van State ('Council of State') has summarised this assessment.<sup>29</sup> In the asylum procedure, the state confronts an applicant with three types of questions, namely those regarding i) the motives for and the process of conversion, ii) the general basic knowledge of the religion and religious practice, and iii) the practical observance of the applicant. The threshold for making one's religion and belief credible is quite high.<sup>30</sup> The applicant should be able to 'provide insight into why he has come to a more intense experience of his conversion and how this process has happened and that this choice is well-considered and intentional'.

This approach in the migration area to establishing someone's religion or belief is intriguing when compared to the general human rights approach to religious freedom. Stated simply, assessing a religion or belief too thoroughly possibly conflicts with the restraint which the state needs to observe: a state should shy away from making theological assessments. An important tenet of religious freedom is that the state is not called upon to determine what qualifies as a religion and what does not. In the same vein, the state really should not have too much of a stance on an individual's experience of a religion or belief. The ECtHR has phrased it succinctly:

'[While] the notion of the State sitting in judgment on the state of a citizen's inner and personal beliefs is abhorrent and may smack unhappily of past infamous persecutions [...]'<sup>31</sup>

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29 Cf. e.g. ABRvS, 14 July 2014, ECLI:NL:RVS:2014:2697.

30 Even more so when someone submits a fresh asylum application or in case documents are lacking.

31 ECtHR, *Kosteski v. The Former Yugoslave Republic of Macedonia*, 13 April 2006 (Appl.no. 55170/00).

Evidently, the purpose of an asylum procedure differs from, let us say, pursuing a security policy. As a consequence, it matters for the assessment of religion whether religious freedom comes in as being encroached upon by a security policy or whether it is at the very centre of the enquiry. That said, questioning someone about his or her religion and inferring conclusions from the answers on the veracity of that person's conviction can be considered in light of the ECtHR case law to impinge on that part of religious freedom which enjoys absolute protection, the *forum internum*. It should also be remarked that the approach summarised above is still applied today in the Netherlands. Effectively, that means that before assessing the risk of persecution, the veracity of an applicant's faith must be assessed. Accordingly, the finding that an applicant's alleged religion or belief is not credible can still bar a finding that there is a risk of persecution.

## 5. Religion and other human rights

A final remark on a significant aspect of the CJEU judgment concerns the relation of religious freedom with other human rights. In the immigration context, religious freedom can thus be intertwined with someone's legal residence and with the rights attached to a legal status. Furthermore, more than in other contexts, there is a connection between religious freedom and non-refoulement, the prohibition against being tortured or subjected to inhuman treatment, and the prohibition of discrimination. The interplay between these rights has also transpired in the ECtHR case law. For instance, in the case of *M.E. v. France*<sup>32</sup> the extradition of a Christian Copt to Egypt was considered to contravene Article 3 ECHR. So religious freedom can also be of relevance in assessing someone's risk of being ill-treated or tortured. That said, the question whether someone runs a real risk of being treated contrary to Article 3 ECHR is different from the question of whether someone can be qualified as a refugee. The ECJ judgment can thus be considered to add to the protection provided by the ECtHR. Whereas protection under the ECHR pertains to extradition, the ambit of the Directive concerns the qualification of refugees and the protection granted to them. In a way,

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32 ECtHR, *M.E. v. France*, 6 June 2013 (Appl.no. 50094/10).

the key finding that restraint in manifesting religion or belief in order to avoid persecution cannot be required from third country nationals expands the scope of their religious freedom in a host state before they enjoy legal residence there. This explicit constraint on the state can thus be considered an additional protection to the prohibition of non-refoulement as has been guaranteed by the ECtHR. Accordingly, states should not only refrain from extraditing applicants who run a risk of persecution, but they should already take that risk into account when processing the asylum request. The judgment has already caused a turnaround in the case law of the Dutch Council of State in that the Council of State now follows the line of the CJEU,<sup>33</sup> at least once an applicant's religion or belief has been found to be credible.<sup>34</sup>

## 6. Final remarks

In her inaugural lecture, Professor Loenen noted the appearance of the ECJ as a relatively new player in the area of human rights. As she rightly observed, the EU has extended its working field to encompass social and more ideological activities than economic cooperation.<sup>35</sup> The judgment discussed in this contribution demonstrates how it no longer suffices to qualify the Strasbourg Court as the sole human rights actor on European territory. The developments within the EU are indeed significant for the cause of human rights as a whole. Furthermore, the judgment underscores the importance of the mentioned aspects of Loenen's research and at the same time conjures up new questions on these issues. With such richness to explore, we can certainly have faith in Professor Loenen conducting more interesting research in this area.

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33 Previously, the Dutch Council of State did consider that the State could require an applicant to observe restraint in manifesting his religion on return.

34 As elaborated above, this preliminary finding can even leave the question of persecution outside the assessment. Recent case law shows that the threshold for an applicant to have the facts established as credible to be unabatedly high.

35 LOENEN 2013, at p. 4.

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# Violence against women

Ineke Boerefijn

## 1. Introduction

All human rights treaties contain an obligation to guarantee human rights without distinction. That sounds all too obvious, but practice shows shortcomings for various people. The general human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), have been complemented by treaties focusing on a specific issue, such as discrimination on the ground of race and sex and on the human rights of children and persons with disabilities. These play a valuable role in identifying the areas where equal and full enjoyment of all human rights warrants specific attention and the measures that States parties must take to ensure equal and full enjoyment.

Under the general human rights treaties, not much attention was paid to women's human rights. The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) complements the ICCPR and the ICESCR in various areas and makes concrete what States parties should do to eliminate discrimination against women in the enjoyment of human rights. It does not, however, contain a provision that protects women's equal right to be free from inhuman treatment.<sup>1</sup> Violence against women was for a long time not addressed in terms of human rights, neither when it concerned violence in the public sphere (for example, sexual violence in wartime), nor when it occurred in the private sphere. As a result of active campaigning by women's rights experts and activists, the scale and gravity of various forms of violence against women was addressed at the World Conference on Human Rights. Since then, it has been high on the agenda

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1 For the reasons for this, see VAN DEN BRINK 1993.

of international organisations. Treaty bodies dealing with human rights now generally include the issue in their work.

Violence against women can affect various human rights of women, including the right to physical and mental integrity, the right to life, the right to be free from torture and other cruel, inhuman or degrading treatment or punishment and the right to health. It concerns violence that ‘does not just happen or occur to women, but is motivated by factors concerned with gender’.<sup>2</sup> In General Recommendation No. 19 the CEDAW Committee explained how gender-based violence falls within the scope of CEDAW. It affirmed that

‘[t]he definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.’<sup>3</sup>

Violence against women is a form of discrimination and contributes to the perpetuation of discrimination. In its 2013 Agreed Conclusions, the Commission on the Status of Women dealt extensively with violence against women and adopted no less than 69 recommendations.<sup>4</sup> It affirmed that gender-based violence is ‘characterized by the use and abuse of power and control in public and private spheres, and is intrinsically linked with gender stereotypes that underlie and perpetuate such violence, as well as other factors that can increase women’s and girls’ vulnerability to such violence.’<sup>5</sup> Under general human rights treaties a rich body of case law on the right to be free from torture, the right to a fair trial and other rights relevant to the issue

2 CHINKIN 2012, at p. 453 (footnote in quote omitted).

3 CEDAW COMMITTEE, 1992, ‘General Recommendation No. 19, Violence against women’, reprinted in *Compilation of general comments and general recommendations adopted by human rights treaty bodies*, 1998, UN Doc. HRI/GEN/1/Rev.9 (Vol. II), pp. 331-336.

4 COMMISSION ON THE STATUS OF WOMEN, Agreed conclusions on the elimination and prevention of all forms of violence against women and girls, UN Doc. E/2013/27 and E/CN.6/2013/11.

5 COMMISSION ON THE STATUS OF WOMEN, Agreed conclusions, at para. 10.

of violence against women exists. Titia Loenen, Cees Flinterman and I were involved in Fleur van Leeuwen's dissertation which examines how the Human Rights Committee and the Committee on Economic, Social and Cultural Rights have applied a gender perspective in their work.<sup>6</sup> This contribution is a modest complement to that study, because it looks at the CEDAW Committee's case law with regard to the human rights which are relevant to the issue of violence against women. In other words: what does the CEDAW Committee's case law contribute to a gender-sensitive interpretation of the right to be free from ill-treatment, the right to a fair trial and other human rights? At first sight, article 2 of the Optional Protocol to CEDAW could be seen as an obstacle to the CEDAW Committee's mandate to deal with these rights. Article 2 provides that communications may be submitted by individuals or groups of individuals 'claiming to be victims of a violation of any of the rights set forth in the Convention'. This seems quite restrictive, as many of the rights concerned are not as such 'set forth in the Convention'. It would appear, however, that the CEDAW Committee was inspired by the preamble to the Optional Protocol to CEDAW. This reaffirms States parties' 'determination to ensure the full and equal enjoyment by women of all human rights and fundamental freedoms'. How has the CEDAW Committee's case law on violence against women contributed to guaranteeing the full and equal enjoyment of all human rights? On the basis of a number of landmark views it will be discussed how the CEDAW Committee contributes to the practical realisation of that wonderful slogan 'women's rights are human rights',<sup>7</sup> which was the basis for Van Leeuwen's study.

This contribution first makes some general remarks about developments in international human rights law as regards the full and equal enjoyment of all human rights by all persons. Subsequently, it examines the views of the CEDAW Committee to identify the human rights issues that have been addressed.

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6 VAN LEEUWEN 2009.

7 With this slogan, women's rights organisations campaigned during the World Conference of Human Rights (1993) for more attention for the human rights of women in mainstream human rights bodies.

## 2. Equal and full enjoyment of human rights

The notion of the equal enjoyment of human rights has evolved over the years. The Convention on the Elimination of all forms of Racial Discrimination (CERD) dates back to 1965. It is very brief in formulating the general obligations that States parties must take to eliminate racial discrimination in various fields. For example, it imposes a number of obligations concerning the review of legislation and policies, and lists a number of rights to which states parties must pay particular attention. The text of CERD does not contain further details as to what this should entail or should result in. The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW, 1979) is much more elaborate in spelling out the general obligations that States parties must take to review their laws and to ensure equal protection by the law. Further, it is more precise in describing the obligations in respect of the issues covered by CEDAW. The Convention on the Rights of Persons with Disabilities (CRPD, 2006) is even more concrete. This holds true for the obligations of a general nature, on issues such as awareness raising, as well as the substantive issues covered by CRPD.

The practice of treaty monitoring bodies has been a source of inspiration for the drafters of more recent conventions and has led to developments in codification on the international level. In turn, the newer treaties can play a role in interpreting older instruments. For example, article 16 CRPD deals with violence and exploitation. The obligations of States parties in paragraphs 2-5 reflect that the work of expert bodies such as the CEDAW Committee and the Special Rapporteur on Violence against Women on this issue has been taken into account. It requires States parties to take measures to prevent violence and exploitation, to provide for measures for rehabilitation and to identify, investigate and, where appropriate, prosecute instances of violence and exploitation. In its work under this provision, the CRPD Committee can benefit from the experience of the CEDAW Committee. Article 8 CRPD describes in quite some detail which measures States parties must take to raise awareness throughout society in respect of persons with disabilities. The type of measures described in this provision can – and should – play a role in the work of other treaty monitoring bodies in the recommendations addressed to States parties. Cross-fertilisation between treaties and treaty monitoring

bodies underlines the indivisibility and interrelatedness of all human rights. The progress in the codification of developments initiated by treaty monitoring bodies is important. States, non-governmental organisations and individuals can use more recent provisions in interpreting the succinct provisions in older treaties such as the CERD.

An interesting development in the formulation of the objective that the treaties aim to achieve can be distinguished. The treaties all reaffirm that there may be no distinction in the enjoyment of human rights. CERD is primarily a non-discrimination instrument. It aims to eliminate discrimination on the ground of race and to promote the enjoyment of human rights on an equal footing. CEDAW is quite similar, it aims to guarantee human rights on a basis of equality. CRPD, however, uses different terminology. Article 1 CRPD states that the aim of the Convention is to promote, protect and ensure the *full and equal* enjoyment of all human rights by persons with disabilities. Provisions refer to the need to eliminate discrimination, but the Convention is much more than a non-discrimination and equal treatment instrument. It is about full enjoyment, not only equal enjoyment. If persons with disabilities enjoy a right to a lesser extent than persons without disabilities and the disability is the ground for the distinction, this constitutes discrimination, which is, obviously, prohibited under the Convention. But also where there is no discrimination, or where discrimination cannot be proven, the Convention is relevant because it protects the human rights of persons with disabilities.

### **3. Violence against women and CEDAW**

#### *3.1. Violence against women within the scope of article 1 CEDAW*

An explicit right to be free from torture and other cruel, inhuman or degrading treatment or punishment has not been included in CEDAW. The CEDAW Committee's landmark General Recommendation No. 19 affirms that violence against women falls within the scope of CEDAW, because it is a form of discrimination under article 1 CEDAW.<sup>8</sup> The adoption of

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8 CEDAW COMMITTEE, 'Violence against women, General Recommendation No. 19' (1992), in *Compilation of general comments and general recommendations adopted by human rights treaty bodies*, UN Doc. HRI/GEN/1/Rev.9, Vol. II, 331-336.

this general recommendation in 1992 has been called the ‘missing link’ in understanding violence against women as a human rights issue.<sup>9</sup> It constitutes the basis of the CEDAW Committee’s subsequent work on the issue.<sup>10</sup> In the past two decades since its adoption, the issue of violence against women has consistently had a prominent place in the work of the Committee, in the reporting procedure and in its work under the Optional Protocol. The general recommendation refers to human rights that are included in CEDAW, such as equality in the family, and to human rights laid down in other human rights instruments, such as the right to life and the right to be free from torture and inhuman treatment. With a reference to human rights not being included in CEDAW, the CEDAW Committee underlined its status as a human rights body. The indivisibility of all human rights and the need for a coherent interpretation of human rights instruments warrants such an approach. The 1993 World Conference on Human Rights acknowledged this by underlining that women’s rights are human rights. The Vienna Declaration called on all human rights treaty bodies to integrate a gender perspective in their work.<sup>11</sup> According to the CEDAW Committee, ‘[t]he Convention is part of a comprehensive international human rights legal framework directed at ensuring the enjoyment by all of all human rights and at eliminating all forms of discrimination against women on the basis of sex and gender.’<sup>12</sup>

States parties have an obligation to take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private acts.<sup>13</sup> In its concluding observations, the CEDAW Committee has further specified what these measures should entail. Recommendations concern violence against women by state actors, violence in the public sphere, and domestic violence. Measures that States should take include legislative

9 SHIN 2007, at p. 223.

10 Extensively on this issue: CHINKIN 2012.

11 *Vienna Declaration and Programme of Action*, UN Doc. A/CONF.157/23, 1993, Part II, at para. 37.

12 CEDAW COMMITTEE, *General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 2010, UN Doc. CEDAW/C/GC/28, at para. 3.

13 CEDAW COMMITTEE, ‘Violence against women, General Recommendation No. 19’ (1992), in *Compilation of general comments and general recommendations adopted by human rights treaty bodies*, UN Doc. HRI/GEN/1/Rev.9, Vol. II, 331-336, at para. 24(a).

measures, such as the elimination of laws that discriminate against women and to act with due diligence to prevent and combat violence against women committed by private actors. The due diligence standard has become more concrete with each case dealt with by the CEDAW Committee under the Optional Protocol to CEDAW.

### 3.2. *The CEDAW committee's case law*

The individual complaints procedure constitutes an effective tool for the CEDAW Committee to consider whether laws are capable of offering adequate protection in practice. It is not always easy to establish in concrete cases whether a treaty obligation has been violated, especially where it concerns the obligation to legislate.<sup>14</sup> Nevertheless, the CEDAW Committee's case law shows some concrete examples of the way in which it has examined States parties' measures to prevent and combat violence against women and the role article 2 CEDAW plays.

In the first case on domestic violence before it, the CEDAW Committee examined whether Hungary had complied with its positive obligations under CEDAW, in particular under articles 2, 5 and 16. With respect to article 2, which defines a series of general obligations aimed at eliminating discrimination against women, the CEDAW Committee noted that Hungary had admitted that the remedies pursued by the author of the complaint were not capable of providing her with immediate protection against ill-treatment by her former partner and that support for the victims of domestic violence was inadequate. Hungarian law did not provide adequate protection to a woman, among other reasons because it was not possible to impose a restraining order on her violent ex-partner. The Hungarian court found that it was not possible to deny this perpetrator of domestic violence access to his house, because his right to property could not be restricted.<sup>15</sup> The CEDAW Committee found violations of article 2 (a), (b) and (e), because Hungary did not meet its obligations to protect women against domestic violence. With this finding the CEDAW Committee established a significant

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14 BOEREFIJN 2009.

15 CEDAW COMMITTEE, 26 January 2005, *A.T. t. Hungary*, Comm. No. 2/2003, in UN Doc. A/60/38 (Part I), Annex III, at para. 9.3.

precedent. The Optional Protocol to CEDAW allows for communications in which victims allege to be a victim of a right under the Convention, rather than of a failure of the State to comply with the obligations. The CEDAW Committee repeated its recommendation – formulated in the concluding observations on Hungary adopted under the reporting procedure – to adopt a specific law on domestic violence against women.

Further, the woman concerned could not find shelter, because one of her children was seriously disabled, and no shelter could accommodate her and her children. As a consequence, she could not escape from her partner and the abuse continued. The case remained pending before the court for years and the eventual conviction did not result in a custodial sentence, but merely in a fine. The efforts made were not sufficient to address the victim's persistent situation of insecurity. Another aspect of this case was that the CEDAW Committee concluded that domestic violence cases as such did not enjoy high priority in court proceedings. It observed that, 'women's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy.'<sup>16</sup> The Committee found a violation of various provisions of the Women's Convention, among which was the duty to have adequate legislation in place protecting the right to security, to eliminate stereotypes and to guarantee equality in the family.<sup>17</sup> The views reflect the importance States parties should attach to the grave infringement of rights caused by violence, when balancing the human rights of others. Without much ado, it states that women's right to be free from violence cannot be superseded by the perpetrator's right to access his house. A more thorough reasoning of this issue might have made this finding stronger. The CEDAW Committee could, for example, have referred to the fact that the right to privacy as guaranteed in, *inter alia*, article 17 ICCPR, can be restricted to protect the rights of others, and that, on the other hand, the right to be free from violence cannot be restricted for such purposes. Ms. A.T. and her children were in need of adequate protection against ongoing

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16 CEDAW COMMITTEE, 26 January 2005, *A.T. v. Hungary*, Comm. No. 2/2003, in UN Doc. A/60/38 (Part I), Annex III, at para. 9.3.

17 CEDAW COMMITTEE, 26 January 2005, *A.T. v. Hungary*, Comm. No. 2/2003, in UN Doc. A/60/38 (Part I), Annex III, at paras. 9.2-9.6.



violence, and in the absence of shelters that could accommodate her, finding that her partner's right to privacy could be restricted can well be argued. Restrictions on the right to respect for privacy require a legal basis, and some considerations on that aspect make this jurisprudence more easily acceptable and applicable by other human rights treaty bodies.

In *Vertido v. The Philippines*, the CEDAW Committee acknowledged that the text of the Convention does not expressly provide for a right to a remedy. However, it considered that such a right is implied in the Convention. It derived this from article 2 (c), which requires States parties 'to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination'. According to the CEDAW Committee, 'for a remedy to be effective, adjudication of a case involving rape and sexual offences claims should be dealt with in a fair, impartial, timely and expeditious manner.'<sup>18</sup> This appears to be somewhat different from the Human Rights Committee's case law on the issue. It would have been interesting to have some further explanation for the basis for the CEDAW Committee's interpretation. According to the Human Rights Committee, article 2, paragraph 3 ICCPR requires States parties to make reparation to individuals in case of a violation of their rights. The Committee notes that, where appropriate, reparation 'can involve (...) bringing to justice the perpetrators of human rights violations'. The CEDAW Committee's addition that this should be fair, impartial, timely and expeditious is a desirable interpretation of the right to an effective remedy. Additionally, this case is of interest because the CEDAW Committee considered the impact of stereotyping on women's right to a fair trial in a concrete case. It underlined that the judiciary must 'take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-

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18 CEDAW COMMITTEE, 16 July 2010, Comm. No. 18/2008, *Karen Tayag Vertido v. The Philippines*, UN Doc. CEDAW/C/46/D/18/2008, at para. 8.3.

based violence, in general.<sup>19</sup> In this particular case, the CEDAW Committee examined the court's evaluation of the behaviour of the rape victim and its position of how she ought to have behaved: physically resisting the rape, rather than evaluating the aspect of consent.<sup>20</sup> The CEDAW Committee found violations of articles 2 (c) and (f) and 5 (a). It shows how the CEDAW Committee can apply the generally formulated obligations to eliminate stereotypes in concrete cases.

This reasoning was continued and expanded in the case *R.P.B. v. The Philippines*. The CEDAW Committee considered the way in which the courts had dealt with a deaf and mute woman who was the victim of rape. The author of the communication had provided information to demonstrate how the court used gender-based myths and stereotypes about rape and rape victims, which led to the acquittal of the perpetrator. As in the above-mentioned case, the CEDAW Committee found shortcomings in the relevant criminal provisions, which require force or violence to conclude that rape has been committed, rather than the absence of consent. Particularly interesting is the way in which the CEDAW Committee interprets article 2 (c), which obliges States parties to establish the legal protection of the rights of women on an equal basis with men and to ensure, through competent national tribunals and other public institutions, the effective protection of women against any act of discrimination. The CEDAW Committee recalls its general recommendation on violence against women, where it has pointed out that this implies that States parties should ensure that laws against gender-based violence give adequate protection to all women and provide effective complaints procedures and remedies, including compensation. For a remedy to be effective, the adjudication of a case involving rape and sexual offences claims should be dealt with in a fair, impartial, timely and expeditious manner.<sup>21</sup> The CEDAW Committee concluded that there had been an undue delay in the proceedings due to a lack of adequate planning

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19 CEDAW COMMITTEE, 16 July 2010, Comm. No. 18/2008, *Karen Tayag Vertido v. The Philippines*, UN Doc. CEDAW/C/46/D/18/2008, at para. 8.4.

20 CEDAW COMMITTEE, 16 July 2010, Comm. No. 18/2008, *Karen Tayag Vertido v. The Philippines*, UN Doc. CEDAW/C/46/D/18/2008, at paras. 8.4-8.7.

21 CEDAW COMMITTEE, 21 February 2014, Comm. No. 34/2011, *R.P.B. v. The Philippines*, UN Doc. CEDAW/C/57/D/34/2011, at para. 8.3.

by the trial court and the lengthy correspondence with the resource centre providing interpretation. With respect to the assistance of an interpreter, the CEDAW Committee referred to case law from the Human Rights Committee concerning article 14(3)(f) ICCPR. This provision guarantees the rights of accused persons to an interpreter if they do not understand the court language, and which is, under certain circumstances, also relevant to the right of witnesses to an interpreter. The precise reasoning of the Human Rights Committee is not included in the CEDAW Committee's views. According to the Human Rights Committee, '(...) if the accused or the witnesses have difficulties in understanding, or in expressing themselves in the court language, is it obligatory that the services of an interpreter be made available.'<sup>22</sup> The CEDAW Committee's explicit attention for the position of the victim of sexual violence, a deaf and mute woman, is a valuable contribution to this interpretation. Especially since there are not many cases on the right of the assistance of an interpreter for witnesses in criminal trials, this aspect deserved more attention to highlight it and make it more easily accessible. It concluded that the author of the communication could not adequately benefit from sign language, even though this was 'essential to ensure the author's full and equal participation in the proceedings, in compliance with the principle of equality of arms and hence to guarantee her the enjoyment of the effective protection against discrimination within the meaning of article 2 (c) and (d) of the Convention, read in conjunction with the Committee's general recommendation No. 19.'<sup>23</sup>

In *S.V.P. v. Bulgaria*, the CEDAW Committee concluded that the way in which the rape of a minor girl (7 years old at the time of the crime) was dealt with was inadequate. Even though the girl had been raped, the case was prosecuted as an act of molestation, a less serious offence than rape and subject to a lighter penalty. The perpetrator received only a suspended sentence. According to the CEDAW Committee, Bulgaria had failed to take measures under article 2 (b) CEDAW 'to adopt adequate criminal law

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22 HUMAN RIGHTS COMMITTEE, *Hervé Barzbig v. France*, Comm. No. 327/1988, 11 April 1991, UN Doc. CCPR/C/41/D/327/1988, at para. 5.5.

23 CEDAW COMMITTEE, 21 February 2014, Comm. No. 34/2011, *R.P.B. v. The Philippines*, UN Doc. CEDAW/C/57/D/34/2011, at para. 8.7.

provisions to effectively punish rape and sexual violence and apply them in practice through effective investigation and prosecution of the perpetrator.<sup>24</sup> It also concluded that Bulgaria had failed to provide for legislative measures that could support and protect the victim of such violence in violation of article 2, paragraphs (a), (f) and (g) CEDAW. Further, there was no protection against the consequences of the sexual violence and no compensation or rehabilitation was offered. The Committee observed that discriminatory legislation continued to exist. In its views, the CEDAW Committee referred to its concluding observations adopted following the consideration of Bulgaria's periodic report. It expressed its concern about legal provisions that enable the termination of criminal proceedings against rapists when the rapist marries the victim.<sup>25</sup> Such legislation pressures women into marriage. The CEDAW Committee reaffirmed that such laws reflect harmful gender stereotypes.<sup>26</sup> The absence of any mechanisms for the protection of victims of sexual violence from revictimization was found to be in violation of the rights under article 2, paragraphs (a), (b), (e), (f) and (g); read together with articles 3 and 5, paragraph 1 CEDAW. In this case, some noteworthy references are made. The CEDAW Committee refers to the European Court of Human Rights' judgement in *M.C. v. Bulgaria*,<sup>27</sup> and to the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention).

The case of *Goekce v. Austria* was in some respects different, because the problem was mainly found in the inadequate response of the police rather than in existing laws and the application thereof by the courts. The communication concerned the killing of a woman by her husband. The CEDAW Committee praised this State party for the measures it had already put in place. It acknowledged the existence of a comprehensive model to address domestic violence that includes legislation, criminal and civil-law

24 CEDAW COMMITTEE, 12 October 2012, Comm. No. 31/2011, *S.V.P. v. Bulgaria*, UN Doc. CEDAW/C/53/D/31/2011, at para. 9.5.

25 CEDAW COMMITTEE, 27 July 2012, Concluding observations Bulgaria, UN Doc. CEDAW/C/BGR/CO/4-7, at paras. 23-24.

26 CEDAW COMMITTEE, 12 October 2012, Comm. No. 31/2011, *S.V.P. v. Bulgaria*, UN Doc. CEDAW/C/53/D/31/2011, at para. 9.6.

27 ECtHR, *M.C. v. Bulgaria*, 4 December 2003 (Appl.no. 39272/98).

remedies, awareness-raising, education and training, shelters, counselling for victims of violence and work with perpetrators. It then observed that in order for the individual woman victim of domestic violence to enjoy the practical realization of the principle of equality between men and women and of her human rights and fundamental freedoms, the political will that is expressed in the aforementioned comprehensive system of Austria must be supported by State actors, which adhere to the State party's due diligence obligations. The CEDAW Committee concluded that the police knew or should have known that Goekce was in serious danger. The inadequate response led to a finding of a violation of various provisions of CEDAW, including the obligation to provide equal protection under the law and to provide an effective remedy, the obligation for state institutions to refrain from discrimination, to protect against discrimination by private actors and the obligation to modify existing practices and customs that constitute discrimination against women. In addition, it found violations of the corresponding rights to life and physical and mental integrity.<sup>28</sup>

#### **4. Non-discrimination and human rights dimensions in the case law**

The cases illustrate how in individual cases the CEDAW Committee assesses the measures States parties have taken – or failed to take – to respond to violence against women. Article 2 CEDAW plays a crucial role in the jurisprudence on violence against women, in particular in identifying the positive obligations to prevent and combat violence against women. This provision contains the core obligations of States parties to guarantee equality before the law, equal protection by the law, effective access to remedies and the need to protect against violence by private actors. In the examination of the merits, the CEDAW Committee sometimes refers to the discrimination aspect explicitly, and sometimes more implicitly. In the section of the views where the recommendations are formulated in case of a finding of a violation, the gender dimension is much more explicit, especially where the CEDAW Committee urges States parties to address the root causes of

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28 CEDAW COMMITTEE, 6 August 2007, Comm. No. 5/2005, *Sahide Goekce v. Austria*, UN Doc. CEDAW/C/39/D/5/2005, at paras. 12.1-12.2.

violence against women. It takes into account whether appropriate and effective legal measures exist and policies are in place, and whether these provide effective protection in practice. The CEDAW Committee examines the State party's response to specific violations in order to establish whether the measures taken by the State party are adequate and effective. In its case law, the CEDAW Committee has addressed shortcomings in legislation, the application of the law by the judicial authorities, the proceedings leading to prosecutions, the conduct of proceedings before the court, and issues relating to compensation.

In the views referred to above, the CEDAW Committee does not extensively examine whether the violence that constitutes the basis of the communication falls within the scope of article 1 CEDAW. In these cases, it was hardly necessary to evaluate whether or not women's human rights were at stake. In each of the cases, it was obvious that a grave violation of the physical integrity of the woman or girl concerned had taken place. Apparently, the CEDAW Committee considers that to be self-evident with respect to the forms of violence it had before it: domestic violence and sexual violence. In some cases, it explained that particular forms of violence will affect women more seriously than men. Where that was not the case, the CEDAW Committee did not consider the absence of discrimination to be an obstacle to dealing with the case. The discrimination dimension mainly comes to light when the CEDAW Committee examines the way in which the State's legal system and its authorities take measures to prevent and combat violence against women. In the case of *Vertido v. The Philippines*, it reaffirms that it does not act as a fourth instance and will not decide on the perpetrator's criminal responsibility, but it will determine whether the gender-based myths and misconceptions about rape and rape victims that were relied upon in the proceedings amounted to a violation of the rights of the author of the communication and a breach of the corresponding State party's obligations to end discrimination in the legal process.<sup>29</sup>

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29 CEDAW COMMITTEE, 16 July 2010, Comm. No. 18/2008, *Karen Tayag Vertido v. The Philippines*, UN Doc. CEDAW/C/46/D/18/2008, at para. 8.2.

## 5. Concluding remarks

The views adopted by the CEDAW Committee confirm the added value of the individual complaints procedure as such as well as of the expertise this particular Committee has to offer. In its work under the reporting procedure, the CEDAW Committee has developed a comprehensive approach to violence against women. Under the Optional Protocol it has had before it individual situations in which the CEDAW Committee was asked to consider if and to what extent States parties had complied with their obligations under CEDAW. In each case, the CEDAW Committee identified which rights were violated, which is a significant step in advancing women's human rights. Interpreting article 2 (c) as including the right to an effective remedy is an important conclusion. This provision has turned out to be an effective tool for evaluating the judicial proceedings in which violence against women has been addressed in an individual case. With due attention for the interpretation of human rights provisions by other United Nations human rights bodies, the CEDAW Committee has shown what the concept of the adequate and effective protection of women's right to be free from violence implies. It is clear that the CEDAW Committee makes a valuable contribution, but in some cases it was found that a further elaboration of its findings would be appropriate. The CEDAW Committee has in each of the cases identified the factors that contributed to inadequate or ineffective protection of women's human rights. Its attention for the underlying causes or shortcomings in protection and the effects thereof for individual women are of great value. It shows how structural causes have an impact on the rights of individual women. The recommendations formulated by the CEDAW Committee address not only the situation of the individual woman who submitted the communication but also concern general measures, which contribute to overcoming more structural problems. Combined with the concluding observations and general recommendations, the CEDAW Committee makes a major contribution to a better understanding of the concept of women's full and equal enjoyment of all human rights. Clearly, the problem of violence against women has many dimensions, so does the solution.

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# Milestone or stillbirth?

## An analysis of the first judgment of the European Court of Human Rights on home birth

Fleur van Leeuwen<sup>1</sup>

### 1. Introduction

In 2010 the European Court of Human Rights (henceforth: the Court or ECtHR) ruled that Hungary had violated Article 8 of the European Convention on Human Rights (ECHR) because it had interfered with Ms Ternovszky's right to choose where to give birth. Ms Ternovszky had wanted to give birth at home but argued that she was prevented from doing so because a government decree dissuaded health care professionals from assisting home births. The Court ruled that the matter of health professionals assisting home births was surrounded by legal uncertainty prone to arbitrariness and that this was incompatible with the notion of 'foreseeability' and hence with that of 'lawfulness'.<sup>2</sup> The judgment of the Court in *Ternovszky versus Hungary* is the first binding decision by an international human rights monitoring body on the right to choose the circumstances of giving birth. For this reason alone it is noteworthy to take a closer look at it. But what makes scrutiny also interesting is that the decision – which was heralded by home birth advocates around Europe – has started to be used for legal actions and negotiations on a domestic level. This is remarkable because the Court did not explicitly recognise a right to home birth in its decision.

In this commentary I take a closer look at the *Ternovszky* decision and ask whether it provides any clarity in terms of the entitlements of individuals or obligations for the state party in question as far as home birth is concerned. To that end, I scrutinise its line of reasoning and its outcome. Moreover

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1 I would like to thank Marjolein van den Brink, Sam Dubberley, Susanne Burri, and Jenny Goldschmidt for their comments on earlier versions of this article.

2 ECtHR, *Ternovszky v. Hungary*, 14 December 2010 (Appl.no. 67545/09).

– since it is a case that deals with a highly gender-specific issue – I probe the gender sensitivity of the Court in addressing the matter of childbirth. My overall interest is to find out if the judgment provides home birth proponents with any ammunition in their fight for the legal recognition of a human right to home birth and if it gives any guidance as to (negative and positive) obligations on the part of states in this respect. In the following section I provide some background information to the home birth/hospital birth debate, after which I briefly summarise and then analyse the case. I end with some concluding remarks on this and future home birth cases.

## 2. Home birth versus hospital birth

Home births are no longer the norm in developed countries. The World Health Organisation (WHO) notes that with ‘the widespread institutionalisation of childbirth since the 1930s the option of a home birth in most developed countries disappeared, even where it was not banned.’<sup>3</sup> Beckett and Hoffman observe that in the United States ‘under pressure from organised medicine, some states explicitly prohibited midwifery. Others allowed its practice but restricted it through licensure and other regulatory mechanisms; still others, especially those with large rural populations, tolerated but ignored its practitioners’.<sup>4</sup> In Europe the situation is slightly different. Here midwives can exercise their profession, but they are restricted to the confines of a hospital and work under the supervision of physicians. The exception being childbirth in the Netherlands where a considerable proportion of Dutch society still gives birth at home under the supervision of a midwife.<sup>5</sup> With regard to the relocation of childbirth from the home to a hospital, Beckett and Hoffman observe that this was ‘a consequence of a host of demographic, institutional, and cultural changes’, as well as ‘the consolidation of medical authority and power. Indeed, by the early 20th century, allopathic medicine had established itself as authoritative in virtually all health matters, and this

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3 WHO, *Care in Normal Birth – A Practical Guide*, WHO/FRH/MSM/96.24, 1996, at p. 11.

4 BECKETT and HOFFMAN 2005, at p. 131.

5 BECKETT and HOFFMAN 2005, at p. 131.

authority was reflected in licensure laws that increasingly marginalised those who practised alternative forms of health care'.<sup>6</sup>

Ever since the medical establishment started to take over birthing from traditional midwifery, criticism has been voiced about the medicalisation of childbirth. Beckett notes that it was in the late 1960s and early 1970s that an 'alternative birth movement' emerged as an increasingly cohort and united movement in the United States and other industrialised countries. This movement offered a fairly coherent critique of the conventional approach to childbirth, one that emphasised the importance of treating childbirth as an important life experience and family event rather than a medical emergency.<sup>7</sup> Gaskin, one of the important spokespersons of this movement, said in 1975: '(w)e feel that returning the major responsibility for normal childbirth to well-trained midwives rather than have it rest with a predominantly male and profit-oriented medical establishment is a major advance in self-determination for women'.<sup>8</sup> Besides these notions of self-determination and autonomy, advocates of home births also point to the fact that home births are generally safer for women than hospital births and are far less invasive.<sup>9</sup> Those that question or oppose home births tend to focus on the risks that giving birth at home arguably poses to the unborn child. Philip Steer, Emeritus Professor in obstetrics and gynaecology at Imperial College London held in 2011, for example that he 'feels slightly frustrated when women's groups say most women should have a natural labour'. He insists that problems in labour arise far more commonly than many people appreciate and that 'around half of pregnant women in the United Kingdom will have or develop a complicating factor that makes hospital birth advisable'.<sup>10</sup> In 2010 the American Journal of Obstetrics & Gynaecology published the results of a meta-analysis of studies from several industrialised nations that concluded that planned home births carried two to three times more risk of neonatal

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6 BECKETT and HOFFMAN 2005, at p. 130.

7 BECKETT 2005, at p. 254.

8 GASKIN 1975, at p. 11.

9 BECKETT 2005, at p. 255 and p. 263. A recent study in the Netherlands showed that women with planned home births had a lower rate of severe acute maternal morbidity than those with planned hospital births. DE JONGE et al. 2013, at p. 13.

10 HILL 2011.

death than a planned hospital delivery.<sup>11</sup> Although the research was heavily criticised both for reasons of methodology and its findings,<sup>12</sup> the American College of Obstetrics and Gynaecology states in its Committee Opinion on planned home birth that it respects the right of a woman to make a medically informed decision about delivery, but finds that they should be informed that although the absolute risk may be low, planned home birth is associated with a twofold to threefold increased risk of neonatal death when compared with planned hospital birth.<sup>13</sup>

### 3. Ternovszky versus Hungary

#### 3.1. *A brief summary of the judgment*

In December 2009 Anna Ternovszky filed a complaint against Hungary with the ECtHR. At the time of the application she was pregnant and wished to give birth at home. She argued that she was effectively obstructed in doing so because uncertainty in the law dissuaded health professionals from assisting home births. Home birth was not prohibited in Hungary and the Health Care Act of 1997 recognised patients' right to self-determination in the context of medical treatment. Concurrently, however, a government decree was operative that sanctioned health professionals who carried out activities that were incompatible with either the 1997 law or their licence.<sup>14</sup> In this context, proceedings had been instituted against health professionals for assisting in a home birth in at least one case.<sup>15</sup> Although the applicant complained of a violation of both Articles 8 and 14 of the Convention, the ECtHR considered that the complaint should be examined under Article 8 alone. It did not explain why. The Court observed that Article 8 included the right to choose the circumstances of becoming a parent. It held that it was satisfied that giving birth incontestably formed part of one's private life for

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11 WAX et al. 2010, at p. 243.e1-243.e8.

12 ZOHAR and DE VRIES 2011, at e14; GYTE 2011, at e15; HILL 2011.

13 THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS 2011, at p. 3.

14 ECtHR, *Ternovsky v. Hungary*, 14 December 2010 (Appl.no. 67545/09), at para. 9.

15 ECtHR, *Ternovsky v. Hungary*, 14 December 2010 (Appl.no. 67545/09), at para. 6. See also EGGERMONT 2012. She discusses the case of Agnes Gereb, the midwife who was prosecuted in Hungary for assisting a home birth.

the purposes of this provision and it noted that the choice of giving birth in one's home would normally entail the involvement of health professionals. Legislation which arguably dissuaded health professionals from providing the requisite assistance therefore constituted an interference with the right to respect for private life.<sup>16</sup> The question then was whether this interference was in accordance with the law. The Court considered that where choices related to the exercise of a right to respect for private life occur in a legally regulated area, the state should provide adequate legal protection to that right in the regulatory scheme, notably by ensuring that the law is accessible and foreseeable. In the context of home birth it noted that this implied that the pregnant woman was entitled to a legal and institutional environment that enabled her choice, except where other rights render necessary the restriction thereof.<sup>17</sup> The Court observed that the matter of health professionals assisting home births was surrounded by legal uncertainty prone to arbitrariness. The interference with Ms Ternovszky's private life was therefore not in accordance with the law as the laws in question were not compatible with the notion of 'foreseeability'. The Court ruled that Hungary had committed a violation. In their joint concurring opinion, Judges Sajo and Tulkens held that the state has to provide the adequate legal security needed for the exercise of a freedom, but that this could not be equated with liberalising home births as such. The latter, they noted, was 'obviously a matter of balancing in view of available (currently disputed) medical knowledge, the health of the mother and the child, the structure of health care services, etc. This is a matter where the State has a broad margin of appreciation (...)'.<sup>18</sup>

### 3.2. *An unexpected line of reasoning*

Childbirth, like abortion, can be a tricky subject to tackle for an international human rights monitoring body. The interests of the expectant mother and those of the innocent unborn are easily portrayed as being in conflict with

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16 ECtHR, *Ternovsky v. Hungary*, 14 December 2010 (Appl.no. 67545/09), at para. 22.

17 ECtHR, *Ternovsky v. Hungary*, 14 December 2010 (Appl.no. 67545/09), at para. 24.

18 There is one dissenting opinion to the Judgment, made by Judge Popovic. He argued that the complaint should have been declared inadmissible, *inter alia* because the domestic remedies had not been exhausted.

each other, with the accompanying understanding that the primary threat to foetal health comes from pregnant women.<sup>19</sup> The rights of women to self-determination and autonomy are in that context easily overridden for the 'best interests of the child'. Illustrative are the many countries that restrict the possibility to give birth at home *de jure* and/or *de facto* in order to protect the life and health of the unborn child.<sup>20</sup> In the case of *Ternovszky* one could have expected the Court to take the easy (and arguably more correct) way out and look at the procedural requirements with regard to the right to private life and whether these had been met. After all, this is what it generally does in cases of similar controversy: cases concerning a lack of access to abortion in which the right of the pregnant woman is *de facto* restricted for reasons of the protection of the unborn, but is *de jure* available. In most of the Court's cases on abortion the applicant did in fact have a right to have an abortion under national law, but was for a variety of reasons unable to enjoy her legal right. In those cases the ECtHR decided that it was more fruitful to look at the procedural aspects of Article 8 and whether these were met rather than examining whether the interference in the applicant's enjoyment of her right was justified.<sup>21</sup> The Court thus did not have to make any statements about the existence of a right as such, like a right to abortion, and the accompanying understanding that a state should recognise this right. Instead it could suffice by examining the compatibility of the *de facto* situation with the already existing *de jure* one. Judging this matter is a lot less sensitive. In this respect the Court has previously held, for example, that if the legislature decides to allow abortion, it must not

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19 BECKETT 2005, at p. 266.

20 Hungary adopted a similar line of reasoning in this case. It argued that there was professional consensus in Hungary to the effect that home birth was less safe than birth in a health care institution. It appeared to refer here to less safe for the unborn child as it spoke of 'how to strike a fair balance between the mother's right to give birth at home and the child's right to life and health and, in particular, to a safe birth.' ECtHR, *Ternovszky v. Hungary*, 14 December 2010 (Appl.no. 67545/09), at paras. 16 and 17. BECKETT 2005, at p. 265.

21 ECtHR, *Tysiaç v. Poland*, 20 March 2007 (Appl.no. 5410/03); ECtHR, *A, B and C v. Ireland* (Grand Chamber), 16 December 2010 (Appl.no. 25579/05); ECtHR, *P. and S. v. Poland*, 30 October 2012 (Appl.no. 57375/08).

structure its legal framework in a way that would limit real possibilities to obtain it.<sup>22</sup>

The Ternovsky case closely resembles these abortion cases – not only does it also concern a case in which the rights of the mother are weighed against the protection of the unborn (Hungary itself submitted that there is professional consensus in Hungary to the effect that home birth is less safe – thereby it seems to imply less safe for the unborn child),<sup>23</sup> but the applicant also had a right under national law to give birth at home – that is to say she was not prohibited from doing so – and she could not enjoy this right because of obstructing practices by the authorities (which were prosecuting midwives). Following its line of reasoning in the aforementioned abortion cases, the ECtHR could thus have argued that Hungary had breached its positive obligations under Article 8 by deterring health professionals from assisting home births and by offering no alternative means to ensure that the woman in question could give birth at home (it was not contested by Hungary that this particular woman could give birth at home, i.e., there was, for example, no medical reason necessitating a hospital birth). But, as previously stated, this was not the approach that the ECtHR opted for. Instead it examined whether the constituted interference was justified – a negative obligations approach.

### 3.3. *The question of legality*

In theory a negative obligations approach could have offered clarity as to the existence and extent of a right to home birth. But the Court did not provide such an illumination. Although the Court recognised a right to choose the circumstances of becoming a parent and one can decipher an obligation for states to regulate birthing choices, it did not address the question of a right to home birth. This is because its reasoning stopped at the point of the question of legality when it – in my opinion wrongly – held that the interference with Ternovsky's right to private life was incompatible with the

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22 ECtHR, *Tysiaç v. Poland*, 20 March 2007 (Appl.no. 5410/03), at para. 116.

23 ECtHR, *Ternovsky v. Hungary*, 14 December 2010 (Appl.no. 67545/09), at paras. 16 and 17. BECKETT 2005, at p. 265.

notion of 'foreseeability' and therefore with that of 'lawfulness'. Hence, the interference was held to be not justified and Hungary had breached Article 8. I will briefly explain my dissatisfaction with this conclusion by the Court. The interference in the present case was legal in the sense that the prosecution of the midwife (or midwives) was in accordance with domestic law. If there was an interference in this case then it was caused by the *application* of the law (in this case the Health Care Decree), *not* irregularities in the law. This law stipulated that a health professional who carries out activities in a manner which is not in compliance with the law or his or her licence is punishable with a fine. Although this law can be contested by midwives who feel they have been wrongly prosecuted (for example, on the basis of legal uncertainty), this law was of no concern to the pregnant woman in this case, *unless* the law is *applied* wrongly and is used to ensure that midwives cannot (or will not) assist in home births. The interference was therefore in my opinion construed incorrectly by the Court – as said it was not the law itself, but its application. It is not uncommon for states to adopt admirable laws and to ignore them in practice. This does not mean that the reasoning of the Court in cases like these should stop at the point of the question of lawfulness (due to the unforeseeability this arguably creates). This would also let states off the hook too easily, as the only statement the Court in fact made is: clarify your laws. In my opinion, when authorities factually deny a person a certain right (or part of that right) the interference lies in that practice and the Court when addressing such a case should either take a positive obligations approach – as described previously – or examine whether the interference was justified on grounds other than just legality. In the present case, this would entail that Hungary would have to explain to the Court why it was prosecuting midwives and as such was interfering with – amongst others – Ms Ternovszky's right to private life. The question then becomes one of proportionality: can a state deny women (in general) the possibility to give birth at home? That is, after all, what the state's policy would boil down to (and Hungary actually admitted as much when they argued that home birth – although considered to be a part of the pregnant woman's right to self-determination – was neither encouraged nor supported 'because



of the inherent risks').<sup>24</sup> This is the question that remains unanswered in the Ternovsky case.

### 3.4. *Regulated birthing options*

A decision by the Court on proportionality would thus have provided clarity as to the existence and breadth of a right to home birth. But as it stands the judgment – ending with a decision on the legality of the interference – is a rather meagre result for home birth advocates. Yes, women have a right to choose the circumstances of the birth of their child – but this is not to say that this choice includes home birth. The Court did not specify a choice, nor whether this is a choice between home or hospital birth; whether it means that women should be able to give birth at any location of their liking; or whether it means a choice with regard to a natural birth or a c-section, for example. Also if this choice was to include home birth (and the choice refers first and foremost to a choice between home and hospital birth), it was not stated that states cannot prohibit home births for reasons of, for example, protection of the unborn. The Court itself stated that it 'is aware that, for want of conclusive evidence, it is debated in medical science whether, in statistical terms, home birth as such carries significantly higher risks than giving birth in hospital'.<sup>25</sup> And as the concurring judges Sajo and Tulkens held in their joint opinion, this decision could not be equated with liberalising home birth as such. The latter was 'obviously a matter of balancing in view of available (currently disputed) medical knowledge, the health of the mother and the child, the structure of health care services'. What we can decipher from the judgment is that states need to regulate home birth (which could also mean that states would be justified in prohibiting home births completely): A woman has a right to know where she can legally give birth and thus what her birthing options are.

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24 ECtHR, *Ternovsky v. Hungary*, 14 December 2010 (Appl.no. 67545/09), at para. 17.

25 ECtHR, *Ternovsky v. Hungary*, 14 December 2010 (Appl.no. 67545/09), at para. 24. I pay more attention to this comment of the Court in the next section on gender (in)sensitivity.

### 3.5. Gender (in)sensitivity

There is a bulk of feminist literature on childbirth which discusses *inter alia* how a fear of childbirth is cultivated and how patriarchy has told the woman in labour that her suffering is purposive, i.e., is in fact the purpose of her life;<sup>26</sup> the role of the medical profession in the relocation and transformation of childbirth;<sup>27</sup> the monopoly of the medical establishment over medical data and statistics;<sup>28</sup> the highly selective ways in which medical research is reinterpreted in order to support current obstetrical dogma;<sup>29</sup> and the role of reproductive technologies in reviving and strengthening the conception of women's role in the reproductive process, and the related notion that the primary threat to foetal health comes from its 'maternal environment'.<sup>30</sup> Childbirth is not a gender-neutral issue. It is therefore unfortunate that the ECtHR did not pay any attention to the role that gender or gender discrimination might have played in this case: i.e. it did not – for example – examine whether certain harmful gender stereotypes lie at the root of the existing domestic laws and practices regarding childbirth in Hungary, despite Hungary's dubious statement on home birth safety (which I will address below), and it refused – point-blank – to analyse whether the interference in Ms Ternovsky's right constituted gender discrimination (despite her complaint to that end).

It has – in my opinion successfully – been argued by several legal scholars that international human rights monitoring bodies, including the ECtHR, play an important role in recognising and addressing harmful gender stereotypes.<sup>31</sup> Gender stereotypes are understandings that are present in societies and which perpetuate, reinforce, and instigate (structural) gender

26 See for example RICH 1976, at pp. 152-162. This is just one of many examples that Rich provides as to how patriarchy (and accompanying gender stereotypes) affects childbirth.

27 See for example LEAVITT 1983; BECKETT 2005, at p. 253; and BECKETT and HOFFMAN 2005, at p. 138. They argue that organised medicine's opposition to midwifery is best understood as one component of a larger effort to protect and restore the professional and cultural hegemony it enjoyed for much of the twentieth century.

28 See for example GOER 1995.

29 BECKETT 2005, at p. 265.

30 BECKETT 2005, at p. 266.

31 See COOK and CUSACK 2010, at pp. 173-180; TIMMER 2011.

discrimination.<sup>32</sup> With regard to the medicalisation of childbirth, much has been written, for example, about the gender stereotype of the ‘good mother’ who is willing to assume the risks (for her) of a surgical delivery for the benefit of the safety of her unborn.<sup>33</sup> Although the Court was arguably not required to do so,<sup>34</sup> the remark made by Hungary in its defence that ‘there was a professional consensus in Hungary to the effect that home birth was less safe than birth in a health care institution’<sup>35</sup> did deserve scrutiny. For whom are hospital births deemed safer and on what basis? And could this justify taking away a woman’s right to decide to give birth at home – under all circumstances? In this respect one should take into account the feminist literature on childbirth previously referred to, especially the arguments presented therein regarding the high levels of technological intervention during hospital births which are frequently unnecessary and often cause harm to women and babies; the notion that medical research is necessarily partial and imperfect for various reasons (for example: physicians and hospitals have their own sets of interests and medical research is reinterpreted in highly selective ways to support obstetrical dogma); and the studies that indicate that planned home births attended by trained midwives are actually as safe or safer than physician-attended hospital births for low-risk women.<sup>36</sup> Is this statement by Hungary then not a reflection of the notion of a ‘good mother’ – the one who should sacrifice herself for the sake of the unborn?

However, more problematic than the Court not addressing Hungary’s stereotypical comments is that the Court itself made a very similar statement in the judgment. It noted that ‘(f)or the Court, the right to choice in matters of child delivery includes the legal certainty that the choice is lawful and not subject to sanctions, directly or indirectly. At the same time, the Court is aware that, for want of conclusive evidence, it is debated in medical science whether, in statistical terms, home birth as such carries significantly higher

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32 COOK and CUSACK 2010, at pp. 20-24.

33 BECKETT 2005, at pp. 266-267.

34 A discussion on this matter – although very interesting – falls outside the scope of this commentary.

35 ECtHR, *Ternovsky v. Hungary*, 14 December 2010 (Appl.no. 67545/09), at para. 17.

36 BECKETT 2005, at pp. 251-257. A recent study in the Netherlands showed that women with planned home births had a lower rate of severe acute maternal morbidity than those with planned hospital births. DE JONGE et al. 2013, at p. 13.

risks than giving birth in hospital'.<sup>37</sup> Again the question is: for whom are the risks higher? Is the Court implying that women's right to choose the circumstances of giving birth can be interfered with when medical research points to higher risks for the unborn? If the Court is indeed referring to the protection of the unborn, would the results of such research make a general prohibition on home birth proportional? Besides the fact that the Court does not seem to question the reliability of these medical data and that it makes no mention of the alternative body of knowledge on childbirth available from midwives, the statement of the Court – if indeed it refers to the safety of the unborn – does seem an awful lot like a reflection of the 'good mother' idea. It is not clear why the Court made this remark as it had no bearing on its final decision.

Secondly, although no harmful gender stereotypes were exposed by the Court in the proceedings on Article 8, they could have surfaced in an examination of the Article 14 complaint of the applicant. This is another reason why it is to be regretted that the Court decided not to examine this part of the application. Laws (or practices) that deny women self-determination over their bodies – especially when it concerns reproductive issues: issues closely entwined with morals regarding women's virtue and sexuality – should be treated as suspect. Although I do sympathise with, for example, reasons of time management (I am aware of the enormous number of pending cases before the Court) that may be offered as an explanation for not examining all alleged violations in an application – I do feel that in cases such as these, the Court should not that easily bypass a complaint of gender discrimination. After all, only when we address the root of the problem can we ensure the elimination of certain practices (like prosecuting midwives in order to prevent home births).

#### **4. Concluding remarks**

In this commentary I set out to examine whether the Ternovsky judgment of the ECtHR offers any clarity with regard to a human right to home birth and, if so, whether any indications are given by the Court regarding human

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37 ECtHR, *Ternovsky v. Hungary*, 14 December 2010 (Appl.no. 67545/09), at para. 24.

rights obligations for states in that respect. Although home birth advocates heralded the judgment, one must conclude after close scrutiny that the Court did not make any ground-breaking statements – or for that matter any statements specifically in favour of home birth proponents. With regard to individual rights, the Court *did* recognise that there should be room for choice in birthing circumstances, but it did not address the question whether this choice should include the possibility to give birth at home. Although home birth advocates might argue that the Court implicitly recognised such a right (it has been held that the choice referred to in this judgment is a choice between a hospital birth or a home birth), home birth opponents can just as well argue that the decision allows states to prohibit home birth if they have the medical data to support this. The truth of the matter is the following: it is still unclear whether states can prohibit home birth and under which conditions. It is therefore also still not possible to decipher any obligations for states with regard to a right to home birth. What can be deduced from the judgement is that states need to regulate the circumstances under which women can give birth: i.e. a pregnant woman has a right to know where she can legally give birth. Hence, the Ternovsky case offers a decent first – not a milestone – but arguably one on which the Court can build in its future judgments.<sup>38</sup> And when it does so it is to be hoped that it does not stop its reasoning at the point of the question of legality and that it takes into account the possibility of gender discrimination as a root cause for denying the woman in question the possibility to give birth at home. I hope that the Court will demonstrate sufficient courage to address the tricky matter of home birth head-on. I for one would be very interested to see what the outcome of the case would then be.

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38 At the time of writing three cases on home birth were still pending: *Dubská v. the Czech Republic* (Appl.no. 28859/11), *Krejzová v. the Czech Republic* (Appl.no. 28473/12), *Kosaite - Cypriene and others v. Lithuania* (Appl.no. 69489/12).

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# Comparators in multiple discrimination cases: a real problem or just a theory?

Merel Jonker

## 1. Introduction

Suppose a black man of Ghanaian descent applies for a job at a Dutch home-care organization and, to his disappointment, is refused the position. After inquiring, he learns that the main reason for this lies in the fact that he is male since, in the experience of the organization, clients regularly refuse to be helped by male nurses. Furthermore, his being black would supposedly increase the possibility that he would not be accepted by clients.<sup>1</sup> This may be considered a typical example of multiple discrimination; the man in question is discriminated against on both accounts.

Legal scholars dealing with such cases distinguish two forms of multiple discrimination. In case of additive discrimination, discrimination grounds ‘add to each other’ and may therefore be distinguished from one another.<sup>2</sup> In contrast, intersectional discrimination, a concept introduced by the legal scholar Kimberly Crenshaw in 1989, refers to the situation in which the discrimination grounds ‘intersect with each other’ and therefore cannot be disentangled, resulting in a specific form of discrimination.<sup>3</sup> Crenshaw emphasised the problematic consequences of the dominant single-ground approach in American anti-discrimination law, denying protection against work-life discrimination for black women, who were being discriminated against not as women, not as blacks, but as black women. Cases of additive discrimination may be dealt with on just one of the grounds. However, for the people involved, who are convinced that they were discriminated on

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1 This case came before the Netherlands Institute for Human Rights (*College voor de Rechten van de Mens*) in 2012 (*Oordeelnummer* 2012-122, 17 July 2012).

2 MAKKONEN 2002; BURRI and SCHIEK 2009, at p. 3.

3 CRENSHAW 1989.

more than a single ground, it will be unsatisfactory if the other grounds remain undiscussed and invisible. In cases of intersecting discrimination the problem may be more complicated since the discrimination may remain invisible when looked at through the lens of a single discrimination ground. An interesting question is how victims of multiple discrimination may establish their discrimination claim and, subsequently, how discrimination based on more than one ground may be responded to by the courts and equality bodies, notably the Court of Justice of the European Union (CJEU). According to the EU anti-discrimination directives,<sup>4</sup> a complainant first has to establish a *prima facie* case of discrimination. These directives state that a complainant of direct discrimination has to present facts from which it may be presumed that he or she is, has been or would be treated unfavourably in comparison with someone else in a comparable situation on the specific discrimination ground. Consequently, a comparator, either real or hypothetical, has to be identified (exceptions to these requirements have been made with regard to pregnancy cases).<sup>5</sup> Indirect discrimination, on the other hand, which occurs when an apparently neutral provision, criterion or practice puts a particular group of persons at a particular disadvantage compared with other persons, has to be established by statistical evidence. In general, in CJEU cases where only one discrimination ground is at issue, identifying an appropriate comparator does not appear problematic. Moreover, the comparator is not always discussed explicitly.<sup>6</sup> However, as has been recognized in the literature,<sup>7</sup> a comparator may not be so easily identifiable in multiple discrimination cases. For instance, who could be the

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4 Council Directive (EC) 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180 p. 22), Council Directive (EC) 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303 p. 16), Council Directive (EC) 2004/113 of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ L 373 p. 37) and Council Directive (EC) 2006/54 implementing the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ L 204 p. 23).

5 Case C-177/88, *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen*, [1990] ECR I-3941.

6 EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS AND COUNCIL OF EUROPE 2011, at p. 23.

7 See EUROPEAN COMMISSION 2007; GERARDS 2007, at pp. 172-173; BURRI and SCHIEK 2009, at pp. 18-19.



comparator of the Ghanaian man in the example presented above? Would this be a black woman, a white man, both a black woman and a black man, or a white woman, or no comparator at all? It has been suggested, therefore, that a strict interpretation of the comparator requirement in the anti-discrimination directives poses a problem for the courts and equality bodies dealing with such situations.<sup>8</sup> As an alternative, some have proposed a contextual approach as a more suitable method.<sup>9</sup> A contextual approach does not require the appointment of a comparator, but instead takes into account all circumstances of the case at hand. The occurrence of discrimination may thus be found by looking, for example, at interactions that have taken place.<sup>10</sup> Although multiple discrimination receives increasing attention, also within the EU context,<sup>11</sup> the subject has not yet been explicitly addressed in CJEU case law.<sup>12</sup> However, a recent ruling by the Court in the *Galina Meister* case<sup>13</sup> seems to imply that the Court will not necessarily choose to adopt a strict interpretation. Although the preliminary questions do not address the multiple discrimination aspect of the case, they do address comparable problems with regard to the burden of proof in discrimination cases (more specifically, in recruitment cases).

This paper examines whether the concern, as has been expressed in the literature, that identifying an appropriate comparator is one of the major challenges of equality bodies in tackling multiple discrimination is justified. Research has shown that the national equality bodies of the Netherlands, Denmark, Norway and Sweden apply different approaches in this matter.<sup>14</sup> As the EU anti-discrimination directives are applicable to all three countries,<sup>15</sup>

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8 HANNET 2003.

9 GOLDBERG 2011; TIMMER 2011.

10 GOLDBERG 2011, at p. 280.

11 MONAGHAN 2011.

12 Notwithstanding the fact that in a number of cases, multiple discrimination could have been recognized. See for an overview BURRI and SCHIEK 2009, at pp. 7-8.

13 Case C-415/10, *Galina Meister v Speech Design Carrier Systems GmbH*, [2012].

14 JONKER and HALRYNJO 2014.

15 Based on the EEA Agreement, Norway has implemented Council Directive 2006/54/EC. Although Council Directive 2000/78/EC and Council Directive 2000/43/EC do not form part of the EEA Agreement, Norway has implemented these directives in its anti-discrimination legislation (NOU 2009:14, 4.6.1).

their national practices may provide valuable lessons as to how the CJEU may deal with the comparator problem in multiple discrimination cases. In the next section, I first discuss the Galina Meister case, where the final ruling suggests that the CJEU may have left the door open for a contextual approach. I then consider the national practices of the Netherlands and the Scandinavian countries,<sup>16</sup> after which I provide suggestions regarding the future assessment of cases by the CJEU.

## 2. Galina Meister

In 2012 the CJEU gave a preliminary ruling in the Galina Meister case.<sup>17</sup> This ruling may provide some salient points for the treatment of other (including multiple) discrimination cases. Most importantly, the Court rendered a decision on evidence requirements when establishing a discrimination case, more specifically on the consequences of not being able to identify a comparator.

Galina Meister had Russian nationality and held a Russian degree in systems engineering, which was recognized in Germany. At the age of 46, she twice applied for a job as an ‘experienced software developer’ with a company called Speech Design in Germany, but was rejected on both occasions without having been invited for a job interview and without any explanation as to the reasons for her rejection. Meister claimed to have been discriminated against on the grounds of sex, age and ethnic origin and brought a case against the employer before the *Arbeitsgericht* (Labour Court), which was subsequently appealed before the *Landesarbeitsgericht* (Higher Labour Court) and, finally, the *Bundesarbeitsgericht* (Federal Labour Court). The latter referred two questions to the CJEU for a preliminary ruling, the first of which was whether the European anti-discrimination directives<sup>18</sup> were to be interpreted as meaning that a job applicant, who is refused the job despite meeting the requirements for the post as advertised by the employer, has a right to know whether the employer engaged another applicant at the

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16 Due to the limited amount of cases in Denmark, the Danish cases are not considered this article.

17 See also FARKAS 2012.

18 Article 19(1) of Directive 2006/54, Article 8(1) of Directive 2000/43 and Article 10(1) of Directive 2000/78.

end of the recruitment process and, if so, on the basis of which criteria the appointment was made.

Secondly, the referring court wanted to know whether, if the answer to the first question was affirmative, the non-disclosure of the requested information by the employer gives rise to a presumption that the alleged discrimination did occur.

With regard to the first question, the Court stated that a job applicant who ‘claims plausibly that he meets the requirements listed in the job advertisement and whose application was rejected is not entitled to information indicating whether the employer engaged another applicant at the end of the recruitment process’. However, it simultaneously mentioned that ‘the refusal to grant any access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination’. In view of this answer there was no further need for the Court to reply to the second question.

One of the main issues in this case concerned the burden of proof. Due to the fact that employers are not obliged to provide information about the other applicants – since privacy rights play an important role here – it may be very difficult for claimants to prove discrimination in cases such as this.<sup>19</sup> Information on the identity and qualifications of the other applicants would be pivotally to identify an appropriate comparator. This implies that even in discrimination cases on a single ground, an appropriate comparator may not be readily available. It is true that in this case, as an alternative, a hypothetical comparator may be construed from evidence about how other persons have been treated in comparable situations, for example on the basis of the employer’s previous recruitment practices. However, in cases of multiple discrimination, it remains unclear who this hypothetical comparator should be, with options ranging from younger workers, male workers, workers of German descent, to, perhaps, a young man of German origin.

The *Galina Meister* case has been heavily debated.<sup>20</sup> While academics welcome the final ruling, they argue that the CJEU ‘missed an opportunity to provide

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19 BURRI 2012, at p. 360.

20 FARKAS 2012; BURRI 2012, at p. 360; VELDMAN 2012.

vital guidance on basic procedural issues'.<sup>21</sup> Although the identification of an appropriate comparator was not at issue, the Court, in my view, has left room for the application of a contextual approach instead of a comparator approach by stating that a refusal to provide such information could be one of the factors to be considered in discrimination cases. This appears to be in line with national judicial practices. Research by Jonker and Halrynjo shows that the national equality bodies of the Netherlands, Norway and Sweden do not identify a comparator in every multiple discrimination case.<sup>22</sup> Moreover, in almost half of the 50 cases examined, a so-called 'non-comparator' approach was applied. The following section highlights the findings with respect to recruitment cases.

### 3. National practice

In our research, we compared and analysed the case law of the Dutch, Norwegian, Swedish and Danish equality bodies concerning gender-plus discrimination in the labour market. The study focused on the characteristics of multiple discrimination cases, on whether comparators were used and whether the structure of the equality body as well as the legislative structure affected the way in which these cases were dealt with. Although our study did not consider which factors were decisive when the equality bodies did not appoint a comparator, the data do provide some indications.

Focusing on the cases that are comparable with the *Galina Meister* case – recruitment cases –, the Norwegian and Swedish equality bodies seemed more familiar with identifying an 'integrated comparator' than the Dutch equality body.<sup>23</sup> In these two countries, employers are obliged, at the request of an applicant, to provide information concerning the education, working

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21 FARKAS 2012.

22 JONKER and HALRYNJO 2014. Some 50 complainant cases concerning gender-plus discrimination were compared (including two Danish cases). The cases came before the equality bodies between 2006 and 2010.

23 In all three Swedish recruitment cases an integrated comparator approach was applied and this was done in 4 out of 7 Norwegian recruitment cases.

experience and other demonstrable qualifications of the other applicants.<sup>24</sup> It appears that, depending on who these other applicants were, one of two approaches is followed. Firstly, the equality body may appoint two comparators (or comparator groups), with each comparator being considered for a particular discrimination ground while keeping the other ground(s) 'invariable'; we have dubbed this the invariable approach. In the example of the Ghanaian man, the man would be compared with a black woman (with ethnicity skin colour as the invariable ground in the comparison) as well as with a white man (with gender being the invariable ground). Conversely, the Ghanaian man may be compared with his 'opposite', which could be a white woman, and this is therefore denoted as the opposite approach.

In the Netherlands, on the other hand, discrimination grounds appeared to be more commonly dealt with separately (in the separate approach), either with or without a comparator.<sup>25</sup> The question arises, then, which elements are decisive to prove discrimination if no comparator is appointed. The recruitment cases in which the Dutch (and in one case the Norwegian) equality body applied a non-comparator approach contain examples of the contextual factors that may substantiate a presumption of discrimination. Substantiation may be done by referring to the correspondence between the claimant and the defendant, by examining the selection criteria and by considering the overall profile of employees working for the particular employer.

Firstly, the least problematic cases are those in which the justification for the rejection proves to be decisive. In some cases, employers explicitly refer to the discrimination grounds concerned in their replies to the questions of rejected applicants. In answering why they were rejected, employers have asserted that they 'were looking for someone who fits [in their team] in terms of gender and age' (CGB 3 June 2008, oordeel 2008-59), or that they were 'looking for a woman, aged between thirty and forty' (CGB 5 November

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24 Art. 4 Norwegian Equality Act; Art. 13-7 Norwegian Working Environment Act; Art. 14 Norwegian Anti-Discrimination and Accessibility Act; Art. 11 Norwegian Anti-Discrimination Act; Chapter 2, Art 4 Swedish Discrimination Act (2008:567).

25 In all of the Dutch cases (9) a separate approach was applied (2 with a comparator and 7 without a comparator).

2010, oordeel 2010-161). In these kinds of cases, it is clear that identifying a comparator is not necessary.

Secondly, the criteria for the selection of job applicants may play different roles in establishing a presumption of discrimination. In a Dutch case (CGB 15 May 2007, oordeel 2007-81), for example, the employer refused to mention the selection criteria when requested to do so by the equality body and this was sufficient to shift the burden of proof to the defendant. In a Norwegian case (LDO 3 July 2007, LDO-07/111), discrimination was not proven when the employer did mention objective selection criteria (not related to the claimed discrimination grounds) and the applicant was shown to fail on these requirements.

Lastly, general information on the employees working for the defendant may be provided and policies investigated. A man, 54 years of age, applied for an administrative job with an insurance company (CGB 9 December 2008, oordeel 2008-149). He claimed to have been discriminated against because of his age and gender, since mainly younger women were working for the company. The claim was overruled; general figures concerning the company showed that the age of the employees ranged from 21 to 58 years, which, according to the CGB, suggested that a younger age was not held to be a selection criterion. Furthermore, the company had an active 'diversity policy', stimulating their employees' personal development while taking into account their age, gender, ethnicity and so on. Moreover, although the vast majority of the employees were female, discrimination could not be presumed in this case since women are generally overrepresented in administrative jobs.

#### **4. Conclusion**

In the literature, identifying an appropriate comparator is mentioned as one of the major challenges for equality bodies in tackling multiple discrimination. Is this concern justified, or does it merely concern a 'theoretical' problem? The practices of the Dutch, Norwegian and Swedish equality bodies show that equality bodies sometimes apply a contextual approach in multiple discrimination cases, which provides a feasible alternative to the comparator approach whereby they compared the complainant with the other applicants. In the case of the Ghanaian man presented in the Introduction,

the identification of his comparator did not appear to be necessary for the Dutch equality body since the statements of the employer were considered sufficient evidence for his discrimination claim. However, it remains unclear whether these practices are in line with EU legislation, since the EU anti-discrimination directives postulate that either a (hypothetical) comparator or statistical evidence is required to prove a discrimination case. With the ruling in the *Galina Meister* case, the CJEU has arguably opened up the possibility of a contextual approach in discrimination cases, at least in recruitment cases. Unfortunately, the Court did not provide any further guidance as to how to prove a discrimination case if an appropriate comparator cannot be identified. Examples may be obtained from the Dutch equality body, which has so far referred to three different contextual factors that could be used in recruitment cases: the selection criteria of the employer, a general evaluation of all employees working for the employer, and the reasons for the rejection provided by the employer.

In conclusion, multiple discrimination cases do not appear to pose insurmountable problems for national judicial practices. In line with these practices, the CJEU may be advised to investigate the feasibility of contextual approaches in future (multiple) discrimination cases whenever a comparator is difficult to identify. If so, additional guidance would be needed regarding the factors to be considered when applying such an approach. This would allow for a more straightforward as well as transparent judicial process, and thus for more legal certainty.

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# Great diversity and some equality: non-marital legal family formats for same-sex couples in Europe

Kees Waaldijk

## 1. Introduction

The year 2013 marks the completion of a major task, while a new challenge is presenting itself.

This was not only true for Titia Loenen, but also for the European Court of Human Rights. From 2003 onwards the Strasbourg court has been developing a body of case law requiring equal treatment of same-sex and different-sex partners *outside* marriage. In 2013 it completed this by ruling that the requirement also applies to the formalisation of family life: through second-parent adoption (*X v Austria*) and through partnership registration (*Vallianatos v Greece*).<sup>1</sup> While developing this case law the Court simultaneously has been creating a new perspective, by starting to talk very affirmatively about the realities and legal needs of same-sex couples.<sup>2</sup> This perspective could become highly relevant to same-sex partners in all those countries where many rights and benefits are still the exclusive privilege of married different-sex partners.

Meanwhile, the number of European countries that legally recognize same-sex couples is growing, and so is the number of pieces of EU legislation that acknowledge non-marital partners (of any gender combination).<sup>3</sup> The result is a wide range of legal 'family formats' (other than marriage) that are being used in this process of recognition, each entailing their own more or less limited set of rights and obligations. The terminology used for these new legal family formats is even more varied. Authors of comparative family law

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1 See section 5, below.

2 See section 6, below.

3 See section 2, below.

have proposed various classifications of these family formats – so far without convincing each other.<sup>4</sup> The European courts in Luxembourg and Strasbourg have now been asked several times to invalidate distinctions made between same-sex and different-sex partners, and between married, registered and cohabiting partners – with mixed results.<sup>5</sup>

## 2. National legislation is extending the range of available legal family formats

For a long time, across Europe, the only available legal family format for a couple was marriage, different-sex marriage. By marrying each other, the partners triggered a range of legal rights and responsibilities, between themselves and in relation to any children and others. However, over the last four decades, new legal family formats have been created and made available to same-sex and/or different-sex couples. Examples are joint household, registered partnership, civil partnership, legal cohabitation, *de facto* union, etc. This has been happening in a growing number of countries, and recently ten of these countries have also opened up marriage to same-sex couples. In most member states of the European Union, and in a handful of other European countries, now at least one legal family format is available to same-sex couples (see *Table 1*).<sup>6</sup>

In spite of the lack of uniformity between the legislation of different European countries, it seems that the picture of Europe's map is becoming less diverse than a few years ago. After the recent opening up of marriage in France and England and Wales, and soon in Scotland and Luxembourg,<sup>7</sup>

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4 See section 3, below.

5 See section 5, below.

6 For sources of most data in *Table 1*, see PAOLI ITABORAHY and ZHU 2014; SAEZ 2011; WAALDIJK 2009; WAALDIJK 2005. And for developing latest news, see 'Recognition of same-sex unions in Estonia', 'Recognition of same-sex unions in Finland' and 'LGBT rights in Greenland' available at: [www.wikipedia.org](http://www.wikipedia.org).

7 In Luxembourg the law of 4 July 2014 (*Réforme du mariage*) allowing same-sex couples to marry will enter into force on 1 January 2015 (available at: [www.legilux.public.lu/leg/a/archives/2014/0125/a125.pdf](http://www.legilux.public.lu/leg/a/archives/2014/0125/a125.pdf)). See also the following four footnotes. The *Marriage and Civil Partnership (Scotland) Act 2014* of 12 March 2014 will enter into force by the end of 2014 (available at: [www.scotland.gov.uk/Topics/Justice/law/17867/samesex](http://www.scotland.gov.uk/Topics/Justice/law/17867/samesex)).

and with the introduction of registered partnership in Malta and Croatia in 2014, the situation will be as follows:

Almost all countries in Northern, Western and Central Europe (the exceptions are Estonia, Latvia, Lithuania, Poland and Slovakia) allow same-sex couples to enter into a legal format that is either called marriage or that entails most of the legal consequences of marriage. In most countries in Eastern and South-Eastern Europe (including Italy, Romania, Bulgaria and Cyprus) this is not (yet) the case; the exceptions are Malta, Slovenia and Croatia, each of which now has registered partnership for same-sex couples. Since the judgment in the *Vallianatos* case, registered partnership in Greece should also be made available to same-sex couples.<sup>8</sup> Meanwhile it seems that Poland,<sup>9</sup> Estonia,<sup>10</sup> Italy<sup>11</sup> and Serbia<sup>12</sup> have extended a small degree of legal recognition to same-sex cohabitants.

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- 8 On 7 November 2013 the ECtHR decided that it is not acceptable that registered partnership in Greece is only available to different-sex couples (ECtHR *Vallianatos v Greece*, 7 November 2013 (Appl.no. 29381/09 and 32684/09), at para. 92).
  - 9 In Poland the recognition of same-sex couples, since 2012, is limited to rent law. When one of two cohabiting partners is renting an apartment and then dies, the other partner can continue the rental contract. This follows from Article 691(1) of the Civil Code ('a person who was in actual cohabitation with the deceased'), as interpreted by the Supreme Court of Poland in a decision of 28 November 2012 ([www.sn.pl/Sites/orzecznictwo/Orzeczenia2/III%20CZP%2065-12.pdf](http://www.sn.pl/Sites/orzecznictwo/Orzeczenia2/III%20CZP%2065-12.pdf); for an English summary of that case see [www.hfhr.pl/en/sn-podjal-uchwale-w-sprawie-wstapienia-w-stosunek-najmu-po-zmarlym-partnerze-homoseksualnym](http://www.hfhr.pl/en/sn-podjal-uchwale-w-sprawie-wstapienia-w-stosunek-najmu-po-zmarlym-partnerze-homoseksualnym)). The interpretation given by the Supreme Court is in line with ECtHR, *Kozak v Poland*, 2 March 2010 (Appl.no. 13102/02).
  - 10 In Estonia, Article 3 of the Citizen of European Union Act of 2006, in its definition of 'family member', speaks of 'any other person who, in the EU citizen's country of origin, is a dependant of the EU citizen or is a member of his/her household', but it is not completely certain that same-sex partners will be included under this definition (see EU AGENCY FOR FUNDAMENTAL RIGHTS 2001, at pp. 13-15).
  - 11 In Italy same-sex cohabitants may enjoy some recognition because of a judgment of the Court of Cassation of 15 March 2012 (case 4184/12). Two commentators state that 'the Court grants gay couples a right to family life on the basis of the equality/non-discrimination provision, Article 3 of the Italian Constitution, and makes clear that this right can be judicially protected, even absent any action by the Legislature' (FICHERA and HARTNELL 2012, at p. 7).
  - 12 For the (unconfirmed) applicability to same-sex couples of the legal protection against domestic violence in Serbia, see CVEJČIĆ JANČIĆ 2010, at p. 81.

Table 1: Chronology of the European countries that have started to legally recognize same-sex couples\*

	Is there any legal recognition of cohabitation of same-sex couples? If so, since when?	Can same-sex couples enter into a registered partnership? If so, since when?	Do same-sex couples have access to civil marriage? If so, since when?
Denmark	1986	no longer (1989-2012)	2012
Norway	1991	no longer (1993-2009)	2009
Sweden	1988	no longer (1995-2009)	2009
Iceland	1994?	no longer (1996-2010)	2010
Greenland (DK)	?	1996	in preparation
Netherlands	1979	1998	2001
France	1993	1999	2013
Belgium	1996	2000	2003
Germany	2001	2001	no
Finland	2001?	2002	in preparation
Luxembourg	?	2004	2015
Spain	1995	no, regionally from 1998	2005
England & Wales (UK)	1999	2005	2014
Scotland (UK)	2000	2005	2014
Northern Ireland (UK)	?	2005	no
Slovenia	?	2006	no
Andorra	?	2006	no
Czech Republic	?	2006	no
Switzerland	2000?	2007, regionally from 2001	no
Hungary	1996	2009	no
Portugal	2001	no	2010
Austria	1998	2010	no
Ireland	1995	2011	in preparation
Liechtenstein	?	2011	no
Isle of Man (UK)	?	2011	no
Jersey (UK)	?	2012	no
Malta	2014	2014	no

	Is there any legal recognition of cohabitation of same-sex couples? If so, since when?	Can same-sex couples enter into a registered partnership? If so, since when?	Do same-sex couples have access to civil marriage? If so, since when?
Croatia	2003	2014	no
Serbia	2005?	no	no
Estonia	2006?	in preparation	no
Poland	2012	no	no
Italy	2012?	in preparation	no
Cyprus	?	in preparation	no

\* The order of countries is based on when either registered partnership or marriage became available nationally.

### 3. Academic literature is trying to classify the new legal family formats

Authors of comparative law and other disciplines have been struggling to find suitable classifications for this wave of new legal family formats. Several authors speak about registered partnership as a form of (unmarried, non-marital) ‘cohabitation’.<sup>13</sup> Others see cohabitation and registered partnership as two distinct alternatives to marriage.<sup>14</sup> The main problem in the many classifications that have so far been proposed (see *Table 2*), is that different criteria are being used – often simultaneously. These criteria include: the legal name used for a format (‘marriage’), the procedure that is required to use the format (‘registration’, ‘enrolled’, ‘formalized’), the place in legal doctrine that the format has been given (‘contract’, ‘civil status’), the level of legal consequences that is attached to a format (‘strong’ or ‘weak’ registration, ‘some’ or ‘most’ rights of marriage), and the degree of similarity to marriage (‘non-marital’, ‘quasi-marriage’, ‘semi-marriage’).

The ‘life partnership’ in Germany is a good example of the difficulties of classification. Introduced in 2001, it was at first mostly classified as ‘registered cohabitation’, ‘semi-marriage’ or ‘weak registration’. However, after more legal consequences had been attached to it, by legislation and by case law,<sup>15</sup>

13 BRADLEY 2001; BARLOW 2004; PERELLI-HARRIS and SÁNCHEZ GASSEN 2012.

14 WINTEMUTE 2001, at p. 764; WAALDIJK 2005.

15 See SCHERPE 2013, at p. 92.

it is now mostly seen as a ‘strong’ form of registered partnership entailing most rights of marriage.

The challenge of classification is also highlighted by Scherpe, who points out that in some jurisdictions a mix of ‘simple’ and ‘formalized’ partnership has been created.<sup>16</sup> In some regions of Spain the legal recognition applies automatically after living together for two or three years or having a child together, but it is also possible for the couple to ‘enter the institution through a private contract recorded in a public deed’.<sup>17</sup>

It is clear from *Table 2* that no consensus on classification has been reached in (legal) literature.<sup>18</sup> (In fact, some authors may not agree with how I have used their classification to group the countries at the bottom of *Table 2*.) Nevertheless, it seems that for formats not involving registration the words used most frequently are ‘cohabitation’ and ‘unregistered’. Because the word ‘cohabitation’ is easy to understand, and because ‘unregistered’ is somewhat confusing in its suggestion of a previous registration that has been un-done, I will continue to speak of ‘cohabitation’.

However, I have come to realize that the phrase ‘informal cohabitation’ that I used in 2005,<sup>19</sup> is not always correct, because in some jurisdictions certain legal consequences are only attached to cohabitation if that cohabitation has been formalized in a specific way: by contract and/or with a public notary and/or in a procedure that results in registration. If the registration does not require any period of previous cohabitation, and remains valid when the couple stop living together, one can speak of ‘registered partnership’ (see below), but if not, it would still remain a (formalized) form of cohabitation.<sup>20</sup> I now propose to use ‘cohabitation’ as the umbrella term for informal and formalized forms of cohabitation.<sup>21</sup>

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16 SCHERPE 2005, at p. 582.

17 GONZÁLEZ BEILFUSS 2012, at p. 47.

18 In addition to the authors mentioned in the previous five footnotes and in the following five footnotes, *Table 2* also refers to: BELL 2004; COESTER 2002; FORDER 2000; FULCHIRON 2000; KESSLER 2004; KOLLMAN 2007.

19 WAALDIJK 2005.

20 Of course there are also informal *non-cohabiting* relationships, but neither the literature nor national legislations give much attention to these.

21 Within this category it will only rarely be necessary to distinguish between piecemeal recognition, and situations where there is one general law on informal cohabitation.



For formats that do involve registration, the phrase ‘registered partnership’ is used most frequently, and I will continue to do so (except if a period of previous cohabitation is a condition for registration, or if the registration extinguishes automatically when the couple stop living together). It should be borne in mind that the use of this phrase covers a very wide range of legal formats across Europe. Therefore it will often be useful (for example, when conducting demographic or sociological research) to distinguish between strong and weak forms of registered partnership. Curry-Sumner has proposed to call registration ‘strong’ when there is a ‘near assimilation of the legal effects attributed to registered partners and spouses’.<sup>22</sup> In other words, a ‘strong’ registration can be characterized as a ‘quasi-marriage’.<sup>23</sup> Typically, such a registration would also be very much like marriage in two other dimensions: the conditions and procedures to enter into it and the procedures to get out of it. A weak form of registered partnership, on the other hand, would entail only a limited selection of the legal consequences attached to marriage.<sup>24</sup> Typically the conditions and procedures for entering into such a weak registration (a ‘semi-marriage’) would be different from those for marriage, and it would also be easier to get out of it. Occasionally (as the example of Germany has shown) it may be difficult to decide whether the form of registered partnership enacted by a particular jurisdiction should be classified as strong or as weak.<sup>25</sup> When the level of legal consequences attached to it is somewhere between ‘a limited selection’ and ‘near assimilation’, then regard can be had to how closely the formalities resemble those of marriage.

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22 CURRY-SUMNER 2012, at p. 82.

23 WAALDIJK 2004, at p. 570.

24 WAALDIJK 2004, at p. 571.

25 See the critical remarks of CURRY-SUMNER 2005, at pp. 308-309.

*Table 2: Academic classifications of legal family formats for non-marital couples*

Authors	Classifications that they use or propose for non-marital family formats			
Barlow 2004	cohabitation			
Bradley 2001	unmarried cohabitation			
Perelli-Harris & Sánchez Gassen 2012	cohabitation (unregistered)		cohabitation (registered)	
Forder 2000	cohabitation protection by operation of law	optional co-habitation protection	enrolled contract	partnership registration
Fulchiron 2000	'unions libres'	'partenariats-cadres'		'partenariats-statuts'
Kessler 2004		'partenariats contrats'		'partenariats institutions'
Coester 2002	piecemeal regulation	domestic partnership (cohabitants) legislation	registered partnership	
Scherpe 2005	simple partnership (for specific purpose(s))	simple partnership (for 'bundle' of purposes)	formalized partnership ('formalisierte Lebensgemeinschaft')	
Kollman 2007	unregistered partnership		registered partnership	
Waldijk 2005	informal cohabitation		registered partnership	
Waldijk 2004	para-marriage		semi-marriage	quasi-marriage
Wintemute 2001	unregistered cohabitation		registered cohabitation	registered partnership
Bell 2004	cohabitation		legally recognized partnership	registered partnership
Curry-Sumner 2005	unregistered forms of cohabitation		non-marital registered relationships (weak registration)	non-marital registered relationships (strong registr.)
Curry-Sumner 2012	unregistered relationship forms		registered partnership (weak registration)	registered partnership (strong registr.)
Paoli Itaborahy & Zhu 2014	some rights of marriage			most or all rights of marriage
Waldijk now	cohabitation		registered partnership	

Examples of countries with family formats in the various categories	Netherlands Denmark Iceland Hungary etc.	Sweden Croatia Portugal Slovenia** parts of Spain etc.	Iceland parts of Spain etc.	Belgium France Greece** parts of Spain etc.	Czech Republic* Slovenia*  [initially: Germany*]	Netherlands Finland* UK* Switzerland* Hungary* Austria* Ireland* Croatia* now: Germany*
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\* For same-sex couples only. \*\* For different-sex couples only.

#### 4. EU legislation is cautiously following some national trends

Just like national lawmakers and legal scholars, the institutions of the European Union have not found it easy to deal with new forms and formats of family life. Family law as such is not a field in which the EU plays an important role. However, in quite a number of its fields of operation (ranging from free movement to accounting standards) family relationships do play a small or greater part. At EUR-lex.europa.eu, a search for the words ‘marriage’, ‘spouse’ and/or ‘child’ generates a list of more than 500 EU regulations and directives in force today. Only some of these also make reference to non-marital partnerships.

The overview in *Table 3* makes it very clear that the EU has not yet found one consistent approach to the topic; it uses at least ten different phrases, and these show little overlap with the categories used by scholars (see *Table 2*).<sup>26</sup> The overview also shows that – unlike national legislation in some countries – EU legislation does not distinguish between same-sex and different-sex non-marital relationships.<sup>27</sup> This is not surprising, because such a distinction would have been contrary to the well-established case law of the

26 The list includes three pieces of legislation that speak of ‘dependants’ (Directive 2004/38/EC, Regulation 632/2010, Directive 2012/29/EU). That word is capable of including partners, but it is also possible to clearly distinguish between partners and dependants. The EU Court of First Instance has suggested that the word ‘dependants’ does not include partners in a ‘union between two persons’ (Case T-58/08 P, *Commission v Roodhuijzen*, [2009] ECR II-03797, at para. 84).

27 Whether it is still permissible in EU law to distinguish between same-sex and different-sex marriages that have lawfully been entered into, is a question that has not yet been decided by the Court of Justice of the EU. However, it seems to follow from the *Maruko*, *Romer* and *Hay* cases that such a distinction would be unlawful in the field of spousal benefits in employment (see *Table 6*).

European Court of Human Rights (see *Table 5*). Some of the directives use the phrase ‘registered partnership’, but interestingly, none of the examples in *Table 3* is limited to registered partnership: forms of cohabitation are also covered, provided all substantive and formal conditions are met.<sup>28</sup> Some of the directives and regulations do indeed require some formality, but the way these are phrased (‘duly attested’ and ‘document ... of a member state acknowledging their status’) suggests that a later declaratory document is sufficient. The word ‘cohabitation’, however, does not appear in the phrases used (only the regulation on accounting standards speaks of ‘domestic partner’), but some require the relationship to be similar to marriage, ‘intimate’, stable or ‘long-term’.

Finally, it is important to point out that the listed directives and regulations hardly oblige unwilling member states to start to recognize unmarried partners.<sup>29</sup> The obligation typically only applies when the member state concerned already recognizes such partners. The only example where all member states are being forced to provide some substantial recognition is the recent Victims of Crime Directive.<sup>30</sup> The unease surrounding this novelty becomes apparent in the fact that the relationship not only needs to have a ‘stable and continuous basis’ and a ‘joint household’, but that it must also be both ‘committed’ and ‘intimate’.

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28 This is reflected in the major case interpreting the notion of ‘unmarried partner’ in Article 72 of the EU Staff Regulations: Case T-58/08 P, *Commission v Roodhuijzen*, [2009] ECR II-03797, at paras. 77, 90, 96 and 98.

29 The Staff Regulations and the Statute for Members of the European Parliament, however, do contain such an obligation for the relevant institutions of the European Union.

30 Directive 2012/29/EU, establishing minimum standards on the rights, support and protection of victims of crime.

Table 3: Main examples of EU legislation on non-marital partners\*

Area & legislative text	Article	Terms used	Restrictions
Free movement – Directive 2004/38/EC	art. 2(2)	'registered partnership on the basis of the legislation of a MS'	'if ... <i>host</i> MS treats registered partnerships as <i>equivalent</i> to marriage'
	art. 3(2)(a)	'any other family members ... who ... are dependants or members of the household'	MS only have a duty to ' <i>facilitate</i> entry and residence'
	art. 3(2)(b)	' <i>durable</i> relationship, duly attested'	
Family reunification for third country nationals – Directive 2003/86/EC	art. 4(3)	'duly attested <i>stable long-term</i> relationship' or ' <i>registered</i> partnership'	'MS <i>may</i> ... authorize entry and residence'
Asylum seekers – Directive 2011/95/EU	art. 2(j)	'unmarried partner in a <i>stable</i> relationship'	'where ... <i>MS concerned</i> treats unmarried couples in a way <i>comparable</i> to married couples under its law relating to third country nationals'
Jurisdiction etc. in matters relating to maintenance obligations – Regulation 4/2009	Annex VII, par. 4	'Certificate of marriage or <i>similar</i> relationship'	
	Annex VII, par. 9:3.1.7	' <i>Analogous</i> relationship to marriage'	
Staff Regulations of Officials of the EU, as amended by Regulation 723/2004	art. 72(1) & Annex V, art. 6	'unmarried partner'	'legal document ... of a MS, acknowledging their status as non-marital partners'
	art. 1d	'non-marital partnerships'	'legal document ... of a MS, acknowledging their status as non-marital partners' & 'no access to legal marriage in a MS'
	Annex VII, art. 1(2)(c)	'registered as a <i>stable</i> non-marital partner'	
Statute for Members of the European Parliament – Decision 2005/684/EC	art. 17(g)	'partners from relationships recognized in the member states'	
Implementing measures for Statute Members European Parliament – Decision of 19 May & 9 July 2008	art. 3(1)(a) & 58(2)	' <i>stable</i> non-marital partners'	'official document ... of a MS acknowledging their status as non-marital partners'
Equal treatment of men and women in self-employment – Directive 2010/41/EU	art. 2	' <i>life partners</i> '	'when and in so far as recognized by <i>national law</i> '

Area & legislative text	Article	Terms used	Restrictions
Accounting standards – Regulation 632/2010	art. 9	'domestic partner' and 'dependants'	
Victims of crime – Directive 2012/29/EU	art. 2	'the person who is living with the victim in a committed intimate relationship ... and the dependants of the victim'	'in a joint household and on a stable and continuous basis'

\* MS = member state

### 5. European courts are gradually giving more guidance

The European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU, previously CJEC) have been asked several times to rule on (denied) access to certain legal family formats (*Table 4*), or to rule on controversial differentiations that have been made between same-sex and different-sex partners (*Table 5*) and between different legal family formats (*Tables 6-8*).<sup>31</sup>

As regards access for same-sex couples to civil marriage, the ECtHR has ruled that it is up to the individual countries to decide whether or not to give such access.<sup>32</sup> Even when married partners have become 'same-sex' through a sex change of one of them, the ECtHR does not (yet) consider it a human rights violation if national law forces them out of their marriage (and into a registered partnership).<sup>33</sup>

As regards access to a form of registered partnership or other form of legal recognition of same-sex couples, the ECtHR has ruled that each country enjoys a margin of appreciation 'in the timing of the introduction of legislative changes', and that the United Kingdom could not be criticized for

31 The few relevant cases decided by the UN Human Rights Committee have also been included in the following tables.

32 ECtHR, *Schalk & Kopf v Austria*, 24 June 2010 (Appl.no. 30141/04). The UN Human Rights Committee had reached a similar conclusion, by holding that marriage of a homosexual couple falls outside the scope of the right to marry as guaranteed in Article 23 of the International Covenant on Civil and Political Rights (UN HRC 17 July 2002, *Joslin v New Zealand*, Comm 902/1999).

33 ECtHR, *Parry v United Kingdom*, 28 November 2006 (Appl.no. 42971/05); ECtHR, *Hämäläinen v Finland*, 16 July 2014 (Appl.no. 37359/09). It is established case law that transsexuals should not be excluded from the right to enter into a different-gender marriage (ECtHR, *Goodwin v United Kingdom*, 11 July 2002 (Appl.no. 28957/95)).

not doing so until 2005, nor Austria for not doing so until 2010.<sup>34</sup> However, the ECtHR does not consider it acceptable to introduce a form of registered partnership for different-sex couples only.<sup>35</sup>

*Table 4: Challenges to the exclusion of same-sex couples from marriage or registered partnership*

Court/body	Case	Area	Finding of discrimination?
UN HRC 17.7.2002	<i>Joslin v New Zealand</i> 902/1999	access to marriage	No, words 'men and women' mean that only 'a man and a woman' have right to marry.
ECtHR 28.11.2006	<i>Parry v United Kingdom</i> 42971/05	continuation of marriage after change of gender	No, states have margin of appreciation in regulating effects of change of gender in context of marriage.
ECtHR 4.11.2009	<i>Courten v United Kingdom</i> 4479/06	introduction of registered partnership	No, states enjoy margin of appreciation in timing of legislative changes.
ECtHR 24.6.2010	<i>Schalk &amp; Kopf v Austria</i> 30141/04	access to marriage (and introduction of registered partnership)	No, opening up of marriage to same-sex couples is left to regulation 'according to the national laws' (and states have margin of appreciation in timing of any partnership legislation).
ECtHR 7.11.2013	<i>Vallianatos v Greece</i> 29381/09 & 32684/09	access to registered partnership	Yes, exclusion of same-sex couples from civil union amounts to discrimination in relation to family life.
ECtHR 16.07.2014	<i>Hämäläinen v Finland</i> 37359/09	continuation of marriage after change of gender	No, effects of not being able to remain married after legal change of gender are not disproportionate.

There have been many court challenges claiming that it is discriminatory to distinguish in law between same-sex and different-sex unmarried cohabitants. The only challenge so far at the CJEU was unsuccessful (*Grant*), but that outcome is no longer valid since the entry into force in 2003 of the Employment Equality Directive (2000/78/EC, confusingly also known as the 'Framework

34 ECtHR, *Courten v United Kingdom*, 4 November 2009 (Appl.no. 4479/06); ECtHR, *Schalk & Kopf v Austria*, 24 June 2010 (Appl.no. 30141/04), at paras. 105-106.

35 ECtHR, *Vallianatos v Greece*, 7 November 2013 (Appl.no. 29381/09 and 32684/09), at paras. 73 and 92.

Directive’). Also since 2003, the other European court (ECtHR) and the UN Human Rights Committee (UN HRC) have consistently held that to distinguish between same-sex and different-sex cohabitants is incompatible with the right to non-discrimination (see *Table 5*). In these cases (unlike the ones listed in *Table 8*) the ECtHR has no difficulty in finding that same-sex partners are ‘in a relevantly similar situation to a different-sex couple’.<sup>36</sup>

*Table 5: Challenges to differentiations between same-sex and different-sex cohabitants*

Court/body	Case	Area	Finding of discrimination?
CJEU 17.2.1998	<i>Grant v SW Trains</i> C-249/96	partner benefits in employment	No, sexual orientation is not covered by prohibition of sex discrimination.
ECtHR 24.7.2003	<i>Karner v Austria</i> 40016/98	succession to tenancy after death of partner	Yes, sexual orientation discrimination with respect to home.
UN HRC 6.8.2003	<i>Young v Australia</i> 941/2000	survivor’s pension	Yes.
UN HRC 30.3.2007	<i>X v Colombia</i> 1361/2005	survivor’s pension	Yes.
ECtHR 2.3.2010	<i>Kozak v Poland</i> 13102/02	succession to tenancy after death of partner	Yes, with respect to home.
ECtHR 22.7.2010	<i>PB &amp; JS v Austria</i> 18984/02	sickness insurance	Yes, with respect to family life.
ECtHR 28.9.2010	<i>JM v United Kingdom</i> 37060/06	calculation of level of child maintenance	Yes, with respect to property.
ECtHR 19.2.2013	<i>X v Austria</i> 19010/07	second-parent adoption	Yes, with respect to family life, in comparison with different-sex cohabitants (but not in comparison with married couples).

Until now, the European courts have only in very specific circumstances been willing to declare differentiations between marriage and cohabitation to be discriminatory (see *Table 6* and *Table 7*). The *Petrov* judgment of the ECtHR on phone calls from prison suggests that this court may be willing to entertain further challenges to rules that exclude unmarried partners, provided there are no strong counter-arguments of the type acknowledged in the *Van der Heijden* case on giving evidence. And the *Roodhuijzen* judgment of the EU’s

36 See for example ECtHR, *X v Austria*, 19 February 2013 (Appl.no. 19010/07), at para. 112.



Court of First Instance indicates that the concept of ‘unmarried partners’ as used in the EU staff regulations should not be interpreted restrictively: apart from the formal requirement of a ‘legal document recognised by a Member State’, a couple already qualifies if their ‘cohabitation is characterised by a certain stability’; it is not necessary that rights and obligations are similar to marriage, nor that their relationship is registered.<sup>37</sup>

*Table 6: Challenges to differentiations between different-sex cohabitation and marriage*

Court	Case	Area	Finding of discrimination?
CJEC 17.4.1986	<i>Netherlands v Reed</i> C-59/85	right to residence for partner of EC worker	No, in comparison with spouses. Yes, against unmarried partner of British worker, in comparison with unmarried partners of Dutch workers.
ECtHR 22.5.2008	<i>Petrov v Bulgaria</i> 15197/02	right to use prison phone to call partner	Yes, with respect to family life.
EU Court of First Instance 5.10.2009	<i>Commission v Roodhuijzen</i> T-58/08 P	sickness insurance cover for partner of EC worker	Yes, against couples who formalized their stable cohabitation by contract, in comparison with couples who did so by marriage or partnership registration.
ECtHR 3.4.2012	<i>Van der Heijden v Netherlands</i> 42857/05	right not to give evidence in criminal proceedings against partner	No, differentiation is justified for the prevention of crime.

In the case law of the ECtHR there is no full recognition, as yet, for the fact that in many countries same-sex couples cannot marry (or even register as partners) and that therefore the exclusion of unmarried partners from certain rights and benefits has a disparate impact on same-sex partners (i.e. is indirectly discriminatory on grounds of sexual orientation).<sup>38</sup> The latter argument has been tried several times. In one older case, *Estevez*, the Court responded by saying that the differentiation in question was justified by the legitimate aim of protecting the family based on marriage (see *Table 7*). In more recent cases, the typical response of the Court is that in law cohabitation

<sup>37</sup> Case T-58/08 P, *Commission v Roodhuijzen*, [2009] ECR II-03797, at paras. 77, 90, 96 and 98.

<sup>38</sup> JOHNSON 2013, at p. 139; WAALDIJK 2012, at paras. 10, 22, 31.

is not similar to marriage (and that therefore the right to non-discrimination is not affected). The only case (*W v Commission*) where a European court has honoured the challenge of an unmarried *same-sex* couple concerning a marital privilege (Table 7) must be read in the context of the fairly generously worded provision in the EU Staff Rules (see Table 3).

Table 7: Challenges to differentiations between same-sex cohabitation and marriage

Court	Case	Area	Finding of discrimination?
ECtHR 10.5.2001	<i>Estevez v Spain</i> 56501/00	survivor's pension	No, differentiation is justified for protection of family based on marriage.
ECtHR 29.4.2008	<i>Burden v United Kingdom</i> 13378/05	inheritance tax	No, situation of cohabiting sisters is not analogous with marriage.
ECtHR 4.11.2008	<i>Courten v United Kingdom</i> 4479/06	inheritance tax	No, situation of gay cohabitants is not analogous with marriage.
ECtHR 23.6.2009	<i>MW v United Kingdom</i> 11313/02	bereavement payment	No, situation of gay cohabitants is not analogous with marriage.
EU Civil Service Tribunal 14.10.2010	<i>W v Commission</i> F-86/09	household allowance for EU official	Yes, the fact that W and his Moroccan partner are not married should not be used against them, because situation regarding homosexuality in Morocco makes it unrealistic for them to marry in Belgium.

Finally, there is a growing number of cases in which same-sex registered partners have demanded to be treated in the same way as married spouses (see Table 8). In the first of these cases (*D & Sweden*) the Court of Justice still emphasized the incomparability of marriage and registered partnership (even in Sweden, where registered partnership was rather strong and quasi-marital). In more recent cases (*Maruko*, *Römer*), however, this Court has emphasized that it depends on whether the actual legal situation of registered partners and married spouses is comparable, and it suggested that – in the context of pensions law – the situation of German registered life partners should indeed be considered as comparable to that of spouses. It seems that this is also the approach of the ECtHR, but the first cases that this Court has had to decide (*Manenc*, *Gas & Dubois*) concerned France, and the Court concluded that – as regards pensions and as regards adoption – the legal situation of people in French civil partnership (*PaCS*, *pacte civil de solidarité*) is not similar to

marriage.<sup>39</sup> And in a case concerning Germany, the ECtHR came to the conclusion that – as regards birth certificates – same-sex registered partners are not in a similar situation as different-sex spouses (*Boeckel*). The CJEU, in the recent *Hay* case came to a different conclusion concerning *PaCS* – as regards benefits in terms of pay or working conditions. It held that *PaCS* and marriage are comparable. So it seems that when the comparison is with a *married* different-sex couple, the court in Luxembourg is more inclined to find comparability than the court in Strasbourg.

*Table 8: Challenges to differentiations between registered partnership and marriage*

Court	Case	Area	Finding of discrimination?
CJEC 31.5.2001	<i>D &amp; Sweden v Council</i> C-122/99 & C-125/99	household allowance for EU official	No, Swedish registered partnership is distinct from marriage.
CJEU 1.4.2008	<i>Maruko v Versorgungsanstalt der deutschen Bühnen</i> C-267/06	survivor's pension	Yes, assuming situation of registered partners is comparable to marriage in Germany, their exclusion from pensions amounts to direct sexual orientation discrimination.
ECtHR 21.9.2010	<i>Manenc v France</i> 66686/09	survivor's pension	No, <i>PaCS</i> in France is not analogous with marriage.
CJEU 10.5.2011	<i>Römer v Hamburg</i> C-147/08	retirement pension	Yes, situation of registered partners in Germany is comparable to marriage.
ECtHR 15.3.2012	<i>Gas &amp; Dubois v France</i> 25951/07	second-parent adoption	No, legal situation of lesbian couple in <i>PaCS</i> is not comparable to marriage.
CJEU 6.12.2012	<i>Dittrich and others</i> C-124/11, C-125/11 and C-143/11	assistance for public servants in case of illness	Yes, situation of registered partners in Germany is comparable to marriage (that point was already decided by the referring German court; CJEU was only asked if the assistance was covered by the notion of 'pay' in Directive 2000/78/EC).
ECtHR 7.5.2013	<i>Boeckel &amp; Geesink-Boeckel v Germany</i> 8017/11	registration as parents on birth certificate of child born during partnership	No, as regards birth certificates, two women in registered partnership are not in relevantly similar situation as a married different-sex couple.
CJEU 12.12.2013	<i>Hay v Credit agricole mutuel</i> C-267/12	special leave and bonus for partnership registration	Yes, as regards pay or working conditions, situation of same-sex partners who cannot marry in France and therefore conclude a <i>PaCS</i> , is comparable to married couples.

39 See JOHNSON 2013, at p. 138.

All in all, the main European courts have only provided little concrete recognition of same-sex and non-marital relationships. And the recognition they have so far offered mostly depends on whether the national legislation in question already provides some recognition of non-marital couples.

Both courts use all kinds of terms for registered forms of partnership. The Strasbourg court mostly uses ‘civil partnership’ to refer to the French *pacte civil de solidarité*, mostly ‘registered partnership’ to refer to the Austrian *Eingetragene Partnerschaft*, and mostly ‘civil union’ to refer to the Greek variety, while the Luxembourg court mostly uses ‘life partnership’ to refer to the German *Eingetragene Lebenspartnerschaft*, and mostly PACS or ‘civil solidarity pact’ to refer to the French *pacte civil de solidarité*.

## 6. Affirmative eloquence in Strasbourg

This somewhat limited judicial harvest (listed in section 5) echoes the often slow, hesitant or limited developments in national and EU legislation (listed in sections 2 and 4). It seems to contrast, however, with the eloquent and inclusive language that is often used by the European Court of Human Rights in the very same judgments, albeit mostly *obiter*.

The Court has repeatedly recognized, for example, that the right to respect for private life encompasses the ‘right to establish and develop relationships with other human beings’.<sup>40</sup> It has ruled that non-marital partnerships are also covered by the right to respect for family life,<sup>41</sup> and that this includes same-sex partnerships.<sup>42</sup> It has mentioned ‘the fact that there is not just one way or one choice when it comes to leading one’s family or private life’.<sup>43</sup> It has shown itself to be aware of the ‘rapid evolution of social attitudes towards same-sex couples’,<sup>44</sup> and has acknowledged that ‘the consensus among European States in favour of assimilating same-sex relationships to heterosexual relationships

40 See for example ECtHR, *EB v France*, 22 January 2008 (Appl.no. 43546/02), at paras. 43 and 49; on this right in general, see WAALDIJK 2013.

41 ECtHR, *Johnston v Ireland*, 18 December 1986 (Appl.no. 9697/82), at paras. 55-56.

42 ECtHR, *Schalk & Kopf v Austria*, 24 June 2010 (Appl.no. 30141/04), at para. 94.

43 ECtHR, *X v Austria*, 19 February 2013 (Appl.no. 19010/07), at para. 139; see also ECtHR, *Kozak v Poland*, 2 March 2010 (Appl.no. 13102/02), at para. 98; and ECtHR, *Vallianatos v Greece*, 7 November 2013 (Appl.no. 29381/09 and 32684/09), at para. 84.

44 ECtHR, *PB & JS v Austria*, 22 July 2010 (Appl.no. 18984/02), at para. 29.

has undoubtedly strengthened',<sup>45</sup> and that a 'growing tendency to include same-sex couples in the notion of "family"' is also reflected in EU legislation.<sup>46</sup> The Court has stressed the 'importance of granting legal recognition to *de facto* family life',<sup>47</sup> and it has held that '*same-sex couples are just as capable as different-sex couples of entering into stable committed relationships*' and that consequently they are '*in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship*'.<sup>48</sup> The Court acknowledged that for a same-sex couple 'an officially recognised alternative to marriage (would) have an intrinsic value', irrespective of its legal effects, and that '*(s)amesex couples sharing their lives have the same needs in terms of mutual support and assistance as different-sex couples*'.<sup>49</sup> Furthermore, it has consistently held that 'differences based on sexual orientation require particularly serious reasons by way of justification',<sup>50</sup> and that the exclusion must be shown to be 'necessary' in order to achieve the legitimate aim.<sup>51</sup> And it ruled that 'a blanket exclusion of persons living in a homosexual relationship (...) cannot be accepted (...) as necessary for the protection of the family viewed in its traditional sense'.<sup>52</sup>

All this may be seen as an indication that the European Court of Human Rights is contemplating taking more steps towards full legal recognition of same-sex and non-marital families than it has taken so far. The Court also seems to be encouraging lawmakers to extend greater legal protection and recognition to new forms of family life, and to provide access to legal family formats that meet the needs of the couples and children concerned. Recently the Court's *Grand Chamber* has implied that countries that have not enacted 'a genuine option which provides legal protection for same-sex couples' may

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45 ECtHR, *JM v United Kingdom*, 28 September 2010 (Appl.no. 37060/06), at para. 50.

46 ECtHR, *Schalk & Kopf v Austria*, 24 June 2010 (Appl.no. 30141/04), at para. 93.

47 ECtHR, *X v Austria*, 19 February 2013 (Appl.no. 19010/07), at para. 145.

48 ECtHR, *Schalk & Kopf v Austria*, 24 June 2010 (Appl.no. 30141/04), at para. 99; see also ECtHR, *Eweida v United Kingdom*, 15 January 2013 (Appl.no. 48420/10, 59842/10, 51671/10 and 36516/10), at para. 105; and ECtHR, *Vallianatos v Greece*, 7 November 2013 (Appl.no. 29381/09 and 32684/09), at para. 78.

49 ECtHR, *Vallianatos v Greece*, 7 November 2013 (Appl.no. 29381/09 and 32684/09), at para. 81.

50 ECtHR, *Karner v Austria*, 24 July 2003 (Appl.no. 40016/98), at para. 37.

51 ECtHR, *Karner v Austria*, 24 July 2003 (Appl.no. 40016/98), at para. 41.

52 ECtHR, *Kozak v Poland*, 2 March 2010 (Appl.no. 13102/02), at para. 99.

be violating the right to respect for private and family life of married spouses one of whom is needing legal recognition of an acquired gender.<sup>53</sup> That case involved a couple that would become same-sex through a legal change of the gender of one of them, but the same reasoning could apply to other same-sex couples – if the Court would take seriously what it has said about the needs of same-sex couples for legal recognition and protection.<sup>54</sup>

## 7. Conclusion

On the one hand, there is a clear trend of more equality and more diversity, in both national and European law. And this is accompanied in Strasbourg by a whole vocabulary that validates same-sex and non-marital family life, thereby encouraging lawmakers to extend greater legal protection and recognition. On the other hand, same-sex partners have mostly been unsuccessful in winning cases in the European courts (or in being included in EU legislation that has an impact on the member states), unless national law already offers some recognition to family life outside marriage.

Whenever national law does recognize different-sex couples outside marriage, the European Court of Human Rights finds it increasingly easy to use non-discrimination arguments to include same-sex partners in this recognition, even when it is about access to registered partnership (*Vallianatos*) or adoption (*X v Austria*).<sup>55</sup> In this respect the principle of equality has been very effective – both judicially and politically – in helping to realize the human rights of same-sex couples. Here the comparability test does not create a stumbling-block, so the court could move quickly to the question of justification. And in none of these cases, where the comparator is an unmarried different-sex couple, was a sufficient justification found.

Where national law does *not* yet recognize unmarried different-sex couples, both European courts have put a lot of emphasis on the test of comparability:

53 ECtHR, *Hämäläinen v Finland*, 16 July 2014 (Appl.no. 37359/09), at para. 87.

54 See ECtHR, *Schalk & Kopf v Austria*, 24 June 2010 (Appl.no. 30141/04), at para. 99; see also ECtHR, *Eweida v United Kingdom*, 15 January 2013 (Appl.no. 48420/10, 59842/10, 51671/10 and 36516/10), at para. 105; and ECtHR, *Vallianatos v Greece*, 7 November 2013 (Appl.no. 29381/09 and 32684/09), at para. 78.

55 Presumably, the Court of Justice of the EU would do the same, but in the field of EU law such equality is already mostly given in the few relevant directives and regulations.

is the situation of unmarried same-sex couples similar to that of married different-sex couples? All cases of this type that made it to the Court of Justice of the EU involved a same-sex couple in a registered partnership claiming a material benefit related to employment, and this probably made it easier for this court to find comparability with marriage. However, in such same-sex cases that made it to the European Court of Human Rights, the comparability test has until now meant *nothing but trouble*, even if the partners had entered into a registered partnership and the case involved some material benefit.<sup>56</sup> In fact, the court in Strasbourg has invoked the lack of comparability so often in these cases that it has never had to go into an assessment of the justification of a distinction.

The most recent of these cases involved the acquisition of parenting (*Gas & Dubois; Boeckel*), and clearly the Strasbourg court was not ready – as regards legal parental status – to see enough similarities between a married heterosexual couple with a child and a registered lesbian couple with a child. Perhaps the Court would find it easier to see such similarities when other aspects of parenting are involved, or when it is about ‘mutual support and assistance’ between the partners or about ‘legal recognition and protection of their relationship’, the equal need for which the court has now recognized (most recently in *Vallianatos*). If so, then the disappointing rulings in the cases of *Courten*, *MW* and *Manenc* are already out of date. And then the court can start to translate its affirmative eloquence into real equality for same-sex couples in all those jurisdictions and situations where no legal family format is available to them.

#### Acknowledgement

This article is also being published in the journal *GenIUS* (2014/2, p. 43-57, [www.articolo29.it/genius](http://www.articolo29.it/genius)). An earlier version appeared as chapter 5 of the report: Olivier Thevenon & Gerda Neyer (eds), *Family Policies and Diversity in Europe: The state-of-the-art regarding fertility, work, care, leave, laws and self-sufficiency*, Stockholm University, Stockholm, 2014 (FamiliesAndSocieties Working Paper Series, nr. 7, p. 42-55, [www.familiesandsocieties.eu/?page\\_id=131](http://www.familiesandsocieties.eu/?page_id=131)).

The research leading to these results has received funding from the European Union's Seventh Framework Programme (FP7/2007-2013) under grant agreement no. 320116 for the research project FamiliesAndSocieties.

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56 But see also the one and only case where the court found that the exclusion of *all* unmarried partners (in this case of different sex) amounted to discrimination: ECtHR, *Petrov v Bulgaria*, 22 May 2008 (Appl.no. 15197/02).

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# The equality of the (non) trans-parent: women who father children

Marjolein van den Brink and Jet Tigchelaar

Parents mostly become parents by having sex and thus conceive a child, which is born about nine months later. This fact of life is reflected in the Dutch law on affiliation (*afstammingsrecht*) just like it is in most parts of the world. Biology may not be destiny but it is often the easiest way into (legal) parenthood. These days there seems to be a new exception to this rule, and that exception is the trans woman who begets a child after having changed her legal sex. It is this exceptional and, as will be seen, quite ‘non-transparent’ legal position of the female ‘father’ that is explored and assessed in this contribution.

The issue and corresponding terminology will be discussed in more detail in section 1. Next (section 2) the possibilities for people – trans\* and cis\* – to acquire legal parenthood will be explored. In section 3 the parental status of trans women who father children will be compared to that of other groups. Several factors seem to influence people’s possibilities to acquire legal parenthood: biological affiliation, cis/trans status, the presence and sex of a partner, the legal status of the relationship with that partner, and last but not least the presence of a ‘third party’ like an ex-partner, a sperm donor or a surrogate mother.<sup>1</sup> People’s legal status as male or female for the acquisition of legal parenthood seems to have lost some if not much of its decisiveness. The outcome of this comparison will be briefly assessed in terms of human rights generally and of women’s human rights in particular. Some attention will be devoted in this regard to the concerns expressed in the 1990s by feminist legal scholars, among whom was Titia Loenen. They expressed doubts regarding the developments in the area of family law,

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1 Thanks to our colleague Evelien Verhagen (Molengraaff Instituut, UCERF) for pointing out this latter aspect.

including affiliation law that appeared to strengthen the position of biological fathers – often to the detriment of the liberties and autonomy of the mothers involved.<sup>2</sup> The note will be concluded with a tentative answer to the question of whether the concurrence of human rights and equality for women (both cis and trans) results in family law trouble once again.

### 1. Women who father children: the issue and some definitions

Cis people are people who feel comfortable with the sex that was assigned to them at birth. The term ‘cis’ indicates the opposite of ‘trans’, that is, people who do not transition/cross. Thus, transsexuals are people who at birth were registered as male or female because of their physical characteristics, but who later in life feel that, even though they may look male, they really are female or the other way around. Trans women are therefore people who transition from male to female. Trans\* is used as an umbrella term to indicate the larger group of people who, for one reason or another, do not entirely fit the male/female binary.<sup>3</sup>

Trans\* may decide to change their legal sex if they live in a country that allows a legal sex change.<sup>4</sup> In the Netherlands, up to 1 July 2014, trans\* who wanted to change their legal sex were required to physically adapt as much as possible to match their ‘new’ sex, and to make sure that they were incapable of ever having a(nother) child. The latter is commonly referred to as the ‘sterilisation requirement’. Both conditions have now been dropped. Since

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2 E.g. LOENEN 1995, at p. 94.

3 The asterisk in cis\* and trans\* is derived from internet practices where one can add it at the end of a search term to indicate that one is looking for any word starting with your search term (e.g. trans) regardless of how it ends (\*: transgender, transsexual etc.): Thus cis\* and trans\* are intended as inclusive terms, referring to anyone who identifies in one way or another as such.

4 In the Netherlands this has been possible since 1986: Art. 1:28-c BW. However, the possibility is not always a blessing. See *Volkskrant* 22 June 2000, ‘Man vindt vrouwenleven veel te zwaar’ (Man finds a woman’s life to be too cumbersome), recounting the story of an Iranian trans woman who, after transitioning, found no relief but instead learned that she could not face the severe restrictions imposed on women in Iran.

1 July 2014 trans men are allowed to give birth to children, and trans women may impregnate cis women and trans men.<sup>5</sup>

The Dutch legislator anticipated the possibility of pregnant (trans) men and (trans) women ‘fathering’ children. In a first draft of the bill to drop the sterilisation requirement, it was proposed that trans men who would become parents one way or another would still be registered as the mothers of those children and trans women would become fathers, despite them being legally male and female respectively. This is in line with the principle laid down in Article 1:28c(2) of the Dutch Civil Code (*Burgerlijk Wetboek*, BW) that provides that legal sex changes do not affect already existing family relationships. Thus, a trans man who is already the mother of one or more children will remain their mother, at least for all legal purposes.<sup>6</sup> Trans women remain the father of their already existing children.

However, at some point in the legislative process the legislator decided to change perspective and take the *new* sex of the (trans) parent as the starting point for determining parental status regarding children born *after* a legal sex change. It was felt to be confusing for children to have a mother who, according to her birth certificate, for all legal purposes would be the child’s father.<sup>7</sup> This argument is not watertight as will be seen later on.

One exception to the general rule of the ‘new’ sex was deemed necessary: the trans man who gives birth to a child will be regarded as the child’s legal mother. This is because of one of the core principles of Dutch affiliation law: the *mater semper certa est rule* (the mother is always certain). If the person giving birth to a child would *not* automatically become the child’s mother, the child might not have any legal parent, since there is not always a (legal)

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5 Wet van 18 december 2013 tot wijziging van Boek 1 van het Burgerlijk Wetboek en de Wet gemeentelijke basisadministratie persoonsgegevens in verband met het wijzigen van de voorwaarden voor en de bevoegdheid ter zake van wijziging van de vermelding van het geslacht in de akte van geboorte (Act of 18 December 2013 amending Book 1 of the Civil Code and the Act on the municipal registration of personal identity information relating to changes in the conditions for and competence regarding changes in the registration of sex on the birth certificate), *Stb.* 2014, 1.

6 Compare the similar situation in ECtHR, *P.V. v. Spain*, 30 November 2010 (Appl.no. 35159/09), which regarded a trans woman who was, legally speaking, the father of her child born prior to her legal sex change.

7 *Kamerstukken II*, 2012/13, 33351 no. 6, at p. 10. See also: FORDER and VONK 2013, at p. 2451.

co-parent. That is considered undesirable, also in light of the UN Children's Rights Convention (1989).

The law, however, is less straightforward regarding the legal status of trans women who are the biological parent of a child. These trans women/impregnators are not 'anonymous donors' as meant in Article 1:198(1)(b) BW. Therefore, they cannot derive legal parenthood from their status as the wife or registered partner of the birth mother. The female begetter and her partner cannot even pretend to have been assisted by an anonymous donor, since such claims must be proven by an official declaration of a sperm bank. Thus trans women fathering children are not entitled to *automatically* acquire legal co-motherhood on the basis of their legal ties to the birth mother, as other women (both cis and trans) in a same-sex relationship can (since 1 April 2014).<sup>8</sup> Neither do they fall within the scope of Article 1:199 BW which lists the different ways for men to attain legal fatherhood, since the idea of trans\* people's original legal sex was dropped. A literal argument could be made to still achieve that same result, based on the wording of Article 1:199 BW, since the article provides that: '*Father of a child is the man ...*'. Trans women obviously are not men, but that may not be decisive since Article 1:198 BW regarding motherhood similarly states: '*Mother of a child is the woman ...*'. This is no longer true since 1 July 2014, when it was established that legal males who give birth to a child will be regarded as the child's mother. Trans men are legally male and they are still considered to fall within the scope of Article 1:198 BW. Therefore, an argument excluding trans women from the scope of Article 1:199 BW might fail, because it seems clear that at least motherhood, and therefore possibly also fatherhood, is no longer exclusively reserved for women. Thus, the opposite may arguably be true as well, and fatherhood can no longer be considered as the exclusive domain of men. However, there is no need to engage in this kind of argument, since the legislator has clearly indicated that the legal road to parenthood for female

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8 Wet van 25 november 2013 tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met het juridisch ouderschap van de vrouwelijke partner van de moeder anders dan door adoptie (Act of 25 November 2013 amending Book 1 of the Civil Code regarding legal parentage of the female partner of the mother other than by adoption), *Stb.*, 2013, 480.

begetters leads through Article 1:28c(3) BW, which in turn refers to chapter 11 of book 1 BW (affiliation law).

The way to attain legal parenthood for female begetters is mapped out in the next section.

## 2. Different roads to legal parenthood for cis\* and trans\* and for same-sex couples

There are several roads to legal parenthood. For women the options used to be much more limited than for men, but women have caught up in the past few years, especially since the introduction of easier options for the female partners of birth mothers, most recently in 2014.<sup>9</sup>

The classic way is for a (cis) man and a (cis) woman<sup>10</sup> to marry and have children. The woman becomes a parent by giving birth to the child, the man by being married to the woman. Thus, (cis) fathers do not need to be the biological father to *automatically* become a legal father.

In the 1990s the position of biological fathers was strengthened, especially in relation to single mothers and lesbian couples. Whereas female couples at the time could not (and still cannot really)<sup>11</sup> rely on the European Court of Human Rights to protect their status as a (legal) parent, biological fathers received a warmer reception.<sup>12</sup> Biological fathers may claim affiliation in court when the birth mother refuses to consent to his recognition of the child (Art. 1:204(3) BW). Depending on the individual case, the biological

9 Much has changed since Titia Loenen listed the different categories of parents in 1995. See LOENEN 1995, at p. 93. On the developments regarding legal parenthood of female same-sex couples see e.g. VONK and BOS 2012.

10 Note that these people do not *per se* have to be cis: a trans woman and a trans man who have not had any surgery on their reproductive organs may achieve a similar situation, depending on the domestic legal framework. See e.g.: “‘We have the parts so we use them’: Transgender couple who BOTH changed sex prepare to explain to their two children how their father gave birth while their mom provided the sperm”, *MailOnline*, 11 August 2014, available at: [www.dailymail.co.uk/news/article-2721891/Transgender-couple-prepare-telling-children-father-actually-mother-vice-versa.html#ixzz3GDfYrXtv](http://www.dailymail.co.uk/news/article-2721891/Transgender-couple-prepare-telling-children-father-actually-mother-vice-versa.html#ixzz3GDfYrXtv) (last visited 19 December 2014).

11 Cf. ECtHR, *Gas & Dubois v. France*, 15 March 2012 (Appl.no. 25951/07). Currently pending: *Bonnaud & Lecoq v. France* (Appl.no. 6190/11), filed 8 January 2011. Bonnaud and Lecoq, a lesbian couple, both had a child and now wish to be granted parental authority in respect of their partner's child.

12 See LOENEN 1995, at p. 94.

father's claim may even override a concurring claim for legal parental status by the birth mother's partner who together with the mother wished for the child to be conceived and born. The only unassailable obstacle to a claim to legal parenthood by biological fathers is the presence of a husband who is in a formal legal relationship with the mother and who was already married to the mother when the child was born: Article 1:204(1)(e) BW prevents recognition if a child already has two (legal) parents.

Other ways to obtain legal parenthood are adoption and recognition of parentage. Recognition was not possible for women prior to 1 July 2014. The possibilities for male couples, especially cis males, to become the legal parents of a child are much more restricted than those for two females. Two men (with the exception of fertile trans men) are dependent on a woman to give birth to a/their child. In the Netherlands that woman, regardless of her intentions regarding the child, will automatically be qualified as the legal mother, as explained above. This means that only one of the partners in a male couple can easily obtain legal fatherhood, for example by recognising the child. Moreover, this is only possible if the birth mother is not in a formal relationship (a marriage or registered partnership) with a man, because in that case the husband will automatically be granted parental status. It does not matter for the recognition whether it is the biological father (if the child was indeed conceived with the sperm of one of the partners) or the other partner who acknowledges the child. The second partner, the partner who does not recognise the child, can only obtain legal parenthood by adopting the child.<sup>13</sup>

There are some legal peculiarities for trans parents. One of these is that trans parents can be a mother and father at the same time. A trans man, for example, who gives birth to a child and thus becomes a mother, can simultaneously become the legal father of a child born to his wife (even if this was accomplished with the help of an anonymous donor). The deletion of

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13 Unless the legal parenthood of the non-biological father would be contested, for instance by the child, in which case the way to legal parenthood for the biological father would be open. However, since his partner would then lose his status as a legal parent, that would not solve the couple's problem.



sterilisation as a requirement for legal sex changes has increased the number of situations in which this may happen. However, also prior to 1 July 2014, a trans person could be the legal father of one child and the legal mother of another. Only, at the time, this could not happen simultaneously. It was only possible with regard to children born before and after their parent's legal change of sex. The children born after the legal change of sex would normally not be biologically related to their trans parent, because of the sterilisation requirement. Still, even before 1 July 2014 it was possible for trans women to be biologically related to their child born after a sex change if the child was conceived with sperm collected and frozen prior to the sterilisation. For trans men this was more complicated, since even a conception with their eggs harvested prior to their sex change would result in the (surrogate) birth mother being identified as the child's legal mother.

So how then, does the female 'father' become the legal parent of a child? For those taking their first steps in Dutch affiliation law, this may be a somewhat bewildering experience. Despite appearances, the starting point is not Article 1:28c(3) BW, but title 11 BW on affiliation law as such. Article 1:198 BW (the second provision of title 11) is applicable to trans women. They do not give birth to their child as meant in paragraph a, nor are they part of a couple that have made use of an anonymous sperm donor as mentioned in paragraph b, so these are not applicable. However, paragraph c (newly introduced to simplify the acquisition of legal motherhood for the co-mother in lesbian couples) states that 'the mother of a child is the woman *who has recognised the child*'. The legal concept of recognition is dealt with in Article 1:204 BW. This provision does *not* state that trans women can recognise their biological child, though. Article 1:204 BW only lists the situations in which the recognition of a child is legally void, for example when this is done by someone under 16 years of age. Therefore, the article's applicability has to be inferred by applying an *a contrario* argument: since there is nothing in this provision to suggest that recognition by a trans woman/begetter would be legally void, the recognition must be legal. Instead of recognition, trans women, just like other women in a same-sex relationship, may opt for adoption. Although the legal procedure to adopt

is more expensive, time-consuming and cumbersome, it has been pointed out that it may be preferable in certain circumstances. This is especially so in the case of migration, since adoption may be more readily accepted by the authorities abroad than recognition by (legal) females.<sup>14</sup>

### 3. The legal position of the trans woman who fathers a child compared

The good news for the trans woman/begetter is that she, different from other co-mothers in a (legally formalised) lesbian relationship, does not have to compete for the right to recognise the child with the biological father of the child (the known donor). Biological fathers may ask the court for permission to recognise the child, even if the birth mother would prefer her female partner to become the child's legal parent. The court will grant permission, unless it would harm the relationship between the mother and child or would otherwise not be in the child's best interests (Art. 1:204(3) BW). However, no such competitor exists in the trans woman/begetter's case.

Her position is also strong in comparison with the position of the known donor or ex-partner, who – just like the trans woman/begetter – fathered the child. They may have to compete for the right to recognise the child with the mother's (new) partner. The decisive difference here is not sex, biology, sexual orientation or cis/trans status, but the presence of a third party.<sup>15</sup>

However, there are two noteworthy differences between the trans woman/begetter and other parents. The first difference is that cis men will automatically become a child's father if the child is born within a formal relationship, *even* if use has been made of the sperm of a known donor. In an informal relationship, the cis man can recognise the child (although he might have to compete with the claims of a known donor). The trans woman, on the other hand, will not automatically obtain legal parental status. If she is married to

14 In the case of co-mothers who are not biologically related to their child there may be additional reasons to opt for adoption. Recognition may be challenged by the known sperm donor, as well as by the child itself later in life. This is not possible in the case of adoption. See for a discussion e.g.: [www.babybytes.nl/encyclopedie/encyclo.php](http://www.babybytes.nl/encyclopedie/encyclo.php) (last visited 19 December 2014).

15 The contribution of a 'third party', however, is not always decisive. The use of donor sperm by a cis male/cis female (or trans male) couple does not affect the male partner's parental status at all. Likewise, the use of anonymous donor sperm by female couples is no obstacle for the female partner of the co-mother to automatically obtain legal parenthood (within a formal relationship).

or in a registered partnership with the birth mother, she can recognise the child. If the relationship is informal, she will have to adopt her own child. A second difference becomes clear when the position of the trans woman/begetter is compared to the position of trans and cis women who are not biologically related to the child with whom they wish to establish legal ties. The latter group may acquire *automatic* legal motherhood if they are in a formal relationship with the birth mother and the child was conceived with the sperm of an unknown donor. This is remarkable, because the underlying rationale of Dutch affiliation law is based on biological affiliation. Even though biological links do not always have priority over other relational aspects such as social parenthood, biological ties are generally considered to be important.<sup>16</sup> This is reflected, for instance, in Article 1:204(3) BW, according to which the court may override the birth mother's refusal to consent to the recognition of her child by the person who fathered the child or donated semen. Despite the importance attached to biological relationships, current affiliation law 'privileges' trans women who are not biologically related to their child by granting them *automatic* legal parenthood (if they are in a formal relationship with the birth mother), over trans women who *are* biologically related to their child, since they will have to recognise their own child.<sup>17</sup>

It is true that the recent legislative changes to make the acquisition of legal parenthood easier for co-mothers, reflect an apparently similar unintended incentive to make use of an anonymous donor instead of a known donor.<sup>18</sup> A major difference, however, is that in the case of trans women who father a child, there is no third party. Contrary to the biological principle underlying affiliation law, the biological ties of the trans woman/begetter work to her disadvantage instead of in her favour.

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16 The landmark decision for human rights law was the decision in the *Marckx v Belgium* case, ECtHR, *Marckx v Belgium*, 13 June 1979 (Appl.no. 6833/74).

17 However, the possibility of recognition is an advantage as compared to the situation faced in 2012 by the trans parent who could only adopt her own (fathered) child. The Court of Appeal in Leeuwarden found that this contravened Article 8 ECHR and decided that the trans woman should be registered as the child's 'parent' (not the father or mother). See *Gerechtshof Leeuwarden*, 23 December 2010, ECLI:NL:GHLEE:2010:BO8039.

18 The incentive is 'perverse' since it is contrary to the principle underlying affiliation law, i.e. that children have the right to know from whom they are descended.

Compared to the situation of (cis) men who father a child within a formal relationship, trans women are worse off as well, since these men will automatically become the legal father of their child. The same is even true for men (cis or trans) who are not biologically related to their child: Article 1:199(a) BW provides that the man who is in a formal relationship with the birth mother will automatically be regarded as the child's legal father.

From the perspective of children's human rights, the anomalous position of trans women who father a child seems to contravene the idea behind Articles 7 and 8 of the Children's Rights Convention. These provisions attach much importance to biological relationships.<sup>19</sup> Although Dutch affiliation law does not prevent the establishment of legal ties between a child and its trans parent, it does make it unnecessarily difficult.<sup>20</sup> Also Article 8 of the European Convention on Human Rights protects the right to have one's biological ties recognised, as the Court of Appeal in Leeuwarden pointed out in 2012.<sup>21</sup>

Secondly, it is generally held to be in a child's best interests to have two legal parents to look after him. The trans woman/begetter, however, will first have to recognise or adopt before a legal relationship with her child will be established, despite their biological relationship. This does not seem to serve the best interests of the child as protected by Article 3 of the Children's Rights Convention.

Regarding the position of the adults involved, one could argue that this discriminatory treatment of trans women who father children, as compared to men, violates Article 23(2) in combination with Article 26 (equality before the law) of the International Covenant on Civil and Political Rights (ICCPR). This seems to be reflected in Principle 24 of the so-called Yogyakarta Principles, where it is emphasised that discrimination on the basis of gender identity regarding the right to found a family is incompatible

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19 See e.g.: VAN DEN BRINK 2006, at chapter 4.

20 The same can be said about the perverse incentive built-in in the legal situation of female couples to make use of an anonymous donor. However, that is not the issue here.

21 Gerechtshof Leeuwarden, 23 December 2010, ECLI:NL:GHLEE:2010:BO8039, at paras. 21-23.

with human rights law.<sup>22</sup> One might likewise argue that the differential treatment of trans women violates Article 16, and paragraph 1d in particular, of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). This seems an especially valid argument since the adoption of CEDAW General Recommendation No. 28,<sup>23</sup> in which document the monitoring body stressed the relevance of the convention for discrimination on the basis of gender identity.

However, as mentioned in the introduction, in the past feminist legal scholars tended to worry about the increasing formal equality granted to parents in situations related to parental rights regardless of sex (m/f) and regardless of their share in caring activities and/or responsibilities. Thus, the question arises whether arguments supporting trans women's parental rights on grounds of their biological affiliation, may not be detrimental to the position of (birth) mothers.

This argument was mainly targeted at post-divorce situations, in which fathers claimed equal contact and decision-making rights regarding their children, which impacted significantly on the day-to-day situation of the mothers who continued to act as the primary care-providing parent. In such decisions, the fact that many of these men claiming equal rights had never previously embraced caring activities, when they could easily have done so, hardly seemed to play a role. Thus, the significance and value of caring for children – primarily undertaken by women – was ignored.<sup>24</sup> The concern underlying this discussion is that formal equality in the distribution

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22 The Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity (2007) were drafted by a group of international experts. As a non-legal document it is not binding, and cannot even be regarded as soft law. However, it has been explicitly endorsed by an increasing number of countries, including by the Netherlands. See for example: (DUTCH) MINISTRY OF FOREIGN AFFAIRS 2007, at p. 54: 'The government regards the Yogyakarta Principles as a guideline for its policy'. The Yogyakarta Principles can be found at: [http://www.yogyakartaprinciples.org/principles\\_en.pdf](http://www.yogyakartaprinciples.org/principles_en.pdf) (last visited 5 December 2014).

23 CEDAW COMMITTEE, 2010, 'General Recommendation No. 28 on the core obligations of States parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women', UN Doc. CEDAW/C/GC/28.

24 On the importance of a realistic valuation of caring tasks during marriage and afterwards, see e.g. TIGCHELAAR 1999.

of parental rights, may disadvantage women because it tends to neglect caring activities in the past, which however did influence women's career opportunities, financial situation etc.

Is that at stake here? It does not seem likely that a similar devaluation of female care-providing activities would result from a strengthening of the legal position of trans women who father children. In a worst case scenario the position of the female partners of trans women would be levelled down to the position of the female partners of men. Of course, it is desirable that caring activities are acknowledged and taken into account in situations regarding family life, and especially in the case of conflict. However, it seems disproportionate to start or stimulate such a development by making the acquisition of parental status more difficult for trans women than for other biological parents.

#### **4. Conclusion**

In the previous sections it has been shown that trans women who father children (after their legal sex change) are not treated equally compared to other people who father a child within a formal relationship. This seems to contravene both the equality principle as laid down in many human rights treaties, as well as the importance attached to biological ties by human rights bodies and instruments.

Since it seems unlikely that a legislative change to improve trans parents' position will be disadvantageous to the status of women (or primary carers) generally, there seems no reason not to change the law in this respect.

However, if the reader of this brief article, while trying to follow the intricacies of Dutch affiliation law, has experienced the same bewilderment as we did when trying to figure this out, the reader may agree that legislative changes may be desirable for more reasons than 'just' the position of trans women fathering children. The law seems to be in serious need of simplification and accessibility, without, of course, losing sight of important aspects such as caring activities, biological ties and social parenting. In 2002, one of Titia Loenen's Ph.D. candidates, Annelies Henstra, proposed a revamping of the law relating to affiliation and parentage by taking as a starting point the

question what a parent should be.<sup>25</sup> From this perspective, responsibility still seems to be an important factor for a new conception of the law in which biological and social parenthood may both be accommodated. Since trans women who father children may be assumed to be as responsible or irresponsible as any other category of parents, this might be a good idea from their perspective as well. It is to be hoped that the *Staatscommissie herijking afstammingsrecht* (the State Commission on the recalibration of affiliation law) will take these issues into account while rethinking affiliation law.<sup>26</sup> And while doing that, they might at the same time look into the possibilities to neutralise the very sex-specific and dichotomous terminology used in affiliation law, which leaves no room for any other kind of parents than just fathers and mothers.<sup>27</sup>

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25 HENSTRA 2002.

26 Regeling van 28 april 2014, nr. 512296, houdende instelling van een staatscommissie Herijking ouderschap, *Stcrt.* 2014, 12556.

27 The dichotomous construction of sex as male or female is increasingly criticised. Thus, it may not be too far-fetched to expect that at some point in the future a new category of parents – being neither male nor female – may come into being. Illustrative of these developments is the research commissioned by the deputy minister of Security & Justice and carried out by VAN DEN BRINK & TIGCHELAAR regarding the possibilities and consequences of leaving people's legal sex undetermined in official records. See the deputy minister's letter of 4 December 2013 to the chairperson of the *Tweede Kamer* ('Lower House'), ref.no. 458792. The research report be published early March 2015, M. VAN DEN BRINK and J. TICHELAAR, *M/V en verder. Seksregistratie door de overheid en de juridische positie van transgenders* [M/F and beyond. Sex registration by the government and the legal position of transgenders], Juridische Uitgevers, 2015. The research report, with a summary in English, will be made available online in March 2015, at [www.wodc.nl](http://www.wodc.nl).

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# Parents who want to reconcile work and care: which equality under EU law?

Susanne Burri

## 1. Introduction

Mr Roca Álvarez wanted to reduce his daily working time in order to be able to take care of his baby. According to Spanish legislation, he was not entitled to such a working time reduction because the mother of his child was self-employed. Only fathers of children whose mother was employed had such a right. The Court of Justice of the EU (hereafter: the CJEU or the Court) considered that mothers who are employed always had such a right, while fathers only had a derived right, i.e. when the mother was employed. Such direct sex discrimination is contrary to EU law.<sup>1</sup> Three years later, the CJEU decided in a quite similar Spanish case that Mr Betriu Montull was not entitled to some benefits related to leave, because the mother of his child did not fulfil the conditions required in order to entitle the biological father of her child to such rights. Mr Betriu Montull, just as Mr Roca Álvarez, had only a derived right from the mother's right, but he had no individual, autonomous right. In his opinion in the *Betriu Montull* case AG Wathelet applied the Court's reasoning in the *Roca Álvarez* case and concluded that also in this case the principle of sex discrimination had been infringed. In his view entitlements to leave were denied to fathers in both cases, which were very similar and no justification for this direct sex discrimination applied. However, the Court followed a different approach and instead emphasized the special relation of the mother and the child.<sup>2</sup> Fathers in the same situation as Mr Betriu Montull are thus denied rights related to their parenthood. What happened in these two cases and in other cases on issues relating to rights of parents who want to care for children? How were the concepts

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1 Case C-104/09, *Pedro Manuel Roca Álvarez v Sesia Start España ETT SA*, [2010] ECR I-8661.

2 Case C-5/12, *Marc Betriu Montull v Instituto Nacional de la Seguridad Social (INSS)*, [n.y.p.].

of non-discrimination and equality interpreted by the Court? Much of the academic work of Titia Loenen addresses the conceptualisation of the principle of equality.<sup>3</sup> And the issue of care is prominent in her work.<sup>4</sup> The aim of this contribution is to discuss and assess in particular some case law of the CJEU in relation to care when parents are denied rights – for example the right to take leave – at the national level and seek to be entitled to such rights by invoking EU law. How does the issue of comparability play a role in such cases? What are the added value and shortcomings of EU law in this field? The contribution starts with a description of the main EU legal norms which are applicable to issues of the reconciliation of work and care in order to delimit the scope of parental rights.<sup>5</sup> The most relevant cases of the CJEU illustrating the added value and shortcomings of EU law are discussed, followed by an assessment. The conclusion is that EU law has added value, but there are also shortcomings that could be addressed in future legislation.<sup>6</sup>

## 2. EU law on the reconciliation of work and care

The main pieces of EU legislation providing for specific rights in relation to reconciliation issues are the Pregnancy Directive 92/85<sup>7</sup> and the Parental Leave Directive 2010/18.<sup>8</sup> EU sex equality law is also relevant, in particular the prohibition of direct and indirect sex discrimination in the field of pay

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3 See in particular her dissertation: LOENEN 1992.

4 LOENEN 1997.

5 The contribution is limited to the field of employment; statutory social security matters and issues related to the access to and supply of goods and services are not discussed here.

6 See for a more in-depth analysis of some issues discussed in this contribution: BURRI 2014b and BURRI forthcoming b.

7 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) (OJ L 348 p. 1).

8 Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (OJ L 68 p. 13).

and employment.<sup>9</sup> The EU Charter of Fundamental Rights applies as well to reconciliation issues. Finally, EU law addresses the working conditions of part-time workers (Directive 97/81)<sup>10</sup> and flexible working arrangements. Historically, the prohibition of direct and indirect sex discrimination was first applied by the Court to reconciliation issues.

### 2.1. Direct and indirect sex discrimination

Discrimination on the ground of pregnancy or maternity amounts to direct sex discrimination and EU law offers strong protection against such discrimination.<sup>11</sup> The refusal to appoint a woman because she is pregnant is prohibited and cannot be justified by financial consequences (*Dekker*).<sup>12</sup> A comparator is not required in such pregnancy cases.<sup>13</sup> The Court ruled in *Brown* that disorders and complications related to pregnancy, which may cause an incapacity to work, form part of the risks inherent in pregnancy and less favourable treatment on that ground, or perhaps even dismissal, also amounts to direct sex discrimination.<sup>14</sup> The *Melgar* case shows that where the non-renewal of a fixed-term contract is motivated by the worker's state of pregnancy, this constitutes direct sex discrimination as well.<sup>15</sup> This prohibition of dismissal applies not only to permanent, but also to fixed-term contracts, even if the worker did not inform the employer of her condition when the contract was concluded and if she was unable to work

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9 Article 157 TFEU (the former Articles 119 EEC and 141 EC) and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ L 204, p. 23).

10 Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC – Annex: Framework agreement on part-time work (OJ L 14, p. 9).

11 See the definition of direct discrimination in Article 2(1)(a) of Directive 2006/54. Less favourable treatment of a woman related to pregnancy or maternity leave is included in the prohibition of discrimination (Article 2(2)(c) of Directive 2006/54).

12 Case C-177/88, *Elisabeth Jobanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, [1990] ECR I-03941.

13 For example AG Wahl acknowledged this in his opinion in case C- 363-12 (Z.) at para. 55.

14 Case C-394/96, *Mary Brown v Rentokil Ltd.*, [1998] ECR I-4185, at para. 22.

15 Case C-438/99, *Maria Luisa Jiménez Melgar v Ayuntamiento de Los Barrios*, [2001] ECR I-06915.

for a large proportion of its duration (*Tele Danmark*).<sup>16</sup> Less strong rights are provided in the field of pay, following the case of *McKenna*.<sup>17</sup> Absences due to pregnancy-related illness during pregnancy prior to maternity leave and after the end of the maternity leave may be treated, with regard to pay, similar to absences related to other forms of illness as far as the protection in relation to pregnancy and maternity is guaranteed.

The prohibition of indirect sex discrimination has been developed by the Court of Justice in particular in relation to part-time work.<sup>18</sup> This case law has contributed to improving the working conditions of part-time workers, especially in relation to access to occupational pensions and to training facilities.<sup>19</sup> Indirect sex discrimination is defined in Article 2(1)(b) of Directive 2006/54.

A disadvantage related to care responsibilities or care leave might amount to indirect sex discrimination, given the fact that many more women than men take up care responsibilities and leave. The Court recognised, for example, in the *Danfoss* case back in 1989 that if the criterion of mobility was understood to include ‘the employee’s adaptability to variable hours and varying places of work, the criterion of mobility may also work to the disadvantage of female employees, who, because of household and family duties for which they are frequently responsible, are not as able as men to organize their working time flexibly’.<sup>20</sup> The employer can justify recourse to the criterion of mobility if it is understood as referring to adaptability to variable hours and varying places of work, by showing that such adaptability is of importance for the performance of the specific tasks which are entrusted to the employee. The concept of indirect sex discrimination has been applied

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16 Case C-109/00, *Tele Danmark A/S/Handels- og Kontorfunktionærernes Forbund i Danmark (HK)*, [2001] ECR I-6993.

17 Case C-191/03, *North Western Health Board/Margaret McKenna*, [2005] ECR I-07631.

18 See for a recent overview of the relevant case law in relation to reconciliation issues: European Network of Legal Experts in the Field of Gender Equality, BURRI and AUNE 2013 and BURRI and AUNE 2014.

19 See for instance TOBLER 1999; BURRI 2000 and TRAVERSA 2003.

20 Case 109/88 *Handels- og Kontorfunktionærernes Forbund I Danmark/Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, [1989] ECR 3199, at para. 25.

by the Court in relation to parental leave, for example in the *Lewen* case, in which a Christmas bonus was at stake.<sup>21</sup>

## 2.2. *Reconciliation and the general principle of equal treatment in the EU charter*

The EU Charter of Fundamental Rights not only prohibits sex discrimination, but addresses explicitly the issue of family and professional life in its Article 33(2), which reads: ‘To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child’. The inclusion of such an article in the Charter underlines the importance of reconciliation issues for the EU, which is considered a fundamental social right by the Court (*Chatzi*),<sup>22</sup> but also illustrates the rather limited scope of EU law in this field. In the *Chatzi* case, the Court considered that the principle of equal treatment had implications for the situation of the parents of twins in relation to parental leave. The general principle of equal treatment can thus play a role in reconciliation issues, in particular when no specific rights of, for example, the Parental Leave Directive 2010/18 or the Pregnancy Directive 92/85 apply.

## 2.3. *The pregnancy directive 92/85*

The main aim of the Pregnancy Directive 92/85 is to implement measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding. The most important right in practice concerns maternity leave. Member States have to ensure that women enjoy a period of at least 14 weeks’ maternity leave (Article 8). During maternity leave, workers are entitled to the payment being maintained and/or the entitlement to an adequate allowance (Article 11 (1) and (2)(b)). Such an allowance is adequate if it guarantees an income which is at least equivalent to sick pay (Article 11 (3)).

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21 Case C-333/97, *Susanne Lewen v Lothar Denda*, [1999] ECR I-7243.

22 Case C-149/10, *Zoi Chatzi v Ypourgos Oikonomikon*, [2010] ECR I-8489.

According to a proposal aimed at amending the Pregnant Workers Directive, the minimum maternity leave should be 18 weeks.<sup>23</sup> The European Parliament is in favour of maternity leave of at least 20 weeks, fully paid.<sup>24</sup> If the pending proposal aiming at amending Directive 92/85 would be adopted, fathers would receive more specific rights, such as paternity leave. There is however little possibility that this proposal will be adopted; the Council of the EU has not reached a decision on this proposal up to now and if there is no agreement before mid-2015, the proposal will be withdrawn according to the Commission's work programme for 2015.<sup>25</sup>

#### 2.4. *The parental leave directive 2010/18*

Directive 2010/18 repealed Directive 96/34 and implements the revised agreement on parental leave that the European social partners reached in June 2009.<sup>26</sup> Workers with an employment contract are entitled to an individual right to unpaid parental leave for at least a period of four months on the grounds of the birth or adoption of a child so as to take care of that child until a given age (up to eight years). Member States are not obliged to introduce (partially) paid parental leave and the Directive does not impose any obligations on Member States to ensure that employees continue receiving social security benefits during parental leave (*Gómez-Limón*).<sup>27</sup> Workers who take parental leave must be protected against less favourable treatment and dismissal. The Court ruled in *Meerts* that this rule articulates

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23 Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, COM(2008) 637.

24 T7-0373/2010.

25 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2015 A New Start, COM (2014) 910 final, at p. 12.

26 Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (OJ L 68 p. 13).

27 Case C-537/07, *Evangelina Gómez-Limón Sánchez-Camacho / Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS), Alcampo SA*, [2009] ECR I-06525.

a particularly important principle of Community social law which cannot therefore be interpreted restrictively.<sup>28</sup>

### 2.5. *Flexible working arrangements*

Some flexible working hours imposed by employers might be difficult to harmonize with care responsibilities, for example given the (un)availability of child care facilities or the school hours of (young) children.<sup>29</sup> Applying such a criterion might therefore amount to indirect sex discrimination (see Section 2.1).

Opportunities to work part time are addressed in the Part-time Work Directive 97/81, but these rights are rather weak. The employers should, for example, as far as possible ‘give consideration to: requests by workers to transfer from full-time to part-time work that becomes available in the establishment’ and to ‘requests by workers to transfer from part-time to full-time work or to increase their working time should the opportunity arise’ (Clause 5(3)). A similar provision can be found in Clause 6(1) of the framework agreement on parental leave. In the framework of the social dialogue, Member States are encouraged to promote equality between men and women, and flexible working arrangements with the aim of facilitating the reconciliation of work and private life.<sup>30</sup> There thus exists no strong right to adjust working time and/or working hours in EU law up to now. EU legislation refers to flexibility which should meet the needs of workers and employers. However, this might entail a conceptualization of ‘flexibility’ which can render the reconciliation of work and care more difficult. It is submitted that the issue of the worker’s influence on working hours might be crucial given, for example, the (lack of) availability of affordable child care facilities, in particular for single parents.

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28 Case C-116/08, *Christel Meerts v Proost NV*, [2009] ECR I-63. A similar approach is taken in C-588/12, *Lyreco Belgium NV v Sophie Rogiers*, [2014].

29 See also EUROSTAT 2009, at p. 20.

30 Article 21(2) of the Recast Directive 2006/54.

### 3. Comparability issues

Some of the cases described above illustrate the difficulties concerning comparability issues when applying the prohibition of sex discrimination. It became clear, for example, that while, at the one hand, no comparator is required in pregnancy cases (*Dekker*), the Court on the other hand considered absences due to pregnancy-related illness to be comparable to absences due to other illnesses before and/or after the end of maternity leave in relation to pay (*McKenna*).

The issue of comparability might also be problematic in indirect sex discrimination cases in relation to parental leave. In the judgment in *Österreichischer Gewerkschaftsbund*, the Court considered that unpaid periods of leave due to military service and such periods due to parental leave were not comparable.<sup>31</sup> The Court held that ‘in the present case, parental leave is leave taken voluntarily by a worker in order to bring up a child. The voluntary nature of such leave is not lost because of difficulties in finding appropriate structures for looking after a very young child, however regrettable such a situation may be’. The Court emphasized that the performance of national service, on the other hand, corresponds to a civic obligation laid down by law and is not governed by the individual interests of the worker.<sup>32</sup> The public/private divide is clearly reflected in the approach of the Court in this case and fails to take into account the context of lacking child care facilities. The EU case law also shows tensions between protective measures for women and reconciliation policies designed in view of a more balanced division of work and care between men and women.

### 4. Protection of women versus fathers’ rights

It is submitted that a long period of protection in relation to maternity after the birth of a child might have the effect that sex-neutral rights on the ground of parenthood are not or are less available to both men and women. It is thus interesting to investigate how far the protection provided

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31 Case C-220/02, *Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten v Wirtschaftskammer Österreich*, [2004] ECR I-5907.

32 At paras. 60-61.



by EU law in relation to pregnancy and maternity reaches and whether this assumption is indeed substantiated in the case law of the Court.

In the German *Hofmann* case of 1984 the issue at stake was how far the statutory protection of mothers after giving birth reaches in relation to the rights of a father who has acknowledged the paternity of a child.<sup>33</sup> Mothers were not allowed to work for eight weeks after giving birth. After that period, they could take voluntary maternity leave until the child reached the age of six months and were entitled to a daily allowance. At that time no statutory parental leave existed in Germany. Mr Hofmann enjoyed unpaid leave provided by his employer for the period of eight weeks after the birth of his child until the child was six months old. The mother resumed her work eight weeks after the birth of the child. Mr Hofmann asked for the maternity leave allowance, which was not granted because only mothers on voluntary maternity leave were entitled to this allowance. According to Mr Hofmann, the aim of the voluntary maternity leave was not to give the mother social protection on biological and medical grounds, but the protection of the child. The Court did not agree and considered that ‘first, it is legitimate to ensure the protection of a woman’s biological condition during pregnancy and thereafter until such time as her physiological and mental functions have returned to normal after childbirth; secondly, it is legitimate to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment’.<sup>34</sup> The Court’s reasoning here was criticised because of the emphasis placed on protecting women in this way, especially in their relationship with her child, an approach which threatened to undermine the genuine sharing of family responsibility between men and women.<sup>35</sup>

Thirteen years later, the Court observed that: ‘Community policy in this area is to encourage and, if possible, adapt working conditions to family responsibilities. Protection of women within family life and in the course

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33 At stake was Directive 76/207 (now repealed by Directive 2006/54): Case 184/83, *Ulrich Hofmann v Barmer Ersatzkasse*, [1984] ECR 3047.

34 At para. 25.

35 See for example MCGLYNN 2000.

of their professional activities is, in the same way as for men, a principle which is widely regarded in the legal systems of the member states as being the natural corollary of the equality between men and women, and which is recognised by Community law' (*Gerster and Hill*).<sup>36</sup> Although the Court still placed emphasis on *protecting* women (and men) in this field, the fact that it pointed out that there is a natural corollary between this principle and equality between men and women offers more room to address problems in this field, even if there are no specific entitlements in a particular case.

In the already mentioned *Roca Álvarez* case, the Court went a step further. At stake was Spanish legislation already adopted in 1900 entitling female workers to daily 'breastfeeding' leave for nine months after birth.<sup>37</sup> Fathers also had this right since 2007, but only if the mother was employed: they thus had a derived right. The mother of Mr Roca *Álvarez's* child was self-employed and Mr Roca *Álvarez* was therefore not entitled to the requested daily leave. The Court considered that this legislation had the effect of changing working hours. However, mothers who were employed were always entitled to 'breastfeeding' leave, whilst fathers who were employed were only so entitled if the child's mother was also an employed person. The Court stated: 'Thus, for men whose status is that of an employed person the fact of being a parent is not sufficient to gain entitlement to leave, whereas it is for women with an identical status. However, the positions of a male and a female worker, father and mother of a young child, are comparable with regard to their possible need to reduce their daily working time in order to look after their child.'<sup>38</sup> As the leave no longer refers to 'breastfeeding', it can be taken by the father and the mother and thus seems to 'be accorded to workers in their capacity as parents of the child. It cannot therefore be regarded as ensuring the protection of the biological condition of the woman following pregnancy or the protection of the special relationship between a

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36 Case C-1/95, *Hellen Gerster/Freistaat Bayern*, [1997] ECR I-05253, at para. 38 and Case C-243/95, *Kathleen Hill and Ann Stapleton v. The Revenue Commissioners and Department of Finance*, [1997] ECR I-03739, at para. 42.

37 At stake was Directive 76/207 (now repealed by Directive 2006/54): Case C-104/09, *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA*, [2010] ECR I-8661.

38 At paras. 23-24.

mother and her child.<sup>39</sup> The regulation at stake is in addition not a positive action measure. The Court considered that when only a mother who is employed qualifies for the leave, whereas a father with the same status can only enjoy this right but not be the holder thereof, this 'is liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties.'<sup>40</sup> The provision at stake is thus contrary to EU sex equality law. The Court has here clearly chosen for an equal position of women and men in parenthood, enabling both parents, employed or self-employed, to take this leave.

As already mentioned in the introduction, a different approach was taken by the Court in the Spanish *Betriu Montull* case on a similar regulation.<sup>41</sup> The father was also employed while the mother was self-employed. The father had only a derived right to leave with an allowance. The leave that Mr Betriu Montull requested was not granted, because the self-employed mother was not affiliated to a statutory social security regime. AG Wathelet, taking up the Court's reasoning in *Roca Álvarez*, considered it evident that the measure at issue established a difference in treatment on grounds of sex as between employed mothers and employed fathers. He recalled that in *Roca Álvarez*, the Court considered comparable the positions of a male and a female worker, father and mother of a young child, with regard to their possible need to reduce their daily working time in order to look after their child.<sup>42</sup> The Court in *Betriu Montull* however emphasised that 'pregnant workers and workers who have recently given birth or who are breastfeeding are in an especially vulnerable situation' that particularly during maternity leave cannot be compared to that of a man or a woman on sick leave.<sup>43</sup> The measure at stake is justified by the protection of women in relation to pregnancy and maternity. It is legitimate to protect a woman's biological condition during and after pregnancy and to protect the special relationship between a woman

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39 At para. 31.

40 At para. 36.

41 See para. 34; Case C-5/12, *Marc Betriu Montull v Instituto Nacional de la Seguridad Social (INSS)*, [n.y.p.].

42 At paras. 67-68.

43 At para. 49.

and her child over the period which follows childbirth.<sup>44</sup> The father had therefore no right to this leave following the maternity leave of the mother. In the *Betriu Montull* case, considerations on reconciliation issues are lacking and the need for the protection of mothers who have recently given birth is once again emphasized. Such an approach tends to deny rights to fathers when they are not entitled to specific individual rights and in the author's view this certainly does not contribute to a more balanced division of work and care between men and women.

## 5. Surrogacy leave

Different approaches to comparability issues, the need to protect women in relation to pregnancy and maternity and fathers' rights are also illustrated by two diverging opinions of AG Kokott and AG Wahl on surrogacy leave.<sup>45</sup> These cases concerned the right to pregnancy and maternity leave for commissioning mothers. In the case *C.D.*, AG Kokott explored the personal scope of Directive 92/85. She considered the situation of the biological mother and the commissioning mother to be different with regard to pregnancy and birth, but comparable in relation to breastfeeding. In both situations there are health risks.<sup>46</sup> She emphasised the importance of care by a commissioning mother and took the *Hofmann* case as a starting point. She submitted that a commissioning mother should fall under the personal scope of the Pregnancy Directive, even if she is not breastfeeding, given the necessary protection of the special relationship between the mother and child. In her view, precisely because the commissioning mother was not pregnant, it is a challenge for her to build up a relationship with the child, to include it in the family and to get used to her role as a mother. She considered this situation not to be comparable to adoption, where generally speaking the building up of the relationship with the child does not begin upon the birth of the child. AG Kokott did not pay any attention to the role of the father in the case of surrogacy. In her view, the Directive applies to a commissioning

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44 At para. 62.

45 Opinion of AG Kokott in case C-167/12 (*CD*) and the opinion of AG Wahl in Case C-363/12 (*Z.*), 26 September 2013. See also: BURRI 2014a.

46 At para. 44.

mother who is a worker, and is thus entitled to maternity leave and the surrogate mother and the commissioning mother should share this leave. She adopted a broad interpretation of the personal scope of Directive 92/85, putting emphasis on care by (commissioning) mothers.

AG Wahl followed quite a different approach. In his view, the protection of the special relationship between mother and child is closely related to the birth of the child. The scope of the Directive should not be interpreted as applying to the protection of motherhood, or even parenthood. A broad interpretation of the personal scope of the Directive would have the effect that an employed commissioning mother would be entitled to paid (maternity) leave, but an adoptive mother or the father involved in a surrogacy arrangement would have no such right.<sup>47</sup> The consequence is that intended mothers have no specific maternity leave rights that could be based on existing EU law. Clearly the member states can adopt measures on parental leave in the case of surrogacy arrangements. According to AG Wahl, there is in this case no sex discrimination. The difference of treatment occurs between a commissioning mother and a woman who has given birth or an adoptive mother. A male parent of a child born through surrogacy would receive the same treatment as a commissioning mother. He finally considered that the provisions of the Charter can be taken into account for the interpretation of secondary EU law, but cannot extend the material scope of Directive 2006/54 or affect the validity of the Directive in this case.<sup>48</sup>

In both cases the Court followed the approach suggested by AG Wahl on the interpretation of Article 2 (personal scope) and Article 8 (pregnancy and maternity leave) of Directive 92/85.<sup>49</sup> In the *C.D.* case, the CJEU (Grand Chamber) considered that the aim of this Directive in the light of existing case law (in particular the *Hofmann* and *Betriu Montull* cases) is the protection of the biological condition of the pregnant woman and the especially vulnerable situation arising from her pregnancy. The protection of the special relationship of the mother and the child only applies to the

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47 At para. 51.

48 Paras. 69-76, at para. 73.

49 Case C-167/12, *.D. v S.T.*, [2014] and Case C-363/12, *Z. v A Government department and The Board of management of a community school*, [2014].

period after the pregnancy and the confinement. The Court thus mentioned once again the two-fold goal of the pregnancy and maternity leave. Article 8 of the Pregnancy Directive presupposes that the worker entitled to maternity leave has been pregnant and has given birth. Member states are not required to provide maternity leave to a female worker who as a commissioning mother has had a baby through a surrogacy arrangement, even if she may or does breastfeed the baby following the birth. However, member states might adopt more favourable provisions. The Court also ruled in *C.D.* that the employer's refusal to grant maternity leave to a commissioning mother does not constitute discrimination on grounds of sex. The comparison is made between the surrogate mother who was pregnant and has given birth and the commissioning mother, both women. There is no indirect discrimination either; as there is nothing in the file to establish that the refusal to grant leave puts a female worker at a particular disadvantage compared to a male worker. In the *Z.* case, the Court followed a similar reasoning.<sup>50</sup> In both cases, neither of the commissioning parents were entitled to rights derived from EU law.<sup>51</sup>

## 6. Assessment

The overview of EU legislation relevant in the field of reconciliation issues shows that it addresses, in the first place, the health and security of pregnant workers and leave in relation to pregnancy, maternity and parenthood. However, there is a declining scale of protection and rights provided in case of pregnancy and maternity. A strong protection is ensured against dismissal related to pregnancy and maternity, while rights related to pay and social benefits during leave are less protected. Rights based on parenthood are still rather weak. Parental leave is unpaid and social security benefits during parental leave are principally a matter of national law and agreements between the social partners. EU research shows that paid parental leave is one of the main factors that would influence the taking of parental leave by

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50 At paras. 51-57. The Court also considered that the inability to have a child does not prevent the mother from participating fully and effectively in professional life on an equal basis with other workers.

51 See further BURRI forthcoming a.

fathers.<sup>52</sup> However, protection against dismissal related to parental leave is rather strong.

As regards the principle of equal treatment between part-time and full-time workers, the rights offered by Directive 97/81 are limited, as only working conditions are addressed.

Specific rights relating to flexible working arrangements are to a large extent lacking or weak. In this area, it is important to acknowledge which kind of flexibility is at stake: some working time schedules might hamper the reconciliation of work and care, while others might facilitate such reconciliation. Worth mentioning is the complementary role that the principle of equal treatment between men and women can play when no specific rights apply. Potentially, the EU Charter could play an even more important role in the case law of the CJEU in relation to reconciliation issues.

The interpretation of EU legislation by the CJEU offers strong rights to both men and women which might facilitate the reconciliation of work and care and provides protection against unfavourable treatment in relation to pregnancy, maternity and parenthood. However, the rights allotted differ depending on the issue and area at stake, as the Court is bound by the limitations of the legislation at stake. The approach of the Court to comparability issues is sometimes problematic when it endorses a private/public divide without recognizing the value of care. Nevertheless, the case law of the Court has led in some areas to strong rights and/or protection. Generally speaking, the protection of women during the pregnancy and maternity leave provided by the case law is rather strong. The same is true for the prohibition of pregnancy discrimination in relation to dismissal. However, in the field of pay, absences due to pregnancy or pregnancy-related illness often means less income, just as in the case of absences due to illness. The analysis provided above also highlights divergences in the approach to the protection of motherhood and rights based on parenthood. This leads to a lack of legal certainty as illustrated by the *Roca Álvarez* and *Betriu Montull* cases. While the Court in some cases extended the protection of mothers

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52 EUROSTAT 2009, at p. 98.

who have recently given birth in such a way that fathers who want to care for their child are denied rights, it sometimes acknowledged the rights of both parents. It is submitted that emphasizing the protection of women who have given birth for a rather long period might hamper a more balanced division of work and care between men and women and might perpetuate gender stereotypes concerning the traditional roles of women and men in relation to care for children.

## 7. Conclusions

EU legislation refers explicitly to the reconciliation of work and family life and its inclusion in the EU Charter points towards a conceptualisation of such reconciliation as a fundamental right alongside the principle of equal treatment. However, the scope of Article 33(2) of the Charter is rather limited, as it covers only the reconciliation of family and professional life in relation to maternity, parental and adoption leave. Inspiration can be drawn from the CJEU case law when it is willing, with a reference to this provision, to apply a general principle of equal treatment to reconciliation issues where no specific rights can be derived from EU legislation and when it recognized the right to parental leave as a fundamental social right (*Chatzi, Meerts*).

The case law of the CJEU has contributed to protecting women against pregnancy and maternity discrimination, in particular in the access to employment and in relation to dismissal. As far as working conditions are concerned, the case law also offers possibilities to strengthen the position of workers who want to reconcile work and care. However, the case law is casuistic, complicated and not always consistent, in particular in relation to comparability issues. It has been submitted that by emphasizing the protection of women who have given birth in its case law, the CJEU sometimes hampers a genuine sharing of care responsibilities between men and women. The issue of gender stereotypes and the danger of reinforcing the traditional roles of men and women in relation to work and care are only addressed explicitly in a few judgements of the CJEU (e.g. *Roca Álvarez*). However, EU case law certainly offers indications towards recognising the need to share care responsibilities between parents which could be further developed by the Court.



Discussions at the EU level aimed at extending the possibilities to reconcile work and care might be taken further if the pending proposal in the Pregnancy Directive is withdrawn. Future legislative proposals might include more possibilities to reconcile work and care, for example in the form of paternity leave, shared parental leave, forms of care leave and more influence by workers with care responsibilities on working time and working hours. It is submitted that a more comprehensive EU approach to leave, working time adjustments, and (child)care facilities should include more rights to be able to take caring responsibilities, not only for mothers and fathers, but also for other relatives. In a society where participation in the labour market of both women and men is increasing and becoming more balanced, the need to address the care of children, older people and the disabled becomes more urgent. However, this contribution was limited to the potential of EU law for parents who want to reconcile work and care when they are denied rights in national law. The interpretation of the principle of equality by the CJEU in this field shows some shortcomings, but also has added value. The equality of parents in relation to work and care in EU law is certainly *not* nothing but trouble.

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## Part III

### Equality and human rights in conflict



# Freedom of religion and human rights laws – awkward bedfellows

Peter Cumper

## 1. Introduction

Do human rights laws risk undermining religious freedom? For many of a conservative faith disposition the answer to this question is likely to be in the affirmative. After all, in recent years, some of Europe's most high-profile religious leaders – including Pope Emeritus Benedict XVI<sup>1</sup> and a former Archbishop of Canterbury (Lord Carey)<sup>2</sup> – have claimed that human rights (and equality) laws pose a threat to religious freedom. Such claims may be of questionable legal validity, but they nonetheless appear to strike a chord with a significant number of (mainly conservative) faith communities today in parts of Europe, leading some people of faith to question the efficacy of human rights legislation.

This chapter aims to cast some light on the often controversial relationship between the principle of freedom of religion and human rights norms such as equality and non-discrimination. The chapter starts by identifying a number of the 'benefits' of human rights instruments for faith groups, but its primary focus is on an issue contemporary relevance – the fear of some religious leaders that the rights of believers (and the autonomy of faith groups) may be eroded by the state affording equal rights to lesbian/gay/bisexual/transgender (LGBT) communities at the workplace.

Few challenges currently facing law and policy makers are more onerous than that of having to reassure faith groups that human rights laws will not erode religious freedom, while also guaranteeing that LGBT rights will be neither undermined nor jeopardized. In seeking to consider the nature of this challenge in a workplace context, detailed reference will be made to a

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1 See for example, BUTT 2010.

2 See for example, STANFORD 2012.

recent ruling of the European Court of Human Rights (ECtHR) – *Eweida and others v the United Kingdom*<sup>3</sup> – a case in which one of the applicants, Lillian Ladele, argued that, in carrying out her job as a Council Registrar, her employer should have been required to have taken account of her religiously motivated objections to officiating at civil partnership ceremonies for same-sex couples. Ladele’s application to the ECtHR may have been ultimately unsuccessful, but the case is important because it highlights the difficulties of striking an appropriate balance freedom of religion and the principle of equality today in Europe.

When one speaks of contemporary Europe, it is of course important to bear in mind that there are significant intra-continent differences, both in terms of citizens’ religious affiliation, as well as in relation to public attitudes to LGBT rights. In relation to the former, whilst organised religion is evidently in decline in many Northern European (traditionally Protestant) nations,<sup>4</sup> this trend has apparently been much less marked in some other parts of the continent.<sup>5</sup> Similarly, in relation to the latter, it is axiomatic that public attitudes to LGBT rights vary greatly between states,<sup>6</sup> so that, for example, whereas ‘[i]n several Central and Eastern European countries ... there is a strong political and sociocultural opposition to gay and lesbian rights’,<sup>7</sup> such opposition has been noticeably less marked in most Western European nations in recent years.<sup>8</sup> Mindful of these considerations, the primary focus of this paper will be on those (mainly western) states in Europe that have afforded considerable recognition to LGBT rights, albeit often to the chagrin of religious groups. Many of the legal references in this chapter will be from the United Kingdom, a legacy of the fact that faith-LGBT relations have, of late, been a particularly controversial issue in that country. Notwithstanding the heavy reliance on materials from the UK, it is suggested that the issues

3 ECtHR, *Eweida and others v UK*, 15 January 2013 (Appl.nos. 48420/10, 59842/10, 51671/10 and 36516/10).

4 See BRUCE 2002.

5 See TOMKA 2011.

6 GERHARDS 2010.

7 ŠTULHOFER and RIMAC 2009, at p. 24. See also URTZ 2012.

8 For example, according to a survey that was conducted across Britain, France, West Germany, Italy and the Netherlands in 2006, only 22% of people said that homosexuality could never be justified. See INGLEHART 2008, at p. 144.



discussed here are of particular relevance for many other Western European nations, and that the subject-matter therein will, in all likelihood, be of increasing importance for the rest of the continent.

The structure of the chapter is as follows. First, it will consider whether human rights laws are generally regarded in positive or negative terms (ie., as ‘friend or ‘foe’) by religious organisations. Secondly, it will explore how a desire on the part of some conservative religious groups to differentiate between people on the grounds of their sexual orientation has often made such groups wary of human rights laws. Thirdly, it will examine – with reference to the case of *Ladele* – whether employers should make provision for the reasonable accommodation of religious belief at the workplace if such accommodation might undermine the dignity of LGBT employees. It will pay particular attention to the scenario (as in *Ladele*) where an employee, already in post, is required to comply with a new workplace policy that they object to on religious grounds. Finally, in the conclusion, it will be suggested that notwithstanding recent controversies in which some people of faith have objected to the interpretation of human rights documents vis-a-vie the recognition of LGBT rights, it is important not to lose sight of the areas of common ground that are shared by religious and LGBT groups.

## **2. Human rights laws – friend or foe of religious organisations?**

On the face of it, faith groups and human rights laws would seem to be natural bedfellows. After all, a number of reasons can be adduced as to why one might ordinarily assume that human rights laws would be warmly welcomed by faith groups. To begin with, there have been several occasions in recent decades where the representatives of the world’s largest religions have issued public statements re-affirming their commitment to the principle of human rights.<sup>9</sup> What is more, contemporary human rights norms have been

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9 See for example, the Preamble to the 2008 Faith in Human Rights Statement, where the leaders of various world religions pledged their ‘support [for] the human rights and fundamental freedoms of every human person, alone or in community with others’, available at: [www.oikoumene.org/en/folder/documents-pdf/faith\\_human\\_rights.pdf](http://www.oikoumene.org/en/folder/documents-pdf/faith_human_rights.pdf).

influenced by religious values,<sup>10</sup> while some of those who were originally responsible for drafting Europe's most important human rights document – the European Convention on Human Rights (ECHR) – even subsequently acknowledged the influence of their own religious beliefs in undertaking this task.<sup>11</sup> In addition, a wide variety of religious (and equivalent non-religious) beliefs have been brought within the protective scope of the ECHR,<sup>12</sup> which guarantees freedom of thought, conscience and religion (Article 9),<sup>13</sup> as well as the right to be free from discrimination on various grounds including one's belief or lack thereof (Article 14).<sup>14</sup> Furthermore, the ECHR's human rights institutions have guaranteed religious groups the right to manifest their faith in a variety of ways (eg., communal prayer,<sup>15</sup> public assembly,<sup>16</sup> and evangelism<sup>17</sup>) as well as affording them protection from discrimination,<sup>18</sup> arbitrary dismissal,<sup>19</sup> and violent attack.<sup>20</sup> And finally, the ECtHR, whilst affirming that neutrality is the principle that must govern the state's relationship with faith communities,<sup>21</sup> has also recognised the historical

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10 On the claim that human rights norms have been *heavily* influenced by religious beliefs see KIPER 2012.

11 See EVANS 2001, at p. 39.

12 See for example, ECtHR, *Kokkinakis v Greece*, 25 May 1993 (Appl.no. 14307/88).

13 'Everyone has the right to freedom of thought, conscience and religion; the right includes the freedom to change his religion or belief, and freedom, either alone or in community with others and in public and private, to manifest his religion or belief, in worship, teaching, practice and observance.' ECHR, Article 9(1).

'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.' ECHR, Article 9(2).

14 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.' ECHR, Article 14.

15 See for example, ECtHR, *Masaev v Moldova*, 12 May 2009 (Appl.no. 6303/05).

16 See for example, ECtHR, *Barankevich v Russia*, 26 July 2007 (Appl.no. 10519/03).

17 See for example, ECtHR, *Jehovah's Witnesses of Moscow and others v. Russia*, 10 June 2010 (Appl.no. 302/02).

18 See for example, ECtHR, *Thlimmenos v Greece*, 6 April 2000 (Appl.no. 34369/97).

19 See for example, ECtHR, *Ivanova v Bulgaria*, 12 April 2007 (Appl.no. 52435/99).

20 See for example, ECtHR, *97 Members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v Georgia*, 3 May 2007 (Appl.no. 71156/01).

21 ECtHR, *Hasan and Chaush v Bulgaria*, 26 October 2000 (Appl.no. 30985/96).

influence of organised religion in parts of the continent, by holding that an established or state church is compatible with the European Convention.<sup>22</sup> At first glance one might thus assume that members of religious communities would, as a general rule, regard human rights laws in extremely positive terms (ie., as ‘friend’ rather than ‘foe’). However, on closer inspection, it soon becomes clear that this is not necessarily the case – certainly in so far as some people from mainly conservative faith traditions are concerned. In recent years it has been claimed that human rights laws, especially in the way in which they have been interpreted by judges, tend to detract from religious freedom.<sup>23</sup> A strong advocate of this view is a former Church of England Bishop (Michael Nazir Ali), who has even suggested that such laws are akin to a modern day ‘Trojan horse’, in that they risk surreptitiously eroding the rights of faith groups under the guise of offering them protection.<sup>24</sup> The dissatisfaction of some faith groups with the interpretation of human rights instruments has been a feature of public life in recent years, in areas ranging from curbs on religious dress and the display of religious symbols,<sup>25</sup> to the boundaries of freedom of expression and the protection of religious sensibilities.<sup>26</sup> But it is the recognition of LGBT rights which has particularly provoked the ire of some religious leaders, becoming a totemic issue around which concerns about human rights laws have been increasingly centred. It is thus to the challenge of balancing LGBT rights and religious freedom at the workplace that this chapter now turns.

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22 See for example, ECtHR, *Darby v Sweden*, 23 October 1990 (Appl.no. 11581/85).

23 See TWIGG 2012.

24 See BONTHRONE 2000.

25 Such an issue has been the display of crucifixes in the classrooms of Italian state schools. It was ultimately resolved to the satisfaction of the Catholic Church by the Grand Chamber of the ECtHR in, ECtHR, *Lausi and Others v Italy*, 18 March 2011 (Appl.no. 30814/06). On the controversy generally see ANNICCHINO 2011.

26 For example, blasphemy laws in some nations (eg., the UK) have been repealed primarily on the basis that they contravene the principle of freedom of expression. See, generally, SANBERG and DOE 2008.

### 3. Freedom of religion, obdurate believers and LGBT rights

When it comes to the recognition of gay rights, many religious groups have a long and difficult history.<sup>27</sup> Yet any assumption that *all* people of faith are opposed to the recognition of LGBT rights is demonstrably false. On the contrary, marked differences currently exist between people of faith in their attitudes to same-sex relationships and, in this regard, there are at least three different perspectives.

First, there are ‘faith’ advocates of LBG<sup>T</sup> relationships, who celebrate sexual diversity as a gift from God and support same-sex marriage.<sup>28</sup> Secondly, in total contrast, there are those who maintain that homosexuality is so anathema to their religious beliefs that they are willing to condone the ill-treatment of homosexuals.<sup>29</sup> And thirdly, there are people of faith who believe that heterosexual relationships should be elevated above same-sex ones, but insist that they object to ‘homosexuality’ only as a practice, rather than ‘homosexuals’ as people.<sup>30</sup> This ‘love the sinner but hate the sin’ approach is very controversial,<sup>31</sup> but it often underpins the motivation of those who argue that their faith constrains them from undertaking certain work related duties that might – at least in their own minds – be construed as constituting a positive endorsement of homosexuality.

It is the third category of religious believers who are the primary focus of this chapter. Members of this group tend to be associated with a ‘conditional’ acceptance of human rights laws. In other words, they are willing in principle to accept such laws as long as they retain the right to be excused from anything that might offend against their religious conscience(s). This approach has been demonstrated by a series of cases in recent years where conservative faith applicants have sought to challenge – seldom successfully – general legal obligations imposed by human rights laws. These cases often

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27 See for example, JORDAN 1997.

28 See for example, ROBINSON 2013.

29 For example, within the Judaeo-Christian tradition, there are some who would use certain Biblical verses (see eg., Leviticus 18:22, and 20:1, condoning the murder of homosexuals) as a justification of homophobic attitudes. See generally YIP 2007.

30 See for example GRENZ 1998.

31 See CORVINO 2013, at pp. 12–13. Corvino attacks this approach, which risks providing a cloak under which homophobia can hide.

have an employment dimension and range from a conservative Christian sex therapist who wished to be excused from having to counsel gay couples<sup>32</sup> to a Christian doctor who challenged the revocation of his appointment to a drugs advisory council because of critical comments he had made about LGBT lifestyles.<sup>33</sup> Controversial as these cases undoubtedly are, few of them have attracted the same attention as that of Lillian Ladele, the Council Registrar who wished to be excused from conducting same-sex ceremonies.

#### 4. Accommodating religious belief and the registration of civil partnerships

Should a liberal state ever accommodate a person's religious beliefs at the workplace if, in so doing, it might risk undermine the dignity of the religious employee's co-workers? This was the issue facing the ECtHR when, in *Eweida and Others v UK*, it considered (inter alia) the case of a religiously conservative Christian – Lillian Ladele – who sought to challenge the failure of her employer to accommodate her beliefs at the workplace.

Ladele was a registrar of births, deaths and marriages for the London Borough of Islington. On 5 December 2005, the Civil Partnership Act 2004, which provided for the legal registration of civil partnerships between two people of the same sex, came into force in the United Kingdom. Unlike some other Councils which had permitted their registrars to be excused on religious grounds from designation as civil partnership registrars, Ladele's employer chose to designate *all* of its existing registrars as civil partnership registrars. Ladele soon made it known that she was unwilling to officiate at civil partnership ceremonies on the basis of her religious beliefs, and initially this was unproblematic because, as a result of informal arrangements with co-workers, she was excused from having to conduct such ceremonies. However, following complaints from two of her colleagues, these informal arrangements broke down, and her employer subsequently requested that she officiate at civil partnership ceremonies – a course of action to which she

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32 *McFarlane v Relate Avon Ltd* [2010] EWCA Civ B1.

33 *Raabe, R (on the application of) v Secretary of State for the Home Department* [2013] EWHC 1736 (Admin).

refused to agree. Having exhausted domestic remedies, Ladele took her case to the ECtHR.

Ladele's main submission was that the failure of her employer to accommodate her religious beliefs constituted a violation of Articles 14 and Article 9 of the ECHR. In this regard she claimed that *not* to exempt someone with her religious beliefs from a policy such as the one operated by her employer – which prohibited discrimination against others on the grounds of sexual orientation ('Dignity for All') – meant that she risked being treated differently from those who did not share her faith or had beliefs that were notably different from her own. In other words, Ladele's contention was that, in the absence of a duty to accommodate her religious beliefs, the Council's policy of outlawing discrimination against people from LGBT communities was, ironically, itself discriminatory. Accordingly, Ladele argued that, as a result of the non-accommodation of her Christian beliefs, she had been a victim of religious discrimination.

The ECtHR was, however, not persuaded by Ladele's argument. In rejecting this application the Court ruled that the state had a wide margin of appreciation in seeking to take account of Ladele's right to manifest her beliefs at work, particularly given the duty on employers to protect the rights of others.<sup>34</sup> Accordingly, on the facts of the case, the Court held that the right balance had been struck because of the Council's clear policy to promote equal opportunities, and the related ban on employees from acting in ways that might discriminate against others (eg., their LGBT co-workers).<sup>35</sup> But how should one respond to the ECtHR's ruling? In this regard there are at least three different responses. These are that the ECtHR:

- (i) should be criticised for not having taken Ladele's beliefs sufficiently seriously, in that it failed to view the case through the prism of freedom of conscience;

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34 ECtHR, *Eweida and others v UK*, 15 January 2013 (Appl.nos. 48420/10, 59842/10, 51671/10 and 36516/10), at para. 105.

35 ECtHR, *Eweida and others v UK*, 15 January 2013 (Appl.nos. 48420/10, 59842/10, 51671/10 and 36516/10), at paras. 106 and 109.

- (ii) should be praised for its strong commitment to the principle of equality, on the basis of its refusal to accommodate Ladele's intolerant beliefs;
- (iii) should have regarded this case, on account of its *exceptional* facts, as potentially affording scope for applying the principle of reasonable accommodation of an employee's religion/belief at the workplace.

#### 4.1. *Ladele and freedom of conscience: should parallels be drawn with conscience clauses in accommodating religious belief*

A first possible response to *Ladele* is to criticise the European Court for not taking the applicant's beliefs sufficiently seriously, in that it refused to regard them as being akin to freedom of conscience. Differences as to what should be meant by 'conscience' certainly lie at the very heart of the ruling of the ECtHR in *Ladele*. Unlike the majority of the Court, dissenting Judges Vučinić and De Gaetano focused primarily on the issue of conscientious objection. In upholding Ladele's complaint, on the basis of a violation of Article 14 taken in conjunction with Article 9, they held that her case 'is not so much one of freedom of religious belief as one of freedom of conscience [in that] no one should be forced to act against one's conscience or be penalised for refusing to act against one's conscience.'<sup>36</sup>

The parameters of freedom of conscience may, in practice, often be difficult to define, but it is accepted that the law should, in principle, attach considerable weight to the protection of an individual's conscience.<sup>37</sup> Perhaps mindful of such considerations, counsel for Ladele specifically attempted to draw parallels between her case and the situation of where medical practitioners are permitted 'to opt out of performing abortions'.<sup>38</sup> This is a potentially significant comparison because the majority of states today in Europe have

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36 Judges Vučinić and De Gaetano, Joint Partly Dissenting Opinion, ECtHR, *Eweida and others v UK*, 15 January 2013 (Appl.nos. 48420/10, 59842/10, 51671/10 and 36516/10), at para.2.

37 As is pointed out by SAPIR and STATMAN 2005, at p. 474: 'coercing people to act against their deepest normative beliefs presents a severe threat to their integrity and makes them experience strong feelings of self-alienation and loss of identity [and that this] should be avoided as far as possible'.

38 ECtHR, *Eweida and others v UK*, 15 January 2013 (Appl.nos. 48420/10, 59842/10, 51671/10 and 36516/10), at para. 72.

conscience clauses in place for physicians and health-care professionals.<sup>39</sup> What is more, the Strasbourg Court has also made it clear that ‘[m]edical professionals are entitled to refuse to provide medical services’, and that ‘[t]his entitlement originates in their moral obligation to refuse to carry out immoral orders’.<sup>40</sup> Thus, in view of its strong affirmation of the conscience rights of medical practitioners, one might, at first glance, assume that the European Court should have afforded equivalent respect to the ‘conscience’ rights of a registrar like Ladele. However, on closer inspection, at least three reasons may be advanced to differentiate between the scenario of a registrar who refuses to officiate at the ceremony of a same-sex couple on religious grounds, and a health-care professional who objects to participating in an abortion on religious/ethical grounds.

First, it can be argued that Ladele did not object to the *act* of registering, but rather to the *people* (ie., same-sex couples) she was expected to register.<sup>41</sup> This is a significant difference because, on that basis, such an exemption would *not* be granted to a doctor/nurse who refused to participate in abortions that only concerned patients from, say, a particular racial/religious group.<sup>42</sup> A second ground for distinction is that the act of refusal in *Ladele* differs from that in abortion, because only in the latter scenario is harm to human life an actual (or potential) consideration.<sup>43</sup> This perhaps serves to explain why the European Court has treated conscience claims involving threats to human life – such as those that concern conscientious objection to military service<sup>44</sup> – more sympathetically than, for example, those relating to pharmacists in the retail trade who refuse to sell contraceptives on religious or ethical

39 See for example, HEINO, GISSLER and FIALA 2013.

40 ECtHR, *P and S v Poland*, 30 October 2012 (Appl.no. 57375/08), at para. 70.

41 For such an argument see WINTEMUTE 2014, at p. 247. However, a potential counter-argument is that at the heart of Ladele’s refusal to officiate at civil-partnerships was an objection to civil partnership ceremonies per se, rather than any aversion to the people (ie. couples in same-sex relationships) wishing to participate in such ceremonies.

42 For example, if it is inconceivable that the Strasbourg Court would accommodate the beliefs of a medical practitioner were s/he to claim that they were prevented from treating certain patients on the basis of their race, religion or sexuality.

43 This point is also made by WINTEMUTE 2014, at p. 247.

44 See, ECtHR, *Bayatyan v Armenia*, 7 July 2011 (Appl.no. 23459/03), which established that conscientious objection, whilst not expressly guaranteed in Article 9, should be read as coming within the scope of it.



grounds.<sup>45</sup> And a third difference relates to the negative message that would be sent to the members of LGBT communities if special accommodation were to be made for registrars who refuse to conduct same-sex ceremonies – whereas, in the case of medical conscience clauses, it is difficult to deduce any implied criticism or negativity towards those who wish to avail themselves of abortion (or related) services.<sup>46</sup>

The difficulties of making a persuasive argument that Lillian Ladele should be regarded as being the moral equivalent of a medical practitioner who wishes to avail him/herself of a conscience clause, should not perhaps disguise the fact that her case – at least to some degree – raises potentially important issues of conscience. Yet, in this regard, it is noticeable that neither the majority nor the dissenting judges in the Strasbourg Court adequately examined the question of religious conscience. Whereas the majority largely ignored such issues, a number of controversial remarks by Judges Vučinić and De Gaetano – including references to ‘the Spanish Inquisition’ and the ‘Nazi firing squad’,<sup>47</sup> alongside other injudicious comments<sup>48</sup> – have detracted from what they had to say about freedom of conscience. Thus, it is perhaps regrettable that the opportunity was missed by the Strasbourg Court to offer some (arguably much needed) guidance on freedom of conscience at the workplace.

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45 See for example, ECtHR, *Pichon and Sajous v. France*, 2 October 2001 (App.no. 49853/99) where the European Court of Human Rights rejected an application from pharmacists who refused to sell contraceptives because of their religious beliefs.

46 This point was emphasized recently by a Scottish judge who, in explaining the rationale for the conscience clause in British law, observed that abortion ‘is a matter in which many people have strong moral and religious convictions, and the right of conscientious objection is given out of respect for those convictions and not for any other reason’: Lady Dorrian in *Doogan and Anor v NHS Greater Glasgow & Clyde Health Board* [2013] Scot CS CSIH 36, at para. 38.

47 Judges Vučinić and De Gaetano, ECtHR, *Eweida and others v UK*, 15 January 2013 (Appl.nos. 48420/10, 59842/10, 51671/10 and 36516/10), at para. 3.

48 For example, Judges Vučinić and De Gaetano suggested that Ladele’s dismissal had been attributable to ‘a combination of back-stabbing by her colleagues and the blinkered political correctness of the Borough of Islington (which clearly favoured ‘gay rights’ over fundamental human rights) eventually led to her dismissal’. ECtHR, *Eweida and others v UK*, 15 January 2013 (Appl.nos. 48420/10, 59842/10, 51671/10 and 36516/10), at para. 5.

#### 4.2. Ladele – a judgement that properly balances equality and freedom of religion?

A second response to *Ladele* is to view the ECtHR's ruling as an important affirmation of principles of non-discrimination and equality, particularly in relation to the Court's rejection of Ladele's claim that her employer should have accommodated her religious beliefs.<sup>49</sup> The rationale for this approach is the assumption that it is neither principled nor 'morally defensible' to privilege religious belief over other forms of deeply and sincerely held secular/human belief.<sup>50</sup> In other words, as Jocelyn Maclure and Charles Taylor have observed, '[t]here do not seem to be any principled reasons to isolate religion and place it in a class apart from the other conceptions of the world and of the good'.<sup>51</sup> Thus, some have argued that had there been any accommodation of Ladele's religious beliefs, it would have unfairly elevated her 'religious' conscience objections over the comparable 'non-religious' conscience beliefs of her colleagues.<sup>52</sup>

This is a powerful argument, which clearly has much to commend it, but it also possibly risks ignoring – or at least underplaying – another potentially important consideration. That is the 'dilemma' (as some would see it) faced by an applicant such as Ladele who must choose whether to obey her employer or act in accordance with what she construes as being required by the tenets her faith. As Anthony Ellis has pointed out in relation to people who hold beliefs of a similar intensity to those held by Ladele, such views cannot be discarded as easily as it might be 'for a pigeon-fancier to give up his hobby'.<sup>53</sup> The ECtHR alluded briefly to these matters when it noted that Ladele 'sincerely believes that same-sex civil partnerships are *contrary to God's law*'<sup>54</sup> (my emphasis), as well as acknowledging what it called 'the strength of her

49 See for example, PITT 2013.

50 LEITER 2012, at p. 133.

51 MACLURE and TAYLOR 2011, at p. 105.

52 See MCCREA 2014, at p. 286.

53 ELLIS 2006, at p. 240. It is however important to observe that Ellis does not confine his argument to religious beliefs, but suggests that it also applies to 'moral, political and, perhaps, some aesthetic beliefs as well as religious ones': ELLIS 2006, at p. 239. More generally, on the close relationship between religious and cultural rights see KETSCHER 2007.

54 ECtHR, *Eweida and others v UK*, 15 January 2013 (Appl.nos. 48420/10, 59842/10, 51671/10 and 36516/10), at para. 23.

religious belief'.<sup>55</sup> There was no further elaboration on the significance of such transcendental considerations, but these are issues that, at least from the perspective of a religiously conservative believer such as Ladele, are of paramount importance to the case.<sup>56</sup>

The extent to which transcendental considerations should have an impact on questions relating to the possible accommodation of one's beliefs at the workplace tends to elicit at least three different responses. First, there is the view that there should be no legal exemptions on the grounds of either religion or conscience.<sup>57</sup> A second approach is that there should be legal exemptions for claims on the much wider grounds of 'conscience', but not specifically for forms of 'religious' belief.<sup>58</sup> And a third perspective would single out religion for special treatment on the basis that, unlike his/her 'unbelieving' co-workers, the religious believer is uniquely subject to extratemporal pressures,<sup>59</sup> and may, on occasion, even be burdened by fears of 'eternal damnation and the fires of hell'.<sup>60</sup>

There seems little doubt that an applicant such as Lillian Ladele will favour the third perspective. After all, the impact of transcendental considerations on Ladele, a religiously conservative Christian who was concerned about acting 'contrary to God's law', will have been immeasurable. Yet it is ironically this point – that such extratemporal considerations are only really accessible to the believers themselves – which means that it is difficult (if not impossible) to take cognisance of these views in a liberal political system which is based on 'values that the others [in society] can reasonably ... endorse',<sup>61</sup> and is supported by arguments that 'appeal to public reason and public reason

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55 ECtHR, *Eweida and others v UK*, 15 January 2013 (Appl.nos. 48420/10, 59842/10, 51671/10 and 36516/10), at para. 106.

56 For example, on the argument that religion is special because of the unique role it plays in the life and identity of the believer see WITTE 2006, at p. 102.

57 See LEITER 2012, at pp. 92-133.

58 See GUTMANN 2004. Similarly, Sapir and Statman comment: '[W]hether we understand freedom of religion as a branch of freedom of conscience or as a branch of the right to culture, there is no justification for granting it special status within the framework of these rights' in SAPIR and STATMAN 2005, at p. 487.

59 See GARVEY 1996, at p. 54.

60 PAULSEN 1997, at p. 1622.

61 RAWLS 1996, at p. 226.

alone'.<sup>62</sup> Thus, given the nebulous, and highly emotive nature of these extra-temporal factors, it is understandable that the ECtHR touched on them in only the briefest of terms. Similarly, the European Court's unwillingness to afford *religious* belief any special treatment is entirely consistent with the view of those who maintain 'that there is no principled reason [why] matters of conscience should be treated differently from matters of religious belief and practice'.<sup>63</sup> Accordingly, it could be argued that the Court's approach in *Ladele* is based on sound practical and theoretical reasons. Yet, be that as it may, such considerations are unlikely to offer solace to the religious employee who believes that the law is oblivious to the very transcendental factors that underpin (as in *Ladele*) his/her refusal to perform certain work-related duties.

#### 4.3. *Ladele: the religious objections of an existing employee to a new workplace policy*

The most troubling aspect of the European Court's decision in *Ladele* is its failure to take into account the fact that, as an *existing* employee, Lillian Ladele was already in post before her employer changed its policy to require *all* registrars to officiate at marriage *and* civil partnership ceremonies. In other words, at the start of her career as a registrar with Islington Council, Ladele could not have anticipated that, at some point in the future, legislation permitting civil partnerships would be passed requiring her to officiate at such ceremonies. This is a potentially important consideration, for had she known otherwise, Ladele might well have chosen to have embarked on a different career path. In considering the possible relevance of such factors to the ECtHR's ruling in *Ladele*, the following argument is advanced. If there ever is to be a situation where it is permissible to accommodate an employee's religious beliefs that might risk undermining the dignity of his/her co-workers,

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62 DORFMAN 2008, at p. 289.

63 KISLOWICZ, HAIGH and NG 2011. See also NUSSBAUM 2000, at p. 207, noting that '[t]he features that make religion worthy of deference are frequently found in nonreligious belief-systems and practices'; and DWORKIN 2006, at p. 61, suggesting that whilst many religious people 'attach great importance to their freedom to choose their own religious commitments and life', we should 'attach comparable importance' to the equivalent life-style choices of non-religious people.

then, given the rather ‘exceptional’ nature of the facts of *Ladele* (ie., she was already in post) this is probably it. *Ladele* is an atypical case, not just because the overwhelming majority of registrars in the UK evidently have no problem with registering couples at same-sex ceremonies but because, in relation to the facts of her particular case, *Ladele* was already working as a registrar when her employer changed its policy and required all registrars to conduct civil partnership ceremonies. This fact has already been noted by legal commentators, prompting one to describe *Ladele* as the ‘real loser’ in the case.<sup>64</sup> Yet moral sympathy aside, the unusual nature of the case is surely a relevant criterion that should be taken into account in relation to the reasonable accommodation debate. For example, it is a factor that may help to assuage the concerns of those who fear that affording any reasonable accommodation of an employee’s religion/ beliefs might have broad-ranging implications for the employment sector (‘floodgate fears’).<sup>65</sup> What is more, even if the ECtHR had made such an ‘exception’ for registrars in *Ladele*’s position – ie., those in post *before* the enactment of the legislation introducing civil-partnerships – its impact would have been minimal. After all, those to whom such ‘exceptions’ might have been granted would, in the fullness of time (following retirement/death), have come to be replaced by registrars who, by virtue of their knowledge of the job, could not reasonably object to officiating at ceremonies involving same-sex couples.

This argument is unlikely to cut much ice with those who are opposed to reasonable accommodation in principle, or are concerned that ‘individual accommodations [may] leave unchallenged and unaffected underlying discriminatory policies and practices’.<sup>66</sup> Yet, that said, the case for taking account of *Ladele*’s religious beliefs is strengthened by the fact that various arguments have been adduced in support of reasonable accommodation in recent years. These include the claims that reasonable accommodation is potentially a ‘promising concept’,<sup>67</sup> which might facilitate the ‘inclusion of religious minorities’,<sup>68</sup> be of assistance when examining issues of

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64 HILL 2013a and HILL 2013b.

65 See WINTERMUTE 2014, at p. 47.

66 WADDINGTON and HENDRIKS 2002, at p. 427.

67 See for example, BRIBOSIA, RINGELHEIM and RORIVE 2010, at p. 137.

68 See for example, ALIDADI 2012, at p. 714.

proportionality,<sup>69</sup> and help to tackle workplace related problems in contemporary Europe.<sup>70</sup> It is admittedly rare that a court would ever contemplate accommodating an employee's religious beliefs that might undermine the dignity of other employees – but to the extent that such a principle should ever be countenanced, the case of *Ladele* might perhaps fit the bill.

## 5. Conclusion

This chapter has focused on an issue of real concern for a significant number of people in conservative faith communities – the fear that LGBT rights are afforded protection at the expense of religious freedom. The attendant debate has often been acrimonious, with the language of 'human rights' used by the various parties in what is often seen as an intractable conflict. Furthermore, in a veiled criticism of the most reactionary elements in both sides of this debate the UN Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, has recently spoken of a 'worrying trend' whereby freedom of religion or belief is regarded [by some] as 'a mere obstacle en route to a society free from discrimination', whilst also warning that 'freedom of religion or belief cannot legitimately be turned into an ideological weapon against LGBTI rights.'<sup>71</sup>

Bielefeldt's warning is salutary, but there is another consideration to bear in mind which is frequently overlooked, and it concerns the *common ground* between people of faith and LGBT communities. All too often cases such as *Ladele* lead to erroneous assumptions that freedom of religion and LGBT rights are mutually incompatible. Admittedly, the history of faith-LGBT relations has often been difficult, but it is unwise to over-state the differences between people in religious and LGBT communities. After all, the days when religious belief was (publicly at least) associated uniquely with a heterosexual

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69 See GIBSON 2013, who has argued that consideration be given to the Canadian model of reasonable accommodation, on the basis that it offers a more nuanced and instructive approach in relation to proportionality.

70 For example, on recent calls for the recognition 'of legally enshrined reasonable accommodation on the basis of religion and belief in the workplace' see FOLETS and ALIDADI 2013, at p. 11.

71 BIELEFELDT 2013, at p. 65.

lifestyle have passed, and today the case for LGBT equality on 'religious' grounds is powerfully made.<sup>72</sup> In addition, in parts of Europe, people from religious traditions seen traditionally as being hostile to LGBT rights, now (increasingly often) display more positive and inclusive attitudes.<sup>73</sup> And finally, the vast majority of faith and LGBT groups share a commitment to certain values, such as 'dignity',<sup>74</sup> 'compassion',<sup>75</sup> and 'empathy'.<sup>76</sup> Of course, many challenges lie ahead, and cases such as *Ladele* raise difficult issues that law and policy makers in Europe have yet to fully resolve. However, by the same token, it should not be forgotten that 'freedom of religion' and 'human rights laws' are 'bed-fellows' – albeit sometimes awkward ones.

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72 See for example, MICHAELSON 2012.

73 For example, in the 2013 British social attitudes survey, only 14.9% of Roman Catholics, 23.9% of Anglicans, and 24.6% of respondents classified as 'other Christians' said that they had negative attitudes towards gay men. See CLEMENTS 2013.

74 See MCRUDDEN 2013.

75 See NUSSBAUM 1996.

76 See HUNT 2008, at pp. 54-58 and 64-66.

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# Born here<sup>1</sup>

## Revocation and the automatic loss of Dutch nationality in case of terrorist activities

Betty de Hart and Ashley Terlouw

### 1. Introduction

On August 30, 2013, the Dutch State Secretary for Security and Justice, Fred Teeven (representing the conservative-liberal VVD (the People's Party for Freedom and Democracy)), submitted a Bill to amend the Dutch Nationality Act (DNA).<sup>2</sup> The aim of this Bill is to allow the withdrawal and automatic loss of Dutch nationality for people who participate in a terrorist organisation or who undertake activities to prepare a terrorist crime. The loss of Dutch nationality is only possible if it does not result in statelessness: thus, the Bill only affects those who possess dual or multiple nationality.<sup>3</sup> In this contribution, we first take a closer look at the content of the Bill. Secondly, we will put it in a historical perspective. The government has argued that the loss of nationality in cases of foreign military service has always been central in Dutch nationality law. However, our historical overview reflects a more complicated and nuanced picture. Thirdly, we will address some issues related to equal treatment. In the past, the loss of Dutch

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1 The title of this contribution refers to the 'born-here selfies with a Dutch passport' posted by the actor Nasrdin Dchar and the comedian/performer Najib Amhali, as a reaction to the provocative speech that the politician Geert Wilders delivered on the evening of the election in 2014 in which he led a crowd of PVV (Party for Freedom) voters in chanting 'fewer, fewer, fewer' (Moroccans). The selfies were quickly followed by many other born-here selfies by Moroccan Dutch people holding their Dutch passports. On 18 December 2014 the Public Prosecution Service announced that it intends to instigate proceedings against Wilders for inciting racial hatred.

2 The text of the Bill and the Explanatory Memorandum is available at: [www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2013/08/30/wijziging-rijkswet-op-het-nederlandschap.html](http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2013/08/30/wijziging-rijkswet-op-het-nederlandschap.html). It cannot be found at the Official Documents site for legislation and parliamentary documents: [overheid.nl](http://overheid.nl).

3 In this contribution we will use the term dual nationality also for situations of multiple nationality.

nationality due to, for example, foreign military service often resulted in statelessness, as those in question had no other nationality. At the time, there was not, as yet, any international convention obliging states to prevent statelessness.<sup>4</sup> Consequently, the loss or withdrawal of nationality now only applies to those who have dual nationality. As we will argue, the Bill would create some new problems and it raises new questions such as: does the Bill violate the prohibition of discrimination? Those with dual nationality – one of which is Dutch nationality – and those with only Dutch nationality are treated differently. Finally, we will discuss three other legal issues: the loss of Dutch nationality by minors, proof of a second nationality and the residence status of those who have lost their Dutch nationality.

## **2. The 2013 bill on the automatic loss of Dutch nationality for jihadists**

The Bill was an extremely quick response to a parliamentary motion by the conservative-liberal (VVD) MP Klaas Dijkhoff which was a reaction to Dutch jihadists fighting ‘against freedom and democracy’ contrary to Dutch values, as the motion puts it.<sup>5</sup>

Contrary to the 2010 Act (see below, section 3), in the 2013 Bill the loss of Dutch nationality is automatic. According to the explanatory memorandum accompanying the Bill, there has to be an irrevocable conviction for participation in a terrorist organization or aiding in (the preparation of) a terrorist crime (Articles 140a and 134a Criminal Code). The rather short, three-page clarification for the bill very briefly sets out the reasons for the amendment, explaining that there are reasons to reconsider the views on the loss of Dutch nationality in cases of involvement in paramilitary or terrorist organizations, because of ‘changing social opinions’. It is not explained what these social opinions are and how they have changed. In fact, the reference to changing ‘social opinions’ about terrorism is the only justification provided for the proposed amendment. The explanatory memorandum also stresses the need for strict requirements of proof of participation in a terrorist organization, because of the far-reaching consequences of a loss of Dutch

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4 The United Nations Convention on the Prevention of Statelessness was drafted in 1961 (*Tractatenblad* 1957,124) and ratified by the Netherlands in 1984 (*Staatsblad* 19 December 1984, 627).

5 *Second Chamber*, 2012-2013, 29 754, no. 224.

nationality. That is why an irrevocable conviction is required. As far as enforcement is concerned, the government is optimistic that, although it will be difficult to collect the required evidence, the Public Prosecutor, the police and the AIVD (the General Intelligence and Security Service) will do everything within their power to collect the necessary proof.<sup>6</sup>

The Bill allows for an automatic loss of Dutch nationality in the case of terrorist acts not only committed after the entry into force of the Bill, but also when there has been an irrevocable conviction for crimes committed *before* its entry into force (article II). After its publication on the internet on August 30, 2013, nothing more was heard concerning this Bill. On July 11, 2014, the Dutch Government (*Rijksministerraad*) agreed to send the Bill to the Council of State (*Raad van State*) for advice, after which it will be sent to Parliament. MPs have already inquired about the Bill on several occasions after new incidents of Dutch jihadists travelling to Iraq with the intention of fighting for ISIS.<sup>7</sup>

### 3. Historical overview

As stated above, in the explanatory memorandum accompanying the Bill, the government argued that the loss of Dutch nationality in the case of foreign military service has always been part of Dutch nationality law. We submit that this is only partly correct.

#### 3.1. *The loss of Dutch nationality in the case of military service*

The first DNA of 1892 indeed laid down an automatic loss of nationality if someone had served in a foreign army without permission from the Dutch authorities.<sup>8</sup> Even before 1892, an automatic loss occurred in the case of foreign military service. This resulted in a mass loss of Dutch nationality in times of war, but sometimes also in individual cases when men, who wanted

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6 *Second Chamber*, 2012-2013, 29 754, no. 224.

7 *Second Chamber*, 2013-2014, 33 852 (R2023), no. 5, at p. 3.

8 Art. 7 section 4 DNA 1892; military service and public service.

to serve in a foreign army, did not ask permission beforehand.<sup>9</sup> Men with dual nationality had the possibility, due to international conventions, to choose in which of their countries of nationality they wanted to carry out their military service.<sup>10</sup> In this contribution, we will only look at the mass loss of Dutch nationality.

An interesting case in the context of this contribution is that of the approximately 3,000 Dutchmen who fought for the Pope (the Zouaaf soldiers) in 1860, after being recruited by Catholic priests. Upon their return to the Netherlands, they were declared to be stateless persons, as were their children born after 1892.<sup>11</sup> It took until 1947 before the Minister of Justice determined that those who had served before they had reached the age of majority had not lost their Dutch nationality. This applied to most of the men involved, but by 1947 all of the Zouaaf soldiers had already died.<sup>12</sup>

A loss of nationality did not occur when a Dutch national was obliged to serve in a foreign army, as this was not on a voluntary basis. This concerned, for example, Dutchmen in the United States during the First World War. Article 7 section 4 DNA 1892 resulted in the automatic loss of nationality for several hundred men who had fought in the Spanish Civil War (1936-1939) against Franco's nationalist army. The Dutch government tried to prevent recruitment for this war, for example by stamping Dutch passports with 'not valid for Spain'. Around 600 Dutchmen fighting against Franco became stateless. As a result of the gender inequality that was central to Dutch

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9 Occasionally, the Dutch government gave permission in individual cases. During the nineteenth and early twentieth century especially the sons of the nobility served with permission in foreign armies, e.g. the Hon. J.M. Teixiera de Mattos, who served in a Prussian regiment from 1913 to 1918. Regularly, the Dutch government gave permission in individual cases. KRAMERS 1996.

10 Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality, Strasbourg, 6.V.1963, arts 5 and 6. European Convention on Nationality, Article 21.

11 Until 1892, the Netherlands recognised *ius soli*, meaning that children born of foreign parents automatically became Dutch nationals upon their birth on Dutch territory. Hence, before 1892, a loss of nationality by the father did not affect the child. After 1892, *ius sanguinis a patre* was introduced, making the nationality of a child dependent on the father.

12 KRAMERS 1996.



nationality law, the loss of nationality for men also affected their wives and children, who automatically also lost their Dutch nationality.<sup>13</sup>

During the Second World War several thousand men who served in the German army, but also those who fought with the Allied Forces (British, Canadian, American) against the Nazis, should have lost their Dutch nationality according to the DNA 1892. However, in 1944 the Dutch government in exile in London decided that all Dutchmen who had served with the Allies after 9 May 1940 retained their Dutch nationality.<sup>14</sup>

After the Second World War, the question was what to do with those who had not served with the Allies after 9 May 1940, but with the Axis Forces. In 1951, a government Bill aimed to automatically reinstate Dutch nationality, and without individual scrutiny, on those who had served in the German army as well as those who had fought against Franco in the Spanish Civil War. This Bill met with opposition from both the Second Chamber and society at large, as the wounds of the War were still too fresh. An amendment aimed at making individual naturalisation requests compulsory was adopted. This Act of April 1, 1953, reinstated Dutch nationality on 11,000 persons upon individual naturalisation requests, until this was withdrawn in 1977. Only a small number of requests were rejected.<sup>15</sup>

As for the former Spanish combatants (*oud-Spanjestrijders*), mainly communists, some of them had also fought against the Nazis in the Second World War and they consequently regained their Dutch nationality. But most of them were still stateless at the end of the Second World War. Because of the communists' contribution to resistance against the German occupation, the Social Democrats in the government wanted to reinstate their Dutch nationality unconditionally and automatically, but the Catholic Party (KVP) preferred individual naturalisation. As the discussion dragged on and the international political situation changed (the communist takeover in Czechoslovakia in 1948 and the Dutch Communist Party that

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13 This was the case until 1936, when women whose husband became stateless during the marriage no longer lost their Dutch nationality with him. However, if a woman married a man who was already stateless, she also became stateless. DE HART 2006.

14 Decree of 4 October 1944, *Staatsblad* 1944, no. E 127.

15 See further HEIJS 1995, at p. 114.

remained loyal to Moscow), their naturalisation requests stood no chance of success, and they were excluded from the 1953 Act. It took until 1964 before the former Spanish combatants could apply for Dutch nationality. Their political conviction was no longer held against them. Thus, although it took several decades, most of those who had lost their Dutch nationality because of foreign military service, whether with enemy forces or not, regained their original nationality. The government thereby confirmed that they were part of Dutch society and belonged here.

However, the automatic loss of Dutch nationality in case of foreign service remained on the books until it was repealed by the entry into force of the Act of 1984 on January 1, 1985. The government argued that the Dutch authorities often had no information as to foreign military service. This meant that the Dutch Nationality Act resulted in the automatic loss of Dutch nationality sometimes being established years after the relevant facts had occurred.<sup>16</sup> The alternative of replacing an automatic loss of nationality with the withdrawal of nationality in individual cases was considered to place too much of a burden on the administration. The government also pointed at the history of the loss of nationality when serving with enemy forces – the German army during the Second World War – that had been rectified by reinstating Dutch nationality on large groups of people by the 1953 law mentioned earlier.<sup>17</sup>

Soon after 1985, a discussion ensued about the consequences of abolishing this law, when it turned out that about one third of the South African army consisted of European nationals who had fought for the *Apartheid* regime, including Dutch nationals who possessed South African nationality. After pleas to make the loss of Dutch nationality once again possible in the case of foreign military service in certain countries with undesirable regimes, the government eventually decided against this. It argued that the acquisition of South African nationality and subsequent military service was not voluntary, and feared unequal treatment for those who had to serve and those who did

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16 DE GROOT 2008.

17 Rijkswet op het Nederlanderschap, explanatory memorandum, *Second Chamber* 1981, 16947 (R 1181), nos. 3-4, p. 4.

not (depending on their gender or age), as well as unequal treatment for dual nationals.<sup>18</sup>

The discussion emerged again during the war in the former Yugoslavia, when it turned out that several Dutchmen had fought in this war as mercenaries in the Croatian army. This time, however, it led to an amendment to the law, after a motion by certain Members of Parliament (from D66 (the Democrats 66 party) and the VVD) was accepted.<sup>19</sup> It was argued that these combatants did not 'feel' Dutch, rather than that they did not fulfil their obligations as a Dutch citizen or constituted a danger to Dutch society.<sup>20</sup> An explicit choice was made, however, not to include participation in paramilitary or guerrilla groups.<sup>21</sup> According to Article 15 section 1 sub. e DNA 2000, still in force today, an automatic loss of Dutch nationality may only occur if the person voluntarily serving in a foreign army is involved in combat operations against the Netherlands or allies of the Netherlands, and only if it does not result in statelessness.

### 3.2. *Withdrawal of Dutch nationality in the case of terrorism*

Since 2010, an irrevocable conviction for certain terrorist acts is a ground for withdrawing someone's nationality according to the Dutch Nationality Act. An analysis of the arguments and discussions on this Bill may be of assistance in better understanding the arguments and issues at stake in the recently proposed Bill.

The intention to allow for the withdrawal of nationality in cases of terrorism was announced for the first time in the Memorandum *Multiple Nationality and Integration* by Minister Rita Verdonk (VVD) in August 2004, but it gained new momentum after the murder of the Dutch filmmaker Theo van Gogh in November of the same year. A Bill of 21 June 2005 allowed

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18 See further DE HART 2012, at pp. 135-138.

19 *Second Chamber* 1999-2000, 25 891, 17 February 2000, pp. 50-3692. The Dutch newspaper *Algemeen Dagblad*, 19 May 2001, 'Opgejaagd op de Balkan', mentioned 15 Dutchmen who had joined the Croatian army as mercenaries at the beginning of the 1990s.

20 In the words of the progressive liberal D66 party: When such a person is willing to fight against the Netherlands, he does not feel Dutch in the sense that he is not unwilling to fight against the Netherlands. *Second Chamber* 1999-2000, 25 891, 17 February 2000, pp. 50-3692.

21 DE GROOT 2003.

for the withdrawal of Dutch nationality when a person had damaged 'vital interests of the Dutch state' including cases of terrorism. Such a withdrawal would only be possible if the person involved had a second nationality in order to prevent statelessness. According to the government this stipulation was allowed by Article 7 section 1 sub. d of the European Convention on Nationality (ECN) of 1997, and the UN Convention on the Prevention of Statelessness of 1961 (Article 8 par. 3 a ii). The withdrawal of nationality would be allowed both in the case of the enactment and the preparation of these acts.<sup>22</sup>

The Second Chamber resisted the inclusion of criminal acts that could be a reason to withdraw nationality by means of an Order in Council (*algemene maatregel van bestuur*, AMvB) and not by means of a formal act, fearing that the number of criminal acts that could potentially result in a withdrawal could be too easily extended and this would therefore violate the principle of legal certainty.

After a change of government in 2007, this part of the Bill was amended and a limited number of criminal acts was included in the Dutch Nationality Act. The list of criminal acts included not only terrorist acts, but also other criminal acts that violate state interests. In all cases, there had to be an irrevocable conviction and a threat to public order. The criminal acts in question were those mentioned in Title I to IV Second Book of the Dutch Criminal Code, (Articles 92-130a), that include acts against the safety of the state, against the King, against the heads of befriended states, terrorist acts and recruitment for foreign armies; all the acts mentioned are acts of violence. In response to objections by the Second Chamber, the government limited the list of criminal acts to those where a prison could be sentenced to eight years imprisonment or more.

Both the Second Chamber and the Dutch Senate doubted its effectiveness, thereby questioning whether the person who had lost his or her Dutch nationality could actually be expelled, as they considered it unlikely that the country of the other nationality would welcome the terrorist with open

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22 *Second Chamber* 2004-2005, 30 166, no. 3, pp. 7-8.

arms. However, the issue of the residence status in immigration law of those who saw their nationality revoked was not raised.

One of the major issues in the political debates was that of equal treatment. A withdrawal of nationality would be made possible both for naturalized Dutch nationals and for persons born with Dutch nationality. The Social Democrats questioned the withdrawal of nationality from those Dutch nationals born with Dutch nationality. In their view, this concerned persons who are on all accounts effectively Dutch, with hardly any links to the country of their other nationality. The government however argued that the withdrawal of Dutch nationality from both groups of Dutch nationals is an expression of equal treatment. Whether someone possesses another nationality voluntarily – by choice – or not was not considered relevant because: ‘In cases where the government decides to withdraw nationality, the irrevocably convicted person has demonstrated that he has renounced his bond with the Kingdom and has taken the risk of losing his Dutch nationality into account.’<sup>23</sup>

In response to questions about the differential treatment of single and dual nationals, the government argued that the difference was justified by the interests of the prevention of statelessness, as required by the European Convention on Nationality (Art. 7 section 3) and the UN Convention for the Reduction of Statelessness (Article 8 par. 3 a ii). The question is whether this is a sufficient justification for the difference in treatment, as this argument makes clear why persons with only Dutch nationality cannot lose Dutch nationality, but not why persons with dual nationality should. Especially in cases where people cannot give up their second nationality, it is not their behaviour, but the arbitrariness of foreign nationality law that determines whether or not someone loses Dutch nationality. We will return to this issue below.

To our knowledge, the introduction of the possibility to withdraw Dutch nationality allowed in the DNA in 2010 has so far not been used. In the one case where it might have been used – in the case of the murderer of Theo van Gogh – this did not happen, because a withdrawal is not allowed for terrorist acts committed before the coming into force of the Act of 2010,

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23 *Second Chamber* 2008-2009, 31 813, no. 6, p. 26.

and Mohammed Bouyeri (the person responsible for van Gogh's murder) had committed his crime several years before.

There are several lessons to be learned from this historical overview. First, it turned out that the automatic loss of Dutch nationality for large numbers of people was subsequently overturned, because the Dutch authorities had to accept that the people concerned were part of Dutch society, regardless of what they had done. Second, it has become clear that concerns about Dutch nationals fighting in foreign countries were always very specific to the historical context. Opinions about what they had done and how to respond (exclusion from or inclusion in society) changed over time, even in the case of Dutch nationals who fought for the Nazis. This was a second reason why Dutch nationality was restored, although the government decision to restore Dutch nationality was sometimes made years or even decades later.

Third, even if the loss of nationality does not result in statelessness, this does not mean that the consequences of the loss of nationality are not questionable, as the debates on the amendment of 2010 concerning discrimination and equal treatment make clear. It is to the issue of equal treatment that we now turn.

#### **4. Equal treatment**

If the new Bill would be enacted, the following situation could occur. Two friends decide to become jihadists and travel to Syria. Both of them were born in the Netherlands. One of them has a Moroccan grandfather and thus both Dutch and Moroccan nationality, without the possibility to renounce the latter.<sup>24</sup> The other one has single Dutch nationality as his parents and grandparents only have Dutch nationality. According to the Bill the first one would face the loss of his Dutch nationality, while his friend with whom he

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24 A child acquires Moroccan nationality at birth if one of the parents is Moroccan (Art. 6 Moroccan Nationality Law), also if the child is born abroad. There is no limitation to passing on Moroccan nationality to following generations. The same holds true for Dutch nationality, which can be passed on to children born abroad without restriction. The difference is that Moroccan nationality cannot be renounced, while Dutch nationality can.

left would not be affected and would retain his Dutch nationality.<sup>25</sup> This raises the question whether the Bill violates the principle of non-discrimination. To answer this question, we will address four sub-questions:

- Are people with single and with dual or multiple nationalities equal cases?
- What is the ground of discrimination?
- What is the legal basis for the prohibition of this discrimination?
- Is there a justification for the differential treatment of participants in terrorist organisations with single and dual or multiple nationalities?

#### 4.1. *Equal cases?*

Equal treatment is only required in equal cases. Therefore, it is important to answer the question whether people with single and dual nationality have to be regarded as equal cases in the context of the loss of nationality. If two people have Dutch nationality one must, in our view, in principle speak of equal cases, whether they became Dutch nationals through naturalization or by birth, even if one of them has one or more other nationalities next to Dutch nationality.<sup>26</sup> Only if this extra nationality is relevant (that is, if it somehow affects the situation at issue) could it be argued that unequal cases exist. The essence of equal treatment legislation is that differential treatment is only permitted in so far as this is necessary due to a relevant difference. Applied to the Bill that distinguishes between single Dutch nationals and Dutch nationals with multiple nationalities, it seems difficult to argue that the difference is relevant in the case of terrorist acts. The aim of the deprivation of nationality is to prevent people who are a threat to Dutch

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25 Raad voor de Rechtspraak (Council for the Judiciary) delivered its advice on the bill on 30 October 2013: 'This advice points at the possible disproportional and/or unfair consequences of the Bill due to unequal treatment in punishment: an insignificant participation in a terrorist organization, for example fund-raising, may lead to much more severe punishment than a terrorist attack if the first act is committed by someone with dual nationality while the other act is committed by someone with only Dutch nationality', available at: [www.rechtspraak.nl/Organisatie/Raad-Voor-De-Rechtspraak/Wetgevingsadvisering/Pages/Wetgevingsadvies-2013.aspx](http://www.rechtspraak.nl/Organisatie/Raad-Voor-De-Rechtspraak/Wetgevingsadvisering/Pages/Wetgevingsadvies-2013.aspx).

26 This could be derived by analogy from Art. 5(2) and Art. 17 ECN as both articles state that no distinction should be made between nationality by birth or subsequently acquired. Compare VAN DEN BRINK and TERLOUW 2007. These authors conclude that people who have Dutch nationality are equal cases under Art. 1 of the Dutch Constitution regardless of whether they also have other nationalities. Also compare HOLTMAAT 2007.

security from returning to or remaining part of Dutch society. This aim does not require a differentiation between jihadists with single and those with dual nationality. Possibly a relevant difference could be that a 'jihadist' with single Dutch nationality is more likely to return to the Netherlands than a 'jihadist' who has dual nationality and therefore also another country to go to. However, such a claim must be substantiated, which the drafters of the Bill did not do, or even argued.

The British scholar Prabhat, writing on the deprivation of nationality in the case of terrorism in the British context, raised the question whether dual nationals have proven to be a greater threat to national security than single nationality holders.<sup>27</sup> She suggests that as no difference in the threat to national security has so far been established, dual nationals are targeted merely because they *can* be targeted without violating international obligations to prevent statelessness.

The burden of proof that – in this specific context and in these specific cases – the extra nationality is of such relevance that the cases cannot be regarded as equal rests on the party that contends that there is a relevant difference, in this case: the State. The only difference mentioned in the explanatory memorandum accompanying the Bill is that Article 7 of the European Convention on Nationality and Article 8 of the UN Convention for the Reduction of Statelessness prohibit the deprivation of nationality if this results in statelessness. However, the mere fact that the consequences for single and dual nationals will not be the same does not make them unequal cases. Compare, for example, the situation of a dismissal from employment due to an internal reorganisation. Employers are legally prevented from dismissing only those employees who have a partner who can provide for them. The conclusion is that as long as the Dutch Minister of Security and Justice offers no more convincing arguments as to why dual and single nationals are different and why this difference is relevant with regard to the aim of the Bill, one must assume that the cases are equal. And equal cases must be treated equally.

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27 PRABHAT 2014, at pp. 18-19.



#### 4.2. *What is the ground of discrimination?*

The unequal treatment of cases that are considered to be equal can be more or less 'suspicious'. Human rights treaties list identity markers, such as race, sex, religion, and often also nationality, which can only be used as a ground for distinctive treatment if there is an objective and reasonable justification for doing so. Identity markers not included in those lists, although they are not necessarily unprotected, since most lists are not exhaustive and include 'other status' (see also below). It depends on the identity marker how strictly a justification for a distinctive treatment is tested.

In this case no difference is made between nationals and non-nationals, but between Dutch nationals, depending on their single or dual nationalities.

It may be argued that although no difference is made between people with different nationalities (in all cases they have Dutch nationality), *nationality* is nevertheless the ground of discrimination which is at stake. After all, having a second nationality apparently makes the difference. There is another reason to state that nationality is central, namely that in fact a distinction is made between 'us', the original Dutch people, and 'them', who are Dutch on paper although they are not really regarded as Dutch but rather as (second or third generation) (Muslim) immigrants. In the discussion about jihadism, terrorism has become linked to Islam and a (second or third generation) immigration background, although not all those going to Syria to fight in fact have such a background. Rephrased in more legal terms, one could claim that discrimination on the ground of single or dual nationality is in fact indirect discrimination<sup>28</sup> on the ground of race, as it primarily and mostly affects people who have acquired dual nationality due to migration by themselves, their parents or grandparents. It is settled case law by the Netherlands Institute for Human Rights (NIHR and of its predecessor, the Dutch Equal Treatment Committee, ECT) that discrimination on the ground of nationality may constitute indirect discrimination on the ground

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28 Whether direct or indirect discrimination is at stake is important for the justification test required, at least according to the CJEU and the NIHR (we deal with this justification test under the fourth question).

of race.<sup>29</sup> The Court of Justice of the European Union (CJEU) has determined in the case of *Vasiliki Nikoloudi* that if a provision (for part-time workers) exclusively affects a protected group (in that case women, because all part-time workers were women) this constituted direct discrimination.<sup>30</sup> This means that it can be argued that as the Bill exclusively affects Dutch people who also have another, non-Dutch nationality, this constitutes direct discrimination on the ground of race.

It could also be argued that it is not race but national origin which is the discrimination ground at stake. National origin is not the same as nationality; it resembles ethnic origin. Discrimination on the ground of national or ethnic origin occurs, for example, when people who are Dutch but originally had another nationality, or national minorities within a country (such as the Kurds in Turkey), are treated differently because of that different background. The essence of the prohibition of discrimination on the ground of national origin is that somebody's origin (for example, related to his parents or grandparents) cannot be a legitimate reason for differential treatment. It is clear that people with dual nationality are more likely to have a (partly) non-Dutch national origin than people with single Dutch nationality. After all, whether or not people have dual or multiple nationalities often depends on where they are born and who their parents or grandparents are. Besides, it depends on whether the laws of the country of their other nationality make it possible to renounce the other nationality. Statistics show that dual nationality is in most cases acquired automatically at birth.<sup>31</sup> It concerns mainly children of mixed parentage or of parents who have dual nationality. This means that dual nationality is often not a free choice for the persons concerned. The Bill therefore indirectly discriminates against people due to their national or ethnic origin.

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29 Most recently, NIHR, 27 February 2014, 2014-21. See also ECT 2007-152 with annotation by ДАVIDОВИЋ 2008, at p. 353. And see ECT 24 February 2011, 2011-27 for an explanation of the concept of national origin.

30 Case C/196-02, *Vasiliki Nikoloudi v. Organismos Tilepikoinonion Ellados AE*, [2005] ECR I-01789.

31 In 2011, there were 1,195,090 dual citizens in the Netherlands. In the period 1996-2010, about one third of these dual nationalities were acquired at birth. Source: CBS statistics, DE HART 2012, at p. 93.

De Groot refers to this situation as holding their genealogy and the nationality laws of the countries of origin of their parents against them.<sup>32</sup> De Groot suggests in his comment on the 2010 Act, which introduces the withdrawal of Dutch nationality in the case of terrorism, that the deprivation of nationality should not be allowed in the case of dual nationals who were born and bred in the Netherlands. We disagree with De Groot, as this would create another inequality, in particular between different categories of Dutch citizens. This is prohibited by Article 5(2) ECN, which reads: 'Each State Party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently.' Furthermore, one should not lose sight of the fact that even if people have acquired Dutch nationality by naturalisation, Dutch nationality may very well be their effective nationality.<sup>33</sup>

In short, we conclude that it is not so easy to argue that nationality is the ground for discrimination which is at stake, but at least it can be said that the Bill (indirectly) discriminates between Dutch people who do and those who do not have a certain ethnic or migration background.

#### *4.3. The legal basis for the prohibition of (indirect) discrimination based on nationality and national or ethnic origin*

Neither the equal treatment principles contained in Article 14 of the European Convention on Human Rights (ECHR) and Article 1 of Protocol XII to the ECHR, nor Article 26 of the International Covenant on Civil and Political Rights (ICCPR), nor Article 1 of the Dutch Constitution explicitly prohibit discrimination on the ground of nationality. Nevertheless, discrimination on the ground of nationality is understood to fall within the scope of these provisions, as the grounds of discrimination are not limited to those mentioned in the provisions. The provisions mention that discrimination based 'on any other status' is also prohibited.

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32 DE GROOT 2005.

33 Effective nationality is the nationality of the country with which a person with more than one nationality has the strongest social ties.

On the other hand, Article 21 (2) of the Charter of the EU and Article 18 of the Treaty on the Functioning of the EU (TFEU) explicitly prohibit discrimination on the ground of nationality. The latter article states: ‘Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.’

Moreover, Article 17 (1) ECN states: ‘Nationals of a State Party in possession of another nationality shall have, in the territory of that State Party in which they reside, the same rights and duties as other nationals of that State Party’. Apparently the ECN regards nationals of a State Party with dual and single nationality as equal cases.

Article 1(2) of the 1965 Convention on the Elimination of All Forms of Racial Discrimination (CERD) states: ‘This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.’ However, Recommendation 30 of the CERD, paragraph 4, reads: ‘Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.’ Also, Article 5 (1) of the 1997 ECN prohibits any practice which amounts to discrimination on the grounds of (among others) race, national or ethnic origin.<sup>34</sup>

#### *4.4. Is this discrimination justifiable?*

The two European Courts use different standards to judge whether discrimination can be justified. Different from the CJEU, the ECtHR does not clearly distinguish between the requirements for the justification

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<sup>34</sup> See, however, the explanatory report to the ECN on Art. 5, which not only explains that the terms national and ethnic origin are based on Art. 1 CERD but also explicitly states that State Parties in some situations can give more favorable treatment to nationals of other States. Available at: <http://eudo-citizenship.eu/InternationalDB/docs/ECN%20Explanatory%20Report.pdf>.

of direct and indirect discrimination.<sup>35</sup> Discrimination, according to the ECHR, can in principle be justified both in the case of direct and indirect discrimination and the burden on the discriminating State depends on the ground at stake. In case of discrimination on the ground of nationality it requires very weighty reasons.<sup>36</sup>

The EU gender equality and non-discrimination legislation makes a difference between direct and indirect discrimination. Direct discrimination can only be justified in specific cases mentioned in the EU legislation, which depend on the ground at stake. Indirect discrimination can be objectively justified if the aim of a measure is legitimate and the means of attaining that aim are effective and necessary.<sup>37</sup>

The Bill concerns EU citizens, namely Dutch nationals.<sup>38</sup> Therefore we take the CJEU test as a starting point. This justification test requires at least a legitimate aim, effectiveness – that is a clear connection between the threat and the objective – and a fair balance between the interests which are served with the discriminatory measure and the interest of the persons who are discriminated against. Let us take a look at these requirements one by one.

First, the aim of the Bill. As already explained, the official aim of the Bill is to protect the interests of Dutch society against criminal acts by terrorists (jihadists), which might very well be directed at Dutch society.<sup>39</sup> At the time

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35 The ECHR does use the concept of indirect discrimination but until now it is not very clear what this means for the justifications it requires; it seems that the ECHR mainly uses the concept of indirect discrimination to clarify that even if discrimination is not intended but is the result of a neutral measure, discrimination can be at issue. See TERLOUW 2013, at p. 159.

36 ECtHR, *Gaygusuz v. Austria*, 16 September 1996 (Appl.no. 17371/90): ‘*The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. However, very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention*’. See also ECtHR, *Genovese v. Malta*, 11 October 2011 (Appl. no. 53124/09), and recently: ECtHR, *Dhabbi v. Italy*, 8 April 2014 (Appl.no. 17120/09). See also MANTU 2014, at pp. 90-92.

37 For an elaborate description of the concepts of direct and indirect discrimination in EU law, see ELLIS and WATSON 2012, at pp. 148-156 and pp. 171-174.

38 This test of EU law only applies if EU citizens are concerned, not if a distinction is made between EU citizens and third country nationals.

39 *Second Chamber*, 2012-2013, 29 754, no. 224.

of writing, some 130 Dutch jihadists have left for Syria.<sup>40</sup> For some of them, Dutch nationality cannot be revoked as they would then become stateless as a result, while others can be expected never to return to the Netherlands, either because they have been killed in action or for other reasons.<sup>41</sup> Nevertheless, some of them do return; according to the AIVD, up to now some 30 Dutch 'jihadists' have returned.<sup>42</sup>

However, the exact dangers of returning jihadists for Dutch society are not specified in the explanatory memorandum accompanying the Bill. For example, it is unclear whether and why radical jihadists would be less dangerous if they are deprived of their Dutch nationality. The assumption may be that they are less likely to return to the Netherlands. However, entering the Netherlands with another passport is not very difficult if their second nationality is the nationality of an EU Member State or if they travel from a visa-free country. Besides, it can be questioned whether it is legitimate and in accordance with the mutual trust between states to limit the danger for the Netherlands by burdening other countries with Dutch extremists who have been born and bred in the Netherlands under the responsibility of the Dutch government and who happen to have another nationality but often no factual ties with the country of this other nationality.

With regard to the requirement that the means must be suitable to attain the desired aim, the question arises how effective the Bill is if it can only be applied to part of the target group. Is it known how many of the jihadists have dual nationality and will the deprivation of their nationality really diminish the threat for Dutch society? Or is it, as Jensma has argued, a case of 'panic and nonsense rulemaking, which gives a false feeling of safety'?<sup>43</sup> In relation to effectiveness, depriving only dual nationals of their Dutch nationality raises several other questions. We have already touched upon them above: are dual nationals more dangerous than single nationals and

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40 Some 130 jihadists have left the Netherlands, of whom some thirty have returned. NATIONAAL COÖRDINATOR TERRORISME BESTRIJDING EN VEILIGHEID 2014.

41 At the time of writing, fourteen Dutch jihadists had died; NATIONAAL COÖRDINATOR TERRORISME BESTRIJDING EN VEILIGHEID 2014.

42 NATIONAAL COÖRDINATOR TERRORISME BESTRIJDING EN VEILIGHEID 2014.

43 JENSMa 2014.

what exactly are the threats that we are talking about? Is the Bill aimed at the threat of terrorist attacks in the Netherlands or the threat of indoctrinating other youngsters with a fascination for extremism? In both cases one does not need to have Dutch or dual nationality to commit terrorist attacks, or to have a deleterious influence on others. And, as Prabhat convincingly argues: ‘Differential deprivation adds to this perception of unequal treatment, lack of belonging and potentially leads to more extremism.’<sup>44</sup> In judging effectiveness, such possible side-effects should be taken into account.

Finally, the fair balance of interests. This part of the justification test consists of the proportionality requirement, that is whether the means are suitable to attain the aim. Although the Bill lacks a clearly stated aim, we assume that it is to prevent (further) terrorist acts. When weighing the proportionality of a measure, it should be taken into account whether there are alternatives to reach the same aim without discrimination. Such possible alternative measures may include preventive measures or having the persons involved serve their sentence in the Netherlands where they can follow social rehabilitation courses under Dutch responsibility. In this context, it is interesting to point at the practice in Aarhus, Denmark, where returning jihadists are offered medical and psychological aid, as well as support in finding a job or embarking on a study. The aim is to reintegrate them and prevent further terrorist acts.<sup>45</sup>

The proportionality requirement is the most difficult part of the objective justification test as it requires a balancing of unequal interests and because it is difficult to establish which interests have to be proportional with what other interests. The proportionality requirement is, on the one hand, about the interests which are served with the discriminatory measure and, on the other, about the interest of the victims of the discriminatory measure. The aim of the measure is, as said before, national safety: protecting Dutch society, in this case against terrorist attacks and/or the negative influence of radicalisation. It is therefore important to establish in each individual case how dangerous someone is for Dutch society. Although it may be assumed

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44 PRABHAT 2014, at pp. 4-5.

45 VAN LANGENDONCK 2014.

that an individual assessment will already have been carried out during the criminal procedure, another kind of balancing of the individual interests will be necessary in case Dutch nationality is withdrawn.<sup>46</sup> The consequences for the person in question may be very harsh. The argument is that these consequences will be less harsh for persons who have dual or multiple nationalities because they have their other nationality or nationalities to rely on. If having dual nationality makes one more prone to losing Dutch nationality, then multiple nationality becomes less of an advantage and more of a liability. If the person in question has been born and bred in the Netherlands, the loss of his/her Dutch nationality will often result in the loss of the only effective nationality or even *de facto* statelessness.<sup>47</sup>

## 5. Other legal issues

The Bill is not only bound to violate the principle of non-discrimination, but entails other legal issues. We discuss two issues of nationality law: the loss of nationality by minors and proof of the second nationality, and then we will turn to the residence status of persons whose nationality has been lost or withdrawn.

An automatic loss of nationality on the grounds discussed, introduced by the amendment to Article 15 DNA, that only applies to persons older than 18, is therefore only possible for persons who have reached the age of majority. Media reports suggest that a significant number of those persons going to Iraq or Syria are minors. For those minors, the automatic loss of nationality will not apply according to Art. 15 DNA.<sup>48</sup> Dutch nationality can only be lost by a minor in the case of a limited number of grounds under Art. 16 DNA 2000, and Art. 14 section 4 DNA.

Another question is how it has to be determined that a person has another nationality. This is less obvious than it seems. Until January 2014, the

46 Compare the Rottman case in which the CJEU requires a proportionality test in case of the loss of Union citizenship. Case C-135/08, *Janco Rottmann v. Freistaat Bayern*, [2010] ECR I-01449, and about this case MANTU 2014, at p. 126 ff.

47 Compare the *Nottebohm Case (Liechtenstein v. Guatemala)*, second phase, Judgment, 6 April 1955, p. 4 in which it was determined that a national must prove a meaningful connection with the State of his nationality to be entitled to protection by this State.

48 GROEN 2014.



possession of a second nationality was registered in the Dutch civil registry. This basically occurred in two ways: on the basis of a document provided by foreign authorities stating the foreign nationality or, when such a document is lacking, based on the civil registrar's interpretation of foreign nationality law (Art. 43 sections 1 and 2 *Wet Gemeentelijke Basisadministratie Persoonsgegevens* (Municipal Database (Personal Files) Act). However, the registering of a second nationality is not the same as determining or granting a nationality, as this is the exclusive competence of a foreign state.<sup>49</sup> This registration without foreign documents often occurred in cases where a person possesses a foreign nationality by birth alongside Dutch nationality. For several reasons, the nationality registered in the Dutch civil registry does not always reflect reality. First of all, the Dutch authorities have had to interpret foreign nationality law and this is not always easy and has not always been done correctly. Secondly, the foreign nationality law in the books can sometimes differ from its implementation in practice. Hence, the registered nationality is sometimes more a reflection of a presumption than legal reality.<sup>50</sup>

After protests by individual parents opposing the registration of the dual nationality of their children, and after years of political discussion, the Dutch government decided to abolish the registration of a second nationality completely. Data on second nationality that were registered in the old Municipal Database have not been transferred to the new Municipal Population Register introduced in 2014.<sup>51</sup> This means that the Dutch authorities cannot rely on a registration in the civil registry and have to establish for themselves whether a person has a second nationality or not. Hence, the burden of proof concerning a second nationality should rest with the Dutch authorities and the person involved should be able to present counter-evidence.

A final question concerns the residence status of a person who has lost his/her Dutch nationality. The implicit assumption concerning the Bill is that persons who have had their nationality revoked or automatically lost can

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49 KULK forthcoming.

50 KULK and DE HART 2011.

51 KULK forthcoming.

subsequently be expelled to the country of their other nationality. But is this really the case? What is the residence status of the persons involved?

Most of the people targeted by the Bill were born in the Netherlands or came to the Netherlands at a very young age. In the past, immigrants who had been living in the Netherlands for a considerable period of time were entitled to a permanent residence permit, that could not easily be withdrawn, and after twenty years of legal residence expulsion was no longer allowed. However, this protection has recently been lessened.<sup>52</sup>

Nevertheless, after Dutch nationality has been revoked or lost, the persons concerned may still have, under certain circumstances, an entitlement to a permanent residence permit. In the case of youngsters born in the Netherlands or who came to the Netherlands before the age of four years, a permanent residence permit can only be refused in case of a conviction and a subsequent custodial sentence of more than 60 months for a drug offence or if the person in question is a threat to national security (Art. 21 section 4 Aliens Act). When there has been residence for ten years or more – residence as a Dutch national counts as residence – the withdrawal or refusal of a permanent residence permit is only possible when a crime has been committed for which a custodial sentence of six years or more can be imposed (Art. 3.86 section 10 *Vreemdelingenbesluit* (Vb); Immigration Decree). For a conviction under Articles 140a and 134 Criminal Code a custodial sentence of eight years or more may be imposed. The IND (Immigration and Naturalisation Service) may also grant a residence permit on humanitarian non-temporary grounds to former Dutch persons who were born and bred in the Netherlands (Art. 3.51 section 1 sub. d Vb) and to former Dutch persons who were born abroad, but have special ties to the Netherlands (Art. 3.51 section 1 sub. e Vb). It is however likely that the Dutch government will argue that residence should be denied because of national security interests. The Aliens Act may allow for the withdrawal of residence in the case of terrorist acts, but such decisions have to be proportional and in compliance with Art. 8 ECHR (the right to family life).

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52 STRONKS 2013.

## 6. Conclusion

History shows that over the years the Dutch government has enacted laws to deprive people who had been fighting in other countries of their Dutch nationality, but that it was eventually concluded time and time again – although sometimes after a considerable period of time – that nationality had to be restored to large numbers of people. Although the case at hand is different in that statelessness is prevented, we have argued that this does not in itself solve the problem of the loss of nationality, but rather creates the problem of depriving dual nationals of the only effective nationality that they have. It may therefore be expected that deprivation due to this new Bill will eventually lead to the restoration of citizenship for people who belong in the Netherlands, even if they have done things that ‘we’ do not like.

According to some academics, ‘the war on terror’ has resulted in a process of ‘unmaking citizenship’, meaning that the significance of nationality is eroded for dual nationals, who have come to be seen as enemy nationals.<sup>53</sup> Others have argued that dual nationality allows states to use their ‘flexible sovereignty’ against dual nationals.<sup>54</sup> Whatever one wants to call it, it is clear that dual nationality is sometimes not or is no longer an advantage for individuals, but rather a liability.

Besides, the Bill arguably violates the prohibition of discrimination on grounds of nationality (at least indirectly) and on grounds of national or ethnic background as people with dual nationality will more often than people with single Dutch nationality have a non-Dutch ethnic background. The government has not yet given a convincing objective justification for the differential treatment and it can be doubted whether this is at all possible. In most cases, it will not be possible to use the Bill against returning jihadists either because they have single Dutch nationality or because they are minors or have committed the crimes as minors. We have also argued that even if their nationality could be withdrawn, it is not certain that residence can also be refused and expulsion can take place.

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53 NYERS 2006.

54 STASIULIS and ROSS 2006.

We conclude that the Bill is bound to be more symbolic than a serious prevention of radicalisation and terrorism.<sup>55</sup> Moreover, it may have the negative side-effect of enlarging the difference between ‘us’ and ‘them’ and not recognising that at least all ‘Dutch nationals who were ‘born here’, regardless of having single or dual nationality, should be seen and treated as ‘us’. The jihadists concerned are ‘our own terrorists’, like it or not, and the Netherlands should not burden other countries with radicalised Dutch people. From a human rights perspective, the Bill will result in nothing but trouble.

### **Postscript**

On September 4, 2014, the Minister of Security and Justice submitted a revised Bill to Parliament, which no longer contains an automatic loss of Dutch nationality. It also only allows for the withdrawal of Dutch nationality for crimes committed *after* the entry into force of that Act, and not for crimes committed before that date, as the first draft had done.<sup>56</sup> It extends the grounds for the withdrawal of Dutch nationality due to irrevocable convictions for terrorist acts as stipulated in Article 14 DNA – as we have seen, this was already possible since 2010 – due to Article 134a Criminal Code. The reason for revising the Bill was the critical advice delivered by the *Raad voor de Rechtspraak* (Council for the Judiciary) and the *Adviescommissie voor Vreemdelingenzaken* (Advisory Committee on Migration Affairs). In light of the arguments presented in our contribution, we are of course very pleased that the automatic loss of nationality no longer forms part of the Bill. However, what remains is a Bill for the withdrawal of nationality which treats dual nationals and single nationals differently.<sup>57</sup> Together with D’Oliviera, we are of the opinion that nationality law is not a suitable instrument to combat terrorism, and the government should limit itself to measures in the sphere of criminal law.<sup>58</sup>

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55 Compare MANTU 2014, at p. 270.

56 *Second Chamber*, 2014-2015, 34 016, nrs. 1-3.

57 Contrary to the earlier Bill, it allows the withdrawal of nationality only for crimes committed after its coming into force.

58 D’OLIVIERA 2014.

In the first debate in the *Parlementaire commissie voor veiligheid en justitie* (Parliamentary Commission for Security and Justice), political parties voiced their concerns over the effectiveness of the Bill. We find it rather worrying that none of the more principled issues that we discussed in this contribution were addressed.<sup>59</sup>

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59 *Second Chamber*, 2014-2015, 34 016, no. 4.

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# Dutch criminal law, conscience and equality

Marloes van Noorloos

## 1. Introduction

In Dutch criminal law, defendants occasionally contend that they have broken the law because their belief or conscience required them to do so. For instance, in 2013 an orthodox Jewish man, who was convicted of failing to comply with the duty to show an identity document on a Saturday, argued that it was contrary to his religious convictions to carry an identity card with him on Shabbat.<sup>1</sup> Offenders breaking the criminal law because they hold that this law conflicts with their conscience may also be motivated by political convictions, their breaking of the law being a means of focusing the public's attention on perceived wrongs in society – they aim to change the law and policy by breaking it.<sup>2</sup> This contribution deals with the broader group of 'conscience offenders', be they politically motivated or not.

The use of *criminal* law against those whose conscience tells them to do or not to do something is particularly problematic: criminal law sends out a strong signal that the behaviour at issue is wrong, is against the rules and should be punished – whereas the person concerned is convinced that he or she is acting justly and is acting upon his or her conscience.<sup>3</sup> The state's legitimate duty to protect law and order – to uphold the law which has come about in a democratic manner – can strongly conflict with the state's duty to respect the individual liberty, the moral conscience, of its citizens.<sup>4</sup> Moreover, the 'conscience offender' presents a dilemma between the equal application of the law to all persons versus taking into account the individual circumstances of a case – a dilemma that is present throughout criminal law as a whole (e.g. in sentencing), but that is particularly pressing in these types

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1 Hof 's-Gravenhage 26 February 2013, ECLI:NL:GHDHA:2013:BZ2283.

2 REMMELINK 1970.

3 VERMEULEN 1989, at p. 272.

4 SCHUYT 2008, at p. 15.

of cases because they are about individuals consciously breaking the law that is equally applicable to all.

This contribution delves into Dutch criminal case law on drug offences in which defendants have relied upon Article 9 European Convention on Human Rights (ECHR), in order to shed light on the different ways in which the courts have attempted to solve the dilemma of the equal application of the criminal law *versus* acting upon the demands of one's conscience. It first provides a short outline of some legal theoretical conceptions about equality, democracy and 'conceptions of the good' as relevant to conscience offenders; then it sets out the general options for dealing with conscience offenders under Dutch criminal law; and, finally, it provides an analysis of the Dutch criminal case law on drug offences in relation to Article 9 ECHR.

## 2. *Equality, conceptions of the good and the functioning of democracy*

The law should, as far as possible, be neutral between different conceptions of the good – also because of the key importance of *equality*: '[s]ince the citizens of a society differ in their conceptions, the government does not treat them as equals if it prefers one conception to another, either because the officials believe that one is intrinsically superior, or because one is held by the more numerous or more powerful group.'<sup>5</sup> The challenge for liberal states is thus to retain a common idea of justice, but to accept that people have different conceptions of the good life. According to Dworkin, in a constitutional conception majority decision-making must be subject to certain democratic conditions.<sup>6</sup> In order to treat people as 'moral members of the community', who are bound by the decisions of that community, citizens shall have freedom to participate in public opinion formation; there shall be equal concern for every member's interests in the decision-making process; and individuals have to be enabled to make their own moral judgments so that they can regard themselves as part of the community, even though they may not endorse the collective decisions that the community takes.<sup>7</sup> Related to this is the idea that decisions taken by a democratic majority are not

5 DWORKIN 1978, at p. 127.

6 DWORKIN 1996, at pp. 15-17.

7 DWORKIN 1996, at pp. 25-26.

absolute truths, but rather ‘provisional truths’. After all, a minority could one day succeed in becoming the majority or part of the majority.<sup>8</sup>

In a society that denies its citizens political rights, such as the right to protest, offenders breaking the law in order to challenge this may thus have a point. The same is true when such rights are guaranteed in principle, but when less powerful (minority) groups do not effectively have sufficient options to participate in the decision-making process. One could say that the more conscientious offenders appear in court, the less a democracy functions.<sup>9</sup> But even in a society where such democratic freedoms are guaranteed in principle, it is still possible that some individuals or groups are very much opposed to certain prohibitions. Not every conception of the good will be equally protected by the law – think, for instance, of conceptions that require harming others or harming society.

In an ideal world, every offence that is included in criminal legislation proscribes behaviour that is considered to be unlawful – not merely formally (in the sense that it is included in legislation), but substantively. If not, the offence should simply not be part of the criminal law. The legislature should also be careful not to criminalise behaviour that, in many particular instances, would actually be considered lawful. In such cases, it may for instance be an option to create specific exceptions.<sup>10</sup> Criminal policy should, more generally, be grounded on legitimate reasons for criminalisation (also in light of the principle that criminal law is a last resort).<sup>11</sup> In such an ideal situation equality, too, is best safeguarded, as judges do not have to deal with exceptions in individual cases. However, one may ask whether this is at all possible: often, criminal offences have to be couched in rather general terms and when defining a criminal offence, exceptions (in the sense of behaviour that is substantively lawful but still matches the offence’s definition) are difficult to predict. Therefore, a criminal law system is more just if the possibility exists that in individual cases exceptional defences can be raised – including defences that appeal to an individual’s conscience.

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8 BURKENS, KUMMELING, VERMEULEN and WIDDERSHOVEN 2006, at p. 27.

9 REMMELINK 1970, at p. 198.

10 See in this regard VAN KEMPEN 2011.

11 FEINBERG 1987.

### 3. Dutch criminal law and conscience offenders

Legally speaking, offenders motivated by conscience have several options at their disposal in Dutch criminal law. They may challenge the interpretation of certain definitional elements of a criminal offence; they may also argue that the whole offence should be left aside because it conflicts with the right to freedom of thought, conscience or religion (Article 9 ECHR) which takes precedence over Dutch law. An appeal to conscience can also play a role in sentencing. Moreover, defendants regularly use defences that enable them to appeal to their conscience (justifications which focus on the act itself, affecting its unlawfulness; or excuses which focus on the actor, affecting blameworthiness). The courts are then obliged to respond. A relevant defence in this regard is necessity (Article 40 Criminal Code: '*overmacht*'); there are also relevant uncodified defences – in particular the 'lack of substantive unlawfulness' ('*ontbreken van materiële wederrechtelijkheid*').<sup>12</sup> The latter is a justification that has hardly ever been accepted in the history of Dutch criminal law, but that has nonetheless received a great deal of attention in legal doctrine (and that defendants keep trying to contend) because of its inherent appeal.<sup>13</sup> It is based on the presumption that acting in contravention of criminal legislation – 'formal unlawfulness' – is not in all circumstances *substantively* unlawful. In certain exceptional circumstances a defendant may be exculpated because he or she has acted according to just societal standards.<sup>14</sup> However, acting upon one's own ideas about what is just – rather than upon generally accepted ideas in society – is not justified on this ground.<sup>15</sup> In a way, this justification is linked to the defence of necessity ('*overmacht in de zin van noodtoestand*'), where a defendant has to make the right (justified) choice between different duties. An appeal to necessity, however, also requires that there was a situation of actual and concrete

12 'Veearsts-arrest' [the 'Veterinarian' case], HR 29 February 1933, *NJ* 1933, 918 incl. case note Taverne.

13 It was accepted in Hof Arnhem 6 April 2009, ECLI:NL:GHARN:2009:BI1487, *NJ* 2010, 444 incl. case note Reijntjes, although that case did not involve freedom of conscience as such.

14 MACHIELSE 2008.

15 Veearsts-arrest' [the 'Veterinarian' case], HR 29 February 1933, *NJ* 1933, 918 incl. case note Taverne.

distress, which makes this defence different from the ‘lack of substantive unlawfulness’ defence.<sup>16</sup>

In cases of conscientious objections, these defences are hardly ever accepted: after all, the Dutch legislature has drafted specific administrative law regimes for conscientious objections as regards military service (suspended in the Netherlands since 1997) and compulsory education.<sup>17</sup> If such a regime is in place, defences can only come into play if a defendant has not complied with the conditions set in that regime – but it will be extremely difficult to have such a defence accepted as the legislature has already balanced the interests involved. A similar regime applies when criminal offences are combined with an administrative licensing or exemption system, such as for medicinal drugs. Acting in contravention of such a system is, in principle, unlawful – although a defence may be accepted in very exceptional circumstances.<sup>18</sup>

Yet appeals to such defences – particularly the ‘lack of substantive unlawfulness’ – give rise to difficult dilemmas: (in which situations) can individuals be allowed to put their own conscience above the state’s interest in enforcing the law?<sup>19</sup> Defendants may try to argue, through such a defence, for a change in the law on the basis of their political convictions (e.g. actions against nuclear weapons); however, the courts are logically inclined to leave such issues to the legislature rather than solving them by themselves – they often argue that it is for the legislature to strike a balance between different societal interests, rather than for each person individually.<sup>20</sup> This could be different if the legislature has left a lacuna in the law, which – if the legislature had known about this exception – would have been solved in favour of the defendant.<sup>21</sup> It is moreover required for any defence that the defendant has acted in line with the principles of subsidiarity and proportionality; often,

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16 DE HULLU 2012.

17 See VAN NOORLOOS 2014.

18 HR 16 September 2008, ECLI:NL:HR:2008:BC7938, *NJ* 2010, 5 incl. case note Buruma; see also HR 18 May 2010, ECLI:NL:HR:2010:BK2885.

19 See SCHUYT 1972.

20 HR 26 March 1957, *NJ* 1957, 473. In the field of euthanasia, the Dutch courts have actually – through defences – taken the lead in this regard. See also HR 11 January 1977, ECLI:NL:HR:1977:AC1783; DE HULLU 2012, at p. 344.

21 REMMELINK 1970, at p. 185.

legal means (such as lawful demonstrations) would still have been possible to achieve the goal pursued.<sup>22</sup>

#### **4. Dutch criminal law on drug offences and Article 9 ECHR<sup>23</sup>**

As indicated, defendants may also argue that a criminal offence should not be applied at all, because it conflicts with the right to manifest one's religion or belief as laid down in Article 9 ECHR. This played a role in a set of cases regarding drug offences in the Netherlands: there have been several judgments about the use of 'ayahuasca' tea in ceremonies by the Brazilian Santo Daime Church. This hallucinogenic tea contains DMT, a component that is prohibited under Dutch criminal law. In 2001, the Amsterdam District Court held that a member of the Santo Daime Church, who had ayahuasca tea in stock in her home, had not thereby committed a criminal offence.<sup>24</sup> Relying on expert reports, the court found that the use of ayahuasca tea in religious services was one of the central sacraments within the Santo Daime religion and was an essential component of the religious experience of its adherents. This manifestation of religion thus fell within the realm of Article 9 ECHR. Because the church provided its adherents with much information about the risks of the tea, and because of the fact that the risks are rather small and the use within the ceremonies is strictly regulated, the court argued that the strict application of the offence in this case would be violating the freedom of religion. After all, there are sufficient safeguards for public health, which is the central concern of the law in this regard. In a case about the import of ayahuasca tea, the Court of Appeal came to a similar conclusion: considering the restrained usage of the drug by the religious community, the information provided to users and the minor health risks, a criminal conviction would constitute a disproportional restriction of Article 9 ECHR.<sup>25</sup>

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22 MACHIELSE 2008.

23 This description is partly based on VAN NOORLOOS 2014.

24 Rb Amsterdam 21 May 2001, ECLI:NL:RBAMS:2001:AB1739, AB 2001, 342 incl. case note Vermeulen.

25 Hof Amsterdam 24 February 2012, ECLI:NL:GHAMS:2012:BV6888.

The Supreme Court, in a case concerning a request for returning confiscated ayahuasca components, was more critical, however.<sup>26</sup> The Supreme Court emphasised the goals and system of the Dutch drug legislation, the international treaty obligations underlying this and the aim of protecting public health; accordingly, considering these obligations, the argument raised by the applicant that her use of the tea hardly created public health problems did not convince the court. This may have to do with the risk, as the Attorney General stated, that these components may fall into less benign hands and may then be used without the strict guidance of the church. Moreover, the legislature has chosen not to establish any exemption system with regard to these kinds of drugs.<sup>27</sup> The outcome of this case may, however, have been influenced by the fact that the defendant contended (unlike the Santo Daime church) that using ayahuasca was not necessary for manifesting her religion.

As appears from these cases, relying on Article 9(2) ECHR does lead to the question of whether and how the courts should assess whether the conviction of a defendant is actually covered by the right to manifest one's religion or belief as laid down in Article 9(1). In the context of criminal law defences such as necessity (not necessarily involving Article 9), a broad range of political, artistic, religious or other convictions may be relied upon. In the context of specific regulations about conscientious objections, the administrative authorities will check whether the objections are deeply and consistently held. A belief, according to the European Court of Human Rights, refers to 'views that attain a certain level of cogency, seriousness, cohesion and importance'<sup>28</sup> – yet the Court is not very strict on this point and often accepts applicants' assessment in this regard.<sup>29</sup> What counts as a manifestation of religion or belief is somewhat more difficult: 'the manifestation has to have

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26 HR 9 January 2007, ECLI:NL:HR:2007:AZ2497 AB 2007, 181 incl. case note Groen and Vermeulen.

27 HR 9 January 2007, Conclusion AG Bleichrodt, ECLI:NL:PHR:2007:AZ2497, at no. 3.10 and 3.15. See also HR 18 May 2010, ECLI:NL:HR:2010:BK2885.

28 ECtHR, *Campbell and Cosans v. United Kingdom*, 25 February 1982 (Appl.no. 7743/76), at para. 36; ECtHR, *Valsamis v. Greece*, 18 December 1996 (Appl. no. 21787/93), at para. 25.

29 See VAN OOIJEN 2012, at p. 121.

some real connection with the belief<sup>30</sup> and ‘Article 9(1) does not cover each act which is motivated or influenced by a religion or belief’,<sup>31</sup> though it is not necessary to prove that one has acted ‘in fulfilment of a duty mandated by the religion in question’.<sup>32</sup>

As regards conscientious objections, the European Commission on Human Rights held that the Convention does not guarantee, as such, a right to conscientious objection.<sup>33</sup> However, in *Bayatyan v. Armenia* the Court did change its position as regards conscientious objections to military service.<sup>34</sup> It held that

‘Article 9 does not explicitly refer to a right to conscientious objection. However, it considers that opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person’s conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9 (...).’<sup>35</sup>

Under the Article 9(2) test the Court further held that

‘[a]lthough individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position (...) Thus, respect on the part of the State towards the beliefs of a minority religious group like the applicant’s by providing them with the opportunity to serve society as dictated by their conscience might, far from creating unjust inequalities or discrimination as claimed

30 ECommHR, *Arrowsmith v. UK*, 16 May 1977 (Appl.no. 7050/75).

31 ECtHR, *Pretty v. UK*, 29 April 2002 (Appl.no. 2346/02), at para. 82. See also ECtHR, *Pichon and Sajous v. France*, 2 October 2001 (Appl.no. 49853/99).

32 ECtHR, *Eweida and others v. UK*, 15 January 2013 (Appl.nos. 48420/10, 59842/10, 51671/10, 36516/10), at para. 82.

33 ECommHR, *N v. Sweden*, 11 October 1984 (Appl.no. 10410/83).

34 ECtHR, *Bayatyan v. Armenia* (Grand Chamber), 7 July 2011 (Appl.no. 23459/03).

35 ECtHR, *Bayatyan v. Armenia* (Grand Chamber), 7 July 2011 (Appl.no. 23459/03), at para. 110. See also ECtHR, *Erçep v. Turkey*, 22 November 2011 (Appl.no. 43965/04).



by the Government, rather ensures cohesive and stable pluralism and promotes religious harmony and tolerance in society' (par. 126).

In *Savda v. Turkey*, the Court furthermore ruled that there was a positive obligation on the authorities to provide for an effective and accessible procedure to establish an entitlement to conscientious objector status as regards military service.<sup>36</sup> But considering the Court's emphasis on the fact that conscientious objections to military service are so broadly accepted in the Council of Europe's member states, it is difficult to draw general conclusions from these rulings as regards 'conscience defences' in general— with regard to the regulation of drugs, for instance, states' margin of appreciation is generally large.<sup>37</sup> Hence it is not likely that the Supreme Court's conclusion in the ayahuasca case would lead the ECtHR to judge that Article 9 has been violated.

## 5. Conclusion

The ayahuasca case law illustrates how the Dutch courts have tried to solve the dilemmas of individual conscience versus the application of criminal offences that apply equally to every citizen. The courts' differing conclusions in these cases are caused by their different balancing of interests – in these cases, under Article 9(2) ECHR. Can the legislature be expected to anticipate such dilemmas? Naturally, it cannot allow persons to behave according to the demands of their own conscience if this involves harming others or harming society. However, in specific circumstances, the harm done may be minimal and may thus be outweighed by other considerations. In the legislative process (national as well as international) it is particularly important that the voices of minority groups, who may present exceptions to the general rule that are not widely known, are taken into account. Besides legislative options such as exemption systems, there may be a role for prosecution policy. Otherwise, it will come down to the courts to balance the interests involved – either under a general defence or through resorting to Article 9 ECHR. (A right which, in turn, confronts the authorities with the ever-difficult question of what

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36 ECtHR, *Savda v. Turkey*, 12 June 2012 (Appl.no. 42730/05).

37 See ECtHR, *Kanzi v. the Netherlands*, 5 July 2007 (Appl.no. 28831/04).

counts as a manifestation of religion or belief: not every conception of the good necessarily covered by this provision. Again, a fundamental dilemma concerning equality.) Especially when international legal obligations to *prohibit* behaviour are at stake – as the Supreme Court makes clear in the Santo Daime case – the courts’ room for manoeuvre may be small. However, the other arguments used by the Supreme Court – the goals and system of drug legislation and the aim of protecting public health – might have provided room for a different interpretation that is more inclusive of the conceptions of the good of this particular minority group and the ways in which they themselves have attempted to mitigate the impact on public health. Such an interpretation does not necessarily compromise the equal application of the law: the case law of the District Court and the Court of Appeal rather shows that it is possible to engage in a careful balancing act involving various relevant characteristics of the particular case involved, so as to make sure that the outcome does not necessarily set a risky precedent for future cases.

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# Ms Goldschmidt is it true that you are deaf? That would really help us to meet the quota! Positive discrimination revisited...

Jenny E. Goldschmidt

## 1. Introduction

The principle of equality was the subject of Titia Loenen's PhD,<sup>1</sup> and has remained one of the core themes of her work. Incorporating perspectives from different streams of feminist studies and human rights theory, she made a large contribution to this field. Our common interest here was reflected in many debates we had, mostly agreeing but fortunately also discussing and challenging different points of view. In 1989 I was invited to write a report for the Annual meeting of the Dutch Lawyers' Association (NJV) on 'Positive discrimination', in particular the constitutional aspects.<sup>2</sup> This offered me an opportunity to apply the feminist legal debate on the principle of equality as it developed in the same period, mostly in the US.

Some 25 years after this exercise the debate is still continuing on the obligations emanating from the principle of equality and the obligations of the State to promote *de facto* equality. Therefore, it seems challenging to reconsider some aspects of the views at that time against the background of the legal and actual conditions today.

In this short contribution I do not intend to give a complete academic overview, but I will highlight some issues relating the development of the improvement of the position of (in particular) women to the legal development and proposed new instruments.

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1 LOENEN 1992.

2 GOLDSCHMIDT 1989.

My focus will be on the situation in the Netherlands, but as Dutch equality law is closely related to the law of the European Union, this will be taken into account where relevant.

## **2. Positive discrimination in equality law**

First of all, there is a great deal of confusion about the terminology: positive action, positive discrimination, preferential treatment, affirmative action and reverse discrimination are used in different, sometimes overlapping, ways by different authors. My contribution deals with positive discrimination or reverse discrimination (I use both terms in the same meaning): this is a temporary measure where members of a disadvantaged group are given priority over the others to achieve *de facto* equality.

Positive discrimination has to be distinguished from positive action. Positive action (which in my view is more or less the same as affirmative action<sup>3</sup>), on the contrary, concerns all, in principle permanent, measures that intend to contribute to more equality, mostly by taking differences into account and/or including different perspectives in the law. Therefore, it is an essential aspect of the positive obligation that States have to promote equality. Positive discrimination or reverse discrimination, on the other hand, is conceived as an exception to the rule of equal treatment by specific temporary measures. This does not imply that these measures cannot be seen as being equally necessary, because positive discrimination aims to accelerate the achievement of *de facto* equality.<sup>4</sup> But they are seen as temporary, not as permanent measures, and demand a specific justification, based on the extent of *de facto* inequality and the availability of candidates.

Positive discrimination is an instrument to address a situation where the number of people from a specific group (e.g. women or the disabled) who are actually hired significantly lags behind the number of qualified candidates from that group. Because the long history of discrimination has persistent consequences even after the introduction of anti-discrimination law, it is

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3 See: BACCHI 1996, at pp. 15-17: sometimes positive discrimination can (temporarily) be part of the measures.

4 See also: FREEMAN 2003.

necessary to allow positive discrimination or reverse discrimination to bring the excluded, disadvantaged groups to equal positions.

Opinions on whether this persisting *de facto* inequality of women justifies a form of positive discrimination or whether positive discrimination is just an ‘over-inclusive’ measure which amounts to discrimination against men differ, and they have done so since the beginning of the debate on this issue. As a consequence, the first legal measures legitimizing positive discrimination reflected this debate and left the legislators and judges only a very narrow margin of discretion to accept it: national and international legal instruments generally accept this kind of measure, under more or less strictly defined conditions related to proportionality, transparency, and due diligence. Positive discrimination was in practice only allowed when there was solid proof of disproportionate results (in relation to the women qualified for the positions), when men were not altogether excluded, when women were at least equally qualified (giving room for stereotype interpretations of equal qualifications), procedures were strictly temporary and transparent and special circumstances could be taken into account.

The legal debate focuses on these conditions and on the position of women.<sup>5</sup> In particular on the question whether an absolute priority, excluding male candidates altogether during a specific period, is acceptable. At the time I wrote my report in 1989 these types of cases hardly occurred and the general tendency was that preferential treatment should not completely exclude males. Similarly, quotas were not very much supported. The Court of Justice of the European Union and its predecessors reaffirmed these views and the very strict conditions defined by the Court in the cases of *Kalanke*,<sup>6</sup> *Marschall*,<sup>7</sup> *Badeck*<sup>8</sup> and *Abrahamsson*<sup>9</sup> left the national institutions with little or no room for other interpretations and more effective measures to promote equality in selection procedures.

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5 See also: GOLDSCHMIDT and LOENEN 2014.

6 Case C-409/95, *Kalanke v Freie Hansestadt Bremen*, [1995] ECR I-03051.

7 Case C-409/95, *Hellmut Marschall v Land Nordrhein-Westfalen*, [1997] ECR I-06363.

8 Case C-158/97, *Georg Badeck and others*, [2000] ECR I-01875.

9 Case C-407/98, *Abrahamsson v Fogelqvist*, [2000] ECR I-05539.

Only in 2012, after some years earlier (in 2006) the so-called Recast Directive<sup>10</sup> had reframed the provision on positive measures ‘... with a view to ensuring full equality in practice ...’(art. 3), did the Dutch National Human Rights Institution, which succeeded the Equal Treatment Commission, use this change as a tool to broaden the scope for affirmative action and allow absolute priority for women in a case where the exclusion of women was very persistent.<sup>11</sup>

The preferential treatment of women is not only allowed as an exception to equal treatment (as it is constructed in the EU legislation mentioned above) but can also be constructed as an obligation emanating from the principle of equality, as codified in article 4 par. 1 of the CEDAW. In both cases, whether seen as an exception or as an aspect of the general obligation, the scope of the measure is the subject of debate.

### **3. Different approaches and theory**

The opinions in the debate on this issue are based on legal and more strategic arguments. The legal aspects were mentioned above: based on the requirements of proportionality and the prevention of the exclusion of others (than the preferred group). In my report in 1989 I referred to the necessity to take the differences in power between different groups in society into account. As some groups (‘white male heterosexuals without a disability’) can more easily influence the general rules and policies, the general rules and practices reflect the dominant standard. The transformation of these takes time and demands more inclusive institutions where the less powerful groups are participating. These elements related to the impact and implications of male dominance in the public sphere were introduced in the legal debate by feminist legal scholars such as Ann Scales, who argued that ‘Disadvantage has a way of replicating and reinforcing itself’.<sup>12</sup> In this view preferential

10 Directive 2006/54/EC of 5 July 2006 on the Implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ L 204 p. 23).

11 Opinion 12-195 (2012), see also the Comments of CREMERS-HARTMAN and VEGTER 2013, at pp. 70-73.

12 SCALES 1986.



treatment from a legal perspective is not seen as a measure to compensate past injustice (retrospective) but as a (necessary) step to achieve equality in the future (prospective).<sup>13</sup>

With regard to the legal arguments I emphasized the necessity of proportionality to balance the interests at stake and to do justice.

As mentioned, reasons not to support preferential treatment in its various forms can also be strategic. It seems to be quite common that women who have been appointed as a result of preferential treatment are perceived as not really good enough and certainly less qualified than the best male candidate. 'We need the best candidate for the job' or 'I do not want to be selected because I am a woman but because of my qualifications' are the arguments we often hear. Against this reasoning it is held that 'who has the best qualifications' is not easily established and that the entire selection process is more often than not 'gendered', not because the people involved are discriminating but because stereotyped perceptions play a role, even unconsciously<sup>14</sup> and unintentionally. In this context I am always surprised that we never hear 'never a man again' in cases where a very promising male candidate does not meet the expectations or even fails, whereas in similar cases when a woman was appointed (because of active policies or not), her sex is often seen as relevant for the failure.

Another, and in my opinion a more viable strategic argument against various forms of preferential treatment is that women who are appointed on this basis (in particular when there is strong resistance against the policy) will not receive a fair opportunity, will have to face a hostile environment and every minor mistake will be used to reaffirm that they were not the best candidate. On the other hand, if women get no opportunity at all they lack the possibility to show their qualities.

Yet another argument is that in the case of compulsory preferential policies, this may result in 'downgrading' the qualities of the female candidates to establish the far higher quality of a male candidate (no equal qualifications) or

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13 The (not mutually exclusive) arguments of both sides are summarized by Titia Loenen in her synopsis of the theoretical aspects of the Principle of Equality for students, LOENEN 1998, at pp. 57-70.

14 The research carried out at Leiden University by Annelies van Vianen as early as 1987 is still very interesting as it discloses the invisible barriers in a selection procedure: VAN VIANEN 1987.

even to disqualify the women (they do not meet the necessary qualifications): this may also be combined with amending the necessary qualifications during the procedure (e.g. the requirement of a certain amount of publications is changed into ‘international’ publications or publications in a certain field without a direct relevance to the position at stake). This argument can only be countered by guaranteeing and monitoring the neutrality of the procedures and thus trying to prevent any form of bias. Because this is not an easy task, more absolute forms of preferential treatment or quotas are seen as reasonable options despite the possible negative side-effects.

But when it comes to more absolute forms of preferential treatment such as quotas, other aspects also play a role. Quotas will also have to be proportional, i.e. they have to reflect the under-representation of women (for instance) in proportion to the number of women who are qualified for the specific position. This is not always easy to establish: which statistics are relevant: is the national rate also applicable in a small remote village? And it remains to be seen how quotas are used: do they give real opportunities to the women who need them or do they benefit the minority of women who have already achieved much and desire to have more opportunities? In 1989 when a Dutch University had a quota for disabled staff, I had the ‘pleasure’ of being welcomed by the head of the Human Resources department after selection by the Faculty: ‘Ms Goldschmidt, is it true that you are deaf? That would really help us to meet the quota!’.

Because of all these legal and strategic barriers, in 1989 I supported a proportional approach, avoiding the total exclusion of male candidates and quotas, expecting that the increasing participation of women in (higher) education, the workforce, and the redivision of unpaid work between these well-educated, economically independent women and their partners who would also be happy to develop their other skills would gradually change the landscape. However, persistent social patterns of male and female capacities and roles, and stereotyped expectations, seem to be more difficult to change than I had hoped.

#### 4. The reality after 25 years

Without giving a complete overview of the division of men and women in particular in the areas of work and education which are the areas where the debate on preferential treatment, positive discrimination and quotas usually takes place, some data may clarify the situation today with an emphasis on the European Union (after almost 40 years of equality laws).

In the 2010s new figures have shed an alarming light on the lack of progress in the participation of women in the higher professions, and the persisting gender pay gap. In 2011 the European Network of Legal Experts in the field of Gender Equality published its report entitled *Positive Action Measures to Ensure Full Equality between Men and Women*, including on Company Boards,<sup>15</sup> which indicates that the gender pay gap remains at 18% across Europe, and women still have a disproportional share of unpaid work and lower participation in paid work than men, even lower when they have 3 or more children: the employment rate for women without children is 75 %, for women with three children or more it is only 54%, against 80%, respectively 85%, for men (p. 2). Women in Europe are under-represented in decision making, only 24% of members of national Parliaments are female, for example.

The World Gender Gap report of 2014 explains that the gender gap now stands at 60% worldwide which means that it has closed by not more than 4 % since 2006. It will take until 2095 to close the gap under similar circumstances.<sup>16</sup> A remarkable feature is the fact that the gap is narrow in the field of education (94%), which also reaffirms the assumption that even an increase in qualified women does not automatically imply that they will have better opportunities. This aspect is discussed over and over again every time the alarming percentage of female professors is reaffirmed: the last monitoring in the Netherlands showed a percentage of 14.8 %.<sup>17</sup>

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15 SELANEC and SENDEN 2012.

16 WORLD ECONOMIC FORUM, *The Global Gender Gap Report 2014*, available at: [reports.weforum.org/global-gender-gap-report-2014/](http://reports.weforum.org/global-gender-gap-report-2014/).

17 Monitor Vrouwelijke Hoogleraren 2012, available at: [www.lnvh.nl/site/Monitor-Vrouwelijk-Hoogleraren/Monitor-2012](http://www.lnvh.nl/site/Monitor-Vrouwelijk-Hoogleraren/Monitor-2012).

This gap is also reflected in the Proposal of the European Commission to improve the gender balance on company boards, published in 2012.<sup>18</sup> The low number (13.7 %) of women who occupy corporate seats in the largest listed companies is the reason why the Commission proposes to impose a quota.

## 5. Behind the facts

These facts compel me to reconsider the optimistic expectations of 1989 that increasing the education and participation of women in the public sphere would contribute to the gradual elimination of discrimination. I think that two aspects can explain why this optimism was not realistic. The first aspect lies in the fact that I underestimated how the implementation of laws and policies depends on the laws and policies that dominate the 'field' where they have to be applied. It was at a Conference on Comparative Non-Discrimination Law organised in Utrecht in 1998 by Titia Loenen and Peter Rodrigues that John Griffiths applied his theory on the social working of the law on the Dutch Equal Treatment legislation.<sup>19</sup> He explained that the effective implementation of the law will depend on the resistance of the (labour) organisations where the law has to be applied. Labour organisations, in particular large (multinational) companies, usually constitute a social field with its own, usually well-developed, system of formal and informal rules that apply and are enforced by official and informal mechanisms. Very often these systems of rules are largely incompatible with the demands of anti-discrimination law. For that reason it will be extremely difficult to get the latter laws accepted and even more so to make them also effective in practice. Thus, the enforcement procedures used to implement the equality legislation must take this into account and, by definition, weak instruments risk being ineffective versus the relatively strong internal normative systems. Apart from the necessity to have an adequate implementation system, it is most important to empower the groups, such as women, that invoke the equality

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18 Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, COM(2012) 614.

19 GRIFFITHS 1999.

legislation. It will be important for them to find partners such as social organisations, trade unions or parts thereof to increase the susceptibility of the organisation to the ‘imposed’ equality legislation.

Another aspect that influences the slow progress in the elimination of discrimination is the endurance and persistence of stereotypes. I mentioned above the research by Annelies van Vianen in 1998, and unfortunately various researchers since then have reaffirmed the fact that unconscious assumptions and barriers are not easily erased.

The persistence of stereotypes is also increasingly related to the case law of the human rights courts in the context of achieving equal rights: Lourdes Peroni and Alexandra Timmer analysed the risk of stereotyping in the use of the concept of vulnerable groups.<sup>20</sup> As Titia Loenen already explained in her dissertation in 1992, substantive equality can only be achieved when the norms themselves which have to be applied equally are really neutral, i.e. not merely reflecting dominant views and patterns.<sup>21</sup> This will require more ‘inclusive’ concepts, or, from the position of Rikki Holtmaat, ‘a different law’<sup>22</sup> and subsequent implementation. As we can now see, it takes more than 25 years to abolish these stereotypes and to change the dominant normative system to become more neutral, to open the eyes of those who have to apply the law to inherent stereotype mechanisms, and to open the various strong social fields that successfully resist the penetration of equality law. This forces me to reconsider my opinion that we do not need quotas, and that a well-balanced, proportional, limited possibility for preferential treatment would be enough to achieve equal opportunities for women (and other less powerful groups) in addition to the effective implementation of non-discrimination law in general.

## 6. Conclusion: positive discrimination revisited

Some 25 years after my 1989 report on Positive Discrimination I feel somewhat sadder and wiser. Sadder because the optimism underlying my

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20 PERONI and TIMMER 2013.

21 O.C. LOENEN 1992, at p. 266.

22 HOLTMAAT 1988.

more careful approach to proportionality and avoiding absolute priority or quotas seems to have been denied by the facts. Although I can accept that social changes need time, I cannot accept that we need 80 more years at least to close the gender gap. After all, it is about the fundamental rights of women, and about ALL of the fundamental rights of women because the gap and the stereotypes affect women in all aspects of their lives, including e.g. physical integrity: the Fundamental Rights Agency on gender-based violence repeatedly mentions the relevance of attitudes as both a cause of gender-based violence and as an essential aspect of solving the problem.<sup>23</sup> Equal rights are essential to achieve human rights; we cannot perceive the unequal participation of women as a violation of the principle of equality only: it is also a violation of the right to work, including equal opportunities and equal pay, the right to education and other rights. This human rights approach entails positive obligations that all possible instruments are used to achieve equality. When, as I must conclude from the facts, the more gentle approaches of proportionality and 'soft' measures do not result in tangible improvements without objective justifications, it is not only justified but even mandatory from the perspective of the progressive realisation of human rights to take more compulsory measures. Thus, I agree with the Dutch National Institute for Human Rights, which has the role of an Equality Body, when it ruled in 2012 that the Technical University of Delft was allowed to adopt a special tenure track programme for women only, considering the enduring gap between men and women in academic positions.<sup>24</sup> After 25 years I agree that we need preferential treatment in a less committed way and quotas to ensure results that are in accordance with human rights. This also means that the state and other authorities have to ensure that relevant instruments exclude as much as possible concepts that, without further definition, can be interpreted in a typical way (such as 'equal qualifications'). For this and other reasons (the obligation is still not very strict) the proposed Directive on quotas for women (and, surprisingly, also allowing quotas for

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23 EUROPEAN AGENCY FOR FUNDAMENTAL RIGHTS 2014.

24 See College voor de mensenrechten, Opinion 2012-195, available at: [www.mensenrechten.nl/publicaties/oordelen/2012-195/detail](http://www.mensenrechten.nl/publicaties/oordelen/2012-195/detail).

men) on the board of companies has been criticized as having only limited added value and many shortcomings. But, on the other hand, it is essential to take at least some steps to achieve more equality as extensively explained by Linda Senden and Mirella Visser, who provide recommendations to improve the Directive that seem to be absolutely necessary to make it effective.<sup>25</sup>

I can only hope that after another 25 years the debate on quotas and preferential treatment will have become a non-issue because we will then have achieved justice and that gender, disability, ethnicity or other grounds that exclude groups will in no way be decisive for the enjoyment of human rights and dignity.

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25 SENDEN and VISSER 2013.

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# Equality and human rights: new grounds for concern

Lucy Vickers

## 1. Introduction

One might assume when considering equality and human rights together that these two concepts would work cumulatively to create a whole that is greater than the sum of the two parts. However, at times, as the work of Titia Loenen<sup>1</sup> has demonstrated, these two concepts can end up in conflict, with a resulting reduction in each. The reasons for this conflict are numerous, and this paper does not claim to address them all. Instead its focus is on two possible reasons. First, I consider the difficulty that the law in Europe has had in dealing with the increase in the number of grounds on which equality can be claimed. Second, and related to the first, I assess the extent to which the new grounds raise questions about the meaning of the terms ‘equality’ and ‘human rights’. Finally, I suggest that a renewed understanding of the meaning of these terms may help to resolve the supposed conflict between them and lead to ways forward in which these two notions could more positively interact.

## 2. Commonalities between equality and human rights

Of course the notions of human rights and equality are intimately related. At one level, it might be said that they are two sides of the same coin. Human rights and equality rights can be seen to be founded on the same moral first principles. The Kantian idea that humans should be treated as ends rather than means, with the same essential dignity and unique value, underpins most modern human rights thinking.<sup>2</sup> The idea that human beings can

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1 LOENEN 2009; LOENEN 2012b; LOENEN 2012a.

2 KANT 1963.

expect others to respect the dignity inherent in their humanity is one that has been agreed virtually universally, perhaps most famously in the Universal Declaration of Human Rights: 'All human beings are born free and equal in dignity and rights'.<sup>3</sup> Here we immediately see a fundamental link between human rights and equality. The concept of human dignity, a foundational concept in human rights theory, does seem to be intimately linked to the idea of equality: humans may not be equal in their abilities and attributes, but they are equal in their humanity and moral worth. There is thus an objective good in upholding their equality, and in attempting to create a society in which all can flourish.

Thought of in this way, equality and human rights should not be in conflict at all. Equality is thus understood as a fundamental human right: indeed many human rights documents include a right to equality, and most equality advocates would see their quest as governed by human rights principles. Moreover, it is also assumed in most human rights documents that human rights should be enjoyed equally by all, again showing the intimate links between the two concepts.

To an extent the overlapping nature of the interests in human rights and equality have had a positive influence on the development of the first grounds of equality. When considering gender and race equality, for example, it seems to be helpful to consider these in terms of equality as well as human rights. Human rights protection came first, with the realisation that talk of the Rights of Man meant the rights of white men coming only later, a few vital participants having been left out of the debate. Eva Brems<sup>4</sup> outlines clearly the development of human rights to become more inclusive, with its extension to race, gender and disability. In these contexts, the use of the language of equality has led to the improvement of human rights protection, and, in turn, equality claims have been bolstered by the recognition that they are based on fundamental human rights claims. This improved understanding of equality as a part of human rights protection has also led more recently to an

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3 Art 1. Dignity also features in the preamble to the United Nations Charter, and the preambles of the ICCPR and ICESCR.

4 See her contribution in this volume.

increase in the grounds on which equality is protected, to cover age, religion and sexual orientation.

This virtuous circle of protection can be seen reflected in the strict scrutiny with which equality interests have been treated in the courts. In the case of gender and race equality, direct discrimination cannot be justified, and even in the case of indirect discrimination any exception to the norm of equality has to be justified very strictly.<sup>5</sup> This means that even if there is a 'cost' to compliance with the equality norm, courts will nonetheless order compliance. For example, if an employer has to pay more to employ a woman who goes on maternity leave, or loses custom because its clients do not like to be served by a black member of staff, courts will uphold the right to equality of the worker rather than allow discrimination to be justified on the basis of the 'needs of the business'. Indeed, the fact that these examples perhaps seem somewhat shocking shows the extent to which these norms of equality have been generally accepted.

### 3. Conflicts between human rights and equality

Nonetheless, despite the close connections between equality and human rights, it seems that the concepts may also conflict at times. This can be seen perhaps most clearly in relation to the new grounds of equality, particularly the grounds of age and religion. This may be because the protection has been more recently introduced and in addition, the underlying interests at stake have not been generally agreed. For example, the question of whether discrimination on grounds of age and religion should be treated similarly to other grounds is still live in the academic literature,<sup>6</sup> a question that is rarely seen in the case of race or sex. The acceptance of the equality claim is not so well established in relation to age and religion, and so there is perhaps less willingness to accept any 'cost' involved in compliance.

The example of age equality may illustrate the issue. In EU law, age equality can more readily be justified than other grounds of discrimination with justified direct discrimination potentially lawful. Moreover, retirement ages

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5 Case C-170/84, *Bilka-Kaufhaus v Weber von Hartz*, [1986] ECR 1607.

6 See the debate surrounding the concept of the 'fair innings' argument in relation to age discrimination: See FREDMAN 2003. With regard to religion, see MCCOLGAN 2009.

are reasonably easy to justify and remain common across Europe. Applied to other grounds of discrimination such an approach would not be allowed. The arguments about the rights of younger workers and their need for work, which are accepted in relation to debates surrounding retirement,<sup>7</sup> would be very unlikely to be accepted if applied to gender. For example, when in 2011 the UK's Universities Minister David Willets blamed educated working women for the lack of jobs available to aspiring working class men – he said that feminism was the ‘single biggest factor’ in a lack of social mobility<sup>8</sup> – he was roundly criticised. One certainly cannot imagine such an argument gaining the support of the CJEU as a justification for gender discrimination. Yet the argument that older people must be treated unfavourably in order to protect younger people has been accepted in the context of age discrimination. A second area in which conflicts between rights have arisen in relation to the new equality grounds relates to religion, and this will be the focus of what follows. The conflict can be summarised with a few examples from the case law which illustrate the potential clashes between equality law and human rights.

The first example involves the wearing of the *hijab* or headscarf, and can be illustrated by *Şahin v Turkey*<sup>9</sup> in which a university student objected to the prohibition of religious attire being worn in her university as a breach of her freedom to manifest her religion and belief. The ECtHR accepted that the ban on the headscarf could be justified, and referred in its reasoning to the view that the headscarf is ‘hard to square with the principle of gender equality.’<sup>10</sup> A second example of the potential clash between human rights and equality can be seen in the cases involving Christian marriage registrars. In the case of *Ladele*, heard with *Eweida v. United Kingdom*<sup>11</sup> the claim that dismissal for a religiously motivated refusal to conduct civil partnerships was a breach of the right to freedom of religion was rejected. Instead the equality

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7 Case C-341/08, *Petersen v Berufungsausschuss für Zahn für den Bezirk Westfalen-Lippe*, [2010] ECR I-00047.

8 MULHOLLAND 2011.

9 ECtHR, *Leyla Şahin v. Turkey*, 10 November 2005 (Appl.no. 44774/98).

10 ECtHR, *Leyla Şahin v. Turkey*, 10 November 2005 (Appl.no. 44774/98), at para. 111.

11 ECtHR, *Eweida and others v UK*, 15 January 2013 (Appl.nos. 48420/10, 59842/10, 51671/10 and 36516/10) (on *Ladèle*).

rights of gay couples justified the limitation on religious freedom represented by the dismissal. A third example involves employment by religious organisations. Although freedom of religion will justify some exceptions to equality, the extent of those exceptions is unclear. Thus, the fact that the Catholic Church requires that priests be Catholic is uncontroversial, despite its overt discrimination against non-Catholics. But other equality exceptions are more contested, such as requirements for priests to be male; and it is not clear how widely the exceptions should apply, for example whether churches could require staff to be heterosexual.

These examples demonstrate some of the tensions and conflicts that can arise between the human right to religious freedom, and equality. These issues are all ones in which we may identify ‘trouble’ coming from the interaction of equality and human rights, issues which have been contested in a burgeoning literature. The conclusions of this literature are not rehearsed in full here, but are considered in summary form.

#### **4. Debating human rights and equality**

One major issue which arises within the debate between human rights and equality is whether, and if so how, they might be reconciled.<sup>12</sup> However, some have criticised the polarity of this debate, counselling particularly against essentialising religion in general, and Islam in particular, as ‘anti-equality’. As Maleiha Malik has said: ‘The exaggeration of the problem of ‘conflict’ between different groups – and especially races, cultures and religions – gives rise to an assumption that there is a radical difference of values between different social groups in society.’<sup>13</sup> This concern is important. It can be all too easy to assume that religion is antithetical to equality, an assumption that itself can lead to hostility to religion, which in turn could lead to less favourable treatment against religious adherents.

Even if we avoid this danger, however, we are still left with some ‘clashes’ in practice, as illustrated by the scenarios mentioned above. Suggested approaches, including the approach of Malik herself, are to ensure

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12 MCCOLGAN 2009.

13 MALIK 2008.

appropriately nuanced balancing of the different interests, with appropriately drawn boundaries around any areas in which religion may be allowed to 'trump' equality interests. For example, in the case of employment by religious bodies, EU Directive 2000/78 allows for limited occupational requirement exceptions to the non-discrimination principle, thus allowing limited discrimination on grounds of religion where necessary to maintain the religious ethos of an organisation. However discrimination on other grounds is unlawful. Thus requiring an employee in a religious organisation to share its religion would be lawful if it was proportionate as a means of maintaining the religious ethos, but it would not be lawful to require such staff to be heterosexual, as this would discriminate unacceptably on other grounds.

#### *4.1 Contrasting approaches of the CJEU and ECHR*

Other concerns about the tension between human rights approaches and equality relate to the potential clash in approach between the ECHR and the CJEU in dealing with issues such as those outlined above. In short, in relation to headscarves, the human rights case law in the education context has upheld the restrictions on headscarves,<sup>14</sup> and such arguments are likely to apply in the employment context. However this approach can be questioned given the disparate impact of such restrictions on women, leading to a suggestion that the human rights based approach of the ECtHR, which see the practice of restricting headscarves as legitimate, may be incompatible with an approach based on equality. After all, where equality is concerned, the CJEU has not adopted such a similarly flexible approach. The standard of review for interference with equality is strict: any requirement must have a legitimate aim, the means chosen for achieving that objective must correspond to a real need on the part of the undertaking, must be appropriate with a view to achieving the objective in question and must be necessary to that end.<sup>15</sup> If such a strict approach is taken to justifying religious discrimination,

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14 ECtHR, *Leyla Şahin v. Turkey*, 10 November 2005 (Appl.no. 44774/98); ECtHR, *Dahlab v. Switzerland* (admissibility decision), 15 February 2001 (Appl.no. 42393/98).

15 Case C-170/84, *Bilka-Kaufhaus v Weber von Hartz*, [1986] ECR 1607.



it may be that restrictions on headscarves would not be so readily justified as they have been using the approach under the ECHR.

This different legal approach to a similar factual issue demonstrates that the ECHR and CJEU legal cultures may clash on this issue: the ECtHR traditionally allows a margin of appreciation to apply in difficult cases where consensus is difficult to determine; the CJEU sets standards for all of the EU, and aims at uniformity in order to achieve the economic aims of the union. The concept of a margin of appreciation while not unknown (in the form of a margin of discretion and a principle of subsidiarity) is much more limited. The concept of the margin of appreciation is also arguably inappropriate in the context of gender and race: both are areas where the consensus and traditions have long been sexist and racist. The aim of the EU is to eradicate such tendencies, not to reflect them in the standards set.

An additional concern relates to the danger that the difficulties in balancing competing interests when it comes to religion and age will lead to courts using a less strict level of scrutiny when it comes to justifying indirect discrimination. A serious concern is that this will lead to a levelling down or dilution of protection for other grounds as courts seek to treat all equality grounds equally.

In summary, there are a number of concerns which can be identified relating to potential clashes between religion and equality. To an extent, these may be reconciled by careful and sensitive interpretation of the various competing legal frameworks. Both frameworks contain flexible components such as the requirement that limits on equality or human rights should be proportionate. In the next section, I consider some additional challenges which may arise if concepts and approaches developed in the context of religious human rights are translated into the context of equality law.

## **5. 'Lost in translation'**

In some senses, both the 'human rights' perspective and the 'equality' perspective can be seen to use similar methodologies when dealing with difficult cases involving religious rights. Both ultimately rely on a balancing approach, with both the ECHR and the Equality Directive providing limits on their protection. With regard to human rights claims, this is reflected

in the fact that although religion, belief and conscience are protected absolutely, manifestation of religion and belief can be limited where justified. With regard to discrimination claims this is seen in the fact that while direct discrimination cannot be justified, exceptions are allowed where religious employers impose genuine occupational requirements which are justified and proportionate; and indirect discrimination can be justified where proportionate. Thus, beyond the right to believe at all, both systems allow some balancing of competing interests. To an extent then, there is a commonality of approach between the two frameworks.<sup>16</sup> This can be seen in the ready translation of four religious equality cases brought from the UK to the ECtHR in January 2013.<sup>17</sup> At the domestic level, these cases were brought under the Directive derived UK Equality Act 2010, as claims of indirect discrimination (the application of a neutral rule, not to wear a visible cross or not to refuse services to gay clients, put the Christian claimants at a particular disadvantage compared to other staff, and the rules could not be justified). After their rejection by the domestic courts, an application was made to the ECtHR for their consideration under Article 9 cases, on the basis that the claimants' freedom to manifest religion had been interfered with. The question for the court was then whether this failure could be justified.<sup>18</sup> However, the human rights jurisprudence brings some approaches to the balancing exercise which do not translate readily between the two perspectives. Indeed, care is needed to avoid the danger that matters are 'lost in translation', if concepts developed in the human rights context are used without further reflection in the equality context.

### 5.1. *The specific situation rule*

The first example is in the traditional acceptance in the jurisprudence of the ECtHR of the 'specific situation rule'. This is the recognition that a person's Article 9 rights may be influenced by the particular situation of the

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16 See HAVERKORT 2012; VAN OOIJEN 2012.

17 ECtHR, *Eweida and others v UK*, 15 January 2013 (Appl.nos. 48420/10, 59842/10, 51671/10 and 36516/10).

18 The ECtHR ruled that the interference was not justified in the case of *Eweida*, but was justified in the case of *Chaplin*, *McFarlane* and *Ladele*.

individual claiming that freedom. In particular, where individuals voluntarily submit themselves to a system of rules which limits their manifestation of religion, their claims will be limited. Examples of the specific situation rule were clear in the context of religion and employment,<sup>19</sup> but can also be seen in other dress code cases.<sup>20</sup> In the recent ECtHR case of *Eweida* the court held that the fact that the claimant could resign should not mean there was no interference at all, but nonetheless they still held that the possibility of changing job should be weighed in the overall balance when considering whether or not the restriction was proportionate.<sup>21</sup> This approach to the protection of religious freedom is undoubtedly an improvement on what went before. Prior to the most recent *Eweida* decision, the specific situation rule amounted to a significant restriction on religious freedom at work, despite some strong reasons to allow the protection, such as the importance of religion to the individual, and the interests in distributing the benefits of employment without discrimination on religious grounds. Yet, despite a number of strong reasons to protect religious interests at work, in the final analysis the right to resign does seem to have a role to play, even if only as a residual form of protection for religious freedom. After all, if the employee has very strong and inflexible beliefs that are impossible to reconcile with her work based obligations (for example a religious believer who refuses to work with men), she is free to leave: there is no obligation to work. Thus the specific situation rule will still have some effect on the law, albeit in a more limited manner way than was the case prior to the *Eweida* decision.

However, even the newly diluted specific situation rule may be less easy to accept when considered from an equalities perspective. In relation to equality norms, an onus is rarely put on an individual to take steps to avoid discrimination by 'staying out of harm's way'. 'Separate but equal' provision is not accepted as a defence to direct or indirect discrimination; and the language of choice is never used to deny an equality claim. Although,

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19 EComHR, *Abmad v United Kingdom*, 12 March 1981 (Appl.no. 8160/78); EComHR, *Stedman v United Kingdom* (admissibility decision), 9 April 1997 (Appl.no. 29107/95).

20 For example, see the UK House of Lords case of *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15.

21 ECtHR, *Eweida and others v UK*, 15 January 2013 (Appl.nos. 48420/10, 59842/10, 51671/10 and 36516/10), at para. 83.

post-*Eweida*, the specific situation rule in relation to religious freedom has moved from an *a priori* rule against protecting religion in certain circumstances to a factor to determine proportionality, it is arguable that the approach would not be viewed as appropriate if used as a proportionality factor in an equality-based case.

### 5.2. *The value of communal interests*

A second possible ‘clash’ of approaches can be seen in the acceptance from a human rights perspective of the value of group interests in religious equality. The Article 9 right is one to be enjoyed alone ‘or in community with others’. This is justified, despite the fact that religion may be protected on the basis of its link to human dignity and autonomy, because involvement in communities who share one’s religious identity can be crucial to the development and enjoyment of one’s religious identity and so forms a part of what religious freedom means.<sup>22</sup> This means that religious organisations have their own religious interests which may be at odds with the equality interests of others. This is most obviously seen in the interests of religious employers who may wish to reflect their own religious ethos in their employment practices. For example, in *Obst and Schüth v Germany*<sup>23</sup> churches dismissed staff for failing to comply with religious teaching. In both cases staff had been involved in extra-marital relationships, in *Schüth* this was a Catholic Church organist and in *Obst* the Director of European Public Relations for the Mormon Church. Despite the apparent similarity of their facts, the ECtHR upheld the claim of the Catholic organist but rejected that of the Mormon PR Director. However, this largely related to a procedural question about the extent to which privacy rights had been considered by the decision makers in each case. Moreover, in the UK case of *Reaney v Hereford*,<sup>24</sup> a Christian youth worker was denied employment as a diocesan youth officer because the Bishop did not believe his lifestyle would remain compatible with the church’s teachings on homosexuality. Here the Court upheld the right of

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22 RÉAUME 2003, at p. 678.

23 ECtHR, *Obst v Germany*, 23 September 2010 (Appl.no. 425/03), ECtHR, *Schüth v. Germany*, 23 September 2010 (Appl.no. 1620/03).

24 *Reaney v Hereford Diocesan Board of Finance*, Case No 1602844/2006.

the Church to impose a requirement connected to sexuality, although the church ultimately lost the case, because the tribunal held that the Bishop was unreasonable in his belief that the applicant would not meet the requirement to remain celibate whilst in the post. Although the religious employers were not successful in all these cases, the courts all accepted the principle that religious ethos employers should enjoy the freedom to take action to protect the religious ethos of the organisation. The principle can also be seen in the approach to equality as applied to priests. There would be little chance that a court would interfere with the requirements of many churches that priests must be male and (depending on the Church) heterosexual or celibate. Interference with such practices by a court would be understood to infringe religious freedom.

In these cases, the ‘rights of discriminators’ have some traction in the legal reasoning, as the freedom of a religious group to practice their faith in community with others may best be met by allowing them to employ staff who share the faith. Indeed, in the context of religious freedom claims, the right of religious adherents to choose their leaders is given clear protection under the ECHR.<sup>25</sup> The interest of having religious homogeneity in a workplace thus has some recognition. However, this again may be a concept that is ‘lost in translation’ when applied to the equality context. Trying to find equivalents in respect of other equality grounds is hard. Thus, some direct gender discrimination may be lawful where there is a genuine occupational requirement for a job to be done by person of a particular gender, for example, where a women’s rape crisis centre requires staff to be female, as they can better meet the emotional needs of the client base. However, exceptions to gender equality are interpreted extremely strictly, and moreover would not also allow discrimination on other grounds, as was potentially the case in *Reaney* and as is the case with the employment of clergy.

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25 ECtHR, *Hasan and Chaush v Bulgaria* (Grand Chamber), 26 October 2000 (Appl.no. 30985/96), at para. 62; see also ECtHR, *Serif v Greece*, 14 December 1999 (Appl.no. 38178/97).

### 5.3. *The margin of appreciation*

A third area where concepts may lose something in translation relates to the margin of appreciation and its use in human rights cases. To an extent this has already been noted, with regard to its use in gender or race context. But there remains a wider concern which is significant in the context of a debate regarding the interaction of human rights and equality. The concern relates to the extent to which a lack of consensus and reasonable differences of opinion should be allowed to determine the outcome of human rights protection. Whilst it is perhaps useful as a matter of practical politics to leave some discretion to states on contentious issues about which there is disagreement (such as the headscarf issue in Europe) there are clear dangers in relying on consensus and settled practice to set the boundaries of protection, particularly with respect to minority rights and interests. After all, if the aim of human rights protection is to protect the individual from the power of the majority (as represented by the state), then the boundaries of this protection should not be set by reference to majority opinion.<sup>26</sup> This concern has particular resonance when used in the context of equality, where protection is often being afforded to minority or other disadvantaged groups, who have been badly served by the majority. The problem is well illustrated in relation to the debate on the German headscarf case, which was heard in the German Constitutional Court.<sup>27</sup> Here the Federal Constitutional Court decided that the issue was best dealt with via the democratic process so that only legislative bans would be upheld. In the case before the court, that meant that the headscarf ban was unlawful. However, this was not the end of the matter. Following the judgment, several German legislatures acted to introduce a ban, despite the fact that such bans had a disproportionate impact on Muslim women. With the democratic mandate in favour of the ban, the Constitutional Court's objection was removed. Thus, allowing the majority to determine the rights of the minority via a reliance on political consensus can lead to a diminution of protection for disadvantaged groups. Yet these are the very groups that those striving for equality are seeking to

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26 See LETSAS 2004 and DZEHSIAROU 2011.

27 *Bundesverfassungsgericht*, 24 September 2003, *Ludin*, 2 BvR 1436/02. For more detailed discussion see LOENEN 2012b.

protect. In effect, allowing protection to be ‘norm-reflecting’ rather than ‘norm-setting’ can serve equality interests of minority groups very badly.

## 6. Seeking a solution

These various challenges and conflicts may lead one to suppose that equality and human rights are destined to be forever in some sort of circle of contradiction: they are at once two sides of the same coin, and yet potentially in conflict. Moreover, it seems that it is the new grounds of equality that have given rise to much of the conflict.

How then, might one go about moving towards a resolution of this conflict? The suggestion here is that things could improve if ‘equality’ is viewed less as a unitary concept, and more as a concept with a plurality of meanings. This involves not only the recognition of a range of meanings of equality, but also an acceptance that equality grounds are not all the same.<sup>28</sup> If it is accepted that ‘equality’ is a multi-faceted concept, and that not all grounds of equality are equal, this may enable a better reconciliation of the conflicts identified above.

There has been extensive academic debate about the meaning and purposes of equality<sup>29</sup> which will not be expanded upon here. Suffice to say that a number of meanings exist beyond the most obvious meaning of formal or symmetrical equality; meanings that seek to meet the basic difficulty in equalities thinking about identifying which categories are sufficiently alike to warrant like treatment.<sup>30</sup> More substantive conceptions of equality focus on the link between equality and individual dignity and identity; on the use of equality to address disadvantage and redistribution;<sup>31</sup> and on equality as a means of addressing social exclusion and promoting participation.<sup>32</sup> It is arguable that these different understandings of equality may match better with some grounds than others. For example, it has been suggested that

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28 See McCrudden 2005.

29 See for example, O’Cinneide 2006, Barnard and Hepple 2000, Fredman 2002a, Hepple 2008. See also Fraser 2000 and Taylor 1992.

30 See Westen 1982.

31 See Barnard and Hepple 2000.

32 Collins 2003, Fredman 2002b, Fraser 2000.

sexual orientation equality ties in more fully with ideas of equality based on dignity and identity, than with ideas about redistribution and economic disadvantage. Conversely, it may be that the issue of age discrimination has more resonance with an understanding of equality based on redressing economic disadvantage rather than confirming identity.

A more varied understanding of the meaning of equality may help to meet some of the difficulties identified above: if age equality is founded on a concept of disadvantage, this may help us to balance the interests of the older worker against younger workers better than if we see the issue as one relating to individual dignity. For example, viewed as a matter of redistribution, age equality protection may allow the justification of retirement; viewed as a matter of identity, this would be very difficult to justify.<sup>33</sup>

Not only is it worth considering that equality is not a unitary concept, it may also be helpful to accept that different grounds of equality may not need to be treated the same, even though this goes against the current rhetoric from the CJEU which suggests that there should be no hierarchy as between the various equality provisions across the EU.<sup>34</sup> A number of suggestions have been made in the literature about ways in which the grounds of discrimination are inherently different, which may justify the development of a degree of hierarchy as between them. For example, it has been suggested that some grounds (gender, race, sexual orientation) are truly irrelevant to a person's ability to undertake work, while other grounds are relevant some of the time, because they may either limit availability to do a job (pregnancy, religion) or may limit ability to perform a job (disability, age). Thus treating different strands differently may be an acceptable way forward.<sup>35</sup> Other differences identified include differences between the grounds in terms of whether the characteristics are biological differences (sex, age), ascriptive differences (ethnicity), or chosen characteristics (sexual orientation, religion).<sup>36</sup> The question of whether these latter characteristics are chosen is clearly contentious, but the fact that distinctions can be drawn between the

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33 MANFREDI and VICKERS 2013.

34 See Case C-13/05, *Chacón Navas v Eurest Colectividades SA*, [2006] ECR I-06467, at para. 40, a case involving the definition of disability.

35 BELL and WADDINGTON 2003.

36 For example, SCHIEK 2002.



different grounds does suggest that discrimination is not all equal, and that hierarchies may not only be inevitable but may also be useful tools to help us find a way around the contradictions that have been identified above, when we try to reconcile the two goods of equality and human rights.

## 7. Conclusion

The pursuit of the twin goals of the protection of human rights and of equality at times lead to some difficulty. As explored above, they work both in ways that are complementary and in ways that can conflict. This can cause particular difficulties when the same factual scenario, such as how to deal with religious symbols at work, raise both human rights and equality concerns. Moreover, there is a danger that approaches which add clarity to the debate in relation to human rights thinking can be ‘lost in translation’ and can cause difficulties in the treatment of equality. It has been suggested that recognition of a range of meanings for equality may allow for some creative and flexible responses to these tensions.

However in the shorter term, these tensions are bound to continue. This is largely due to the social and political environment in which the issues are played out, one in which support for the protection of human rights and equality seems to be diminishing. In a world in which protection for equality and human rights can feel under attack it is attractive to join forces and use the additional power which the linking of the two concepts offers: the rhetoric is much stronger if human rights and equality are seen as two sides of the same coin. There is a real danger that if the different grounds of equality part company in terms of their application, so that different justifications are allowed for different grounds of equality, this could lead to a dilution of protection for all grounds. This is because the language of parity of grounds can then be reintroduced in order to level down, rather than level up, the protection. This can be seen in the context of the Netherlands, in the discussions on the accommodation of religious manifestations in the public sphere.<sup>37</sup> Thus, it may well be that politically it is important for the two concepts to remain linked for the time being. However, where tensions

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37 For an overview of developments in the Netherlands see VAN DEN BRINK and LOENEN 2012.

between the concepts arise, consideration of varied meanings of equality may help courts to feel a way towards a reasoned resolution.

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# Dogs on the internet: equality and human rights

Tina van der Linden-Smith

## 1. Introduction

If human rights are truly universal they must apply to interactions between humans on the internet – even if one cannot know for certain who the person is that one is dealing with, even if he, she or it may be a dog.<sup>1</sup> On July 5, 2012, the UN Human Rights Council adopted the Resolution entitled ‘The Promotion, Protection and Enjoyment of Human Rights on the Internet’, affirming that ‘the same rights that people have offline must also be protected online’.<sup>2</sup>

It seems obvious that the same rights that people have offline must also be protected online, especially human rights. However, it is not so obvious what this means exactly, and how this might be done. Even if human rights are universal, there are major differences in the views on what these rights mean and how they should be realised, even between explicitly self-proclaimed human rights supporters such as the US, on the one hand, and European Union member states, on the other. The aim of this short note is modest: some of the major issues will be looked at to serve as food for thought on how to view the complex relationship between human rights, equality and the internet. It is argued that this rethinking is badly needed.

If equality and human rights is nothing but trouble, there is even more strife when we consider equality and human rights on the internet. Two specific characteristics of communication mediated by the internet cause major challenges for the law. The first is the possibility to be (relatively)

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1 Figuratively speaking of course, and referring to the famous cartoon by Peter Steiner, published by The New Yorker on July 5, 1993. See: [en.wikipedia.org/wiki/On\\_the\\_Internet,\\_nobody\\_knows\\_you're\\_a\\_dog](http://en.wikipedia.org/wiki/On_the_Internet,_nobody_knows_you're_a_dog).

2 UN HUMAN RIGHTS COUNCIL, ‘Resolution: The promotion, protection and enjoyment of human rights on the Internet’, UN Doc. A/HRC/20/L.13, 29 June 2012.

anonymous on the internet. The second is the internet's global character, defying territory-based jurisdiction.

Two branches of human rights will be briefly discussed here: privacy and freedom of expression. For both rights, the difference in approach between the US and Europe will be briefly indicated. It will be explained why the internet calls for a rethinking of the meaning of these rights. Next, some thoughts on the impact of the internet on equality in a broad sense will be mentioned. The conclusion will be that there is even more trouble with equality and human rights on the internet, and that this 'trouble' means challenges for legal research and practice.

## 2. Privacy

Every publication on privacy starts with a reference to Warren and Brandeis, who coined the term privacy and introduced the often cited 'right to be let alone'.<sup>3</sup> Now, there is also a discussion about a 'right to be forgotten'.<sup>4</sup>

Privacy has a physical dimension: one's body, bed, house, and to some extent even one's workplace. Privacy also has an informational dimension. Westin first used the term 'informational privacy' for the idea that everybody should have the right to determine who knows which particular details about him or her.<sup>5</sup> It is this notion of privacy that is the focus of most discussions on privacy in the information age.

Clearly, we do not have an unlimited right to determine who knows which particular details about us. The government, for one, needs to know many things about us for different purposes, and normal daily life entails that we are seen and leave both physical and digital traces.

Do we view privacy as a human right that, as such, cannot be traded by the person concerned, as is the common position in Europe? Or do we treat it as a commodity that can be sold for a discount or a 'free' service?<sup>6</sup> The internet has lured us into the second, U.S. approach. Most of us use one

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3 WARREN and BRANDEIS 1890.

4 See, among others, ROSEN 2012 and AMBROSE 2013. And of course Case C-131/12, *Google Spain*, [2014].

5 WESTIN 1968, at p. 7.

6 PRINS 2006.

or more social media to keep in touch with our network of friends and acquaintances, and to 'meet' new people. We accept (or cannot be bothered to refuse or delete) cookies that keep track of our online behaviour. We have allowed ourselves be persuaded to use loyalty cards in order to obtain discounts. We carry various items that have an RFID chip<sup>7</sup> and most of us have a smartphone. Without too much exaggeration, we can be said to live in a 'surveillance society', where governments and private companies can keep track of everything we do. This, of course, raises concerns, also for the exercise of the right to freedom of expression.<sup>8</sup>

In theory, we have given permission to collect and process all of this 'data exhaust',<sup>9</sup> by agreeing to privacy policies and accepting bulky general terms and conditions. Even if we cannot be bothered to read everything and thus give blanket permission for things that we cannot oversee, we are still responsible for having taken the risk of clicking 'I agree'.

Some of us may feel that we have 'nothing to hide'<sup>10</sup> and may welcome any 'enhancement of our user-experience' by our personal data being shared by 'selected business partners'. What is wrong with that? On the internet, there is no privacy, so get over it.<sup>11</sup> Privacy is an old-fashioned notion, for old people and nerds who do not know how to have fun. Privacy advocates sometimes have difficulty in avoiding a paternalistic tone: I know you do not do so, but you really should care about your informational privacy.

However, privacy is not about hiding things that one may find embarrassing or that may be used against us. The question is not what you want to hide, but what you want others to know about you. If someone asked me what I had for breakfast this morning, my reaction would be: why are you asking? Why do you want to know? Really, it is none of your business!

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7 RFID stands for: Radio Frequency Identification. RFID chips are tiny chips that may be part of various items, and that have a unique identification (thereby possibly identifying the user carrying them).

8 LARUE, F., 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression', UN Doc. A/HRC/17/27, at paras. 78-99.

9 MAYER-SCHÖNBERGER and CUKIER 2013, at p. 113.

10 SOLOVE, 2007.

11 Quote attributed to Scott McNealy, see [en.wikipedia.org/wiki/Scott\\_McNealy](http://en.wikipedia.org/wiki/Scott_McNealy).

The legal implementation of informational privacy, consisting of giving (in theory) full control and thereby full responsibility to the data subject is in urgent need of reconsideration. In an age of big data, where unforeseeable secondary use of data is of crucial value, it no longer makes sense to ask data subjects for permission. Some authors suggest that the responsibility should be shifted to the data controllers. Data controllers could be asked by law to be transparent and accountable for the use they make of personal information, and, crucially, data subjects should have the possibility of disproving any automated conclusion that affects them.<sup>12</sup> The upcoming revision of the EU data protection directive<sup>13</sup> is a good opportunity to rethink the European approach to informational privacy.

### 3. Freedom of expression

Freedom of expression is sometimes considered as the cornerstone of modern democracy. Democracy presupposes the ability to make well-informed choices, which requires free access to information, the press living up to its role as a public watchdog, and an open, uncensored, unrestricted public debate. The UN Special Rapporteur on freedom of expression Frank LaRue noted: 'The right to freedom of opinion and expression is as much a fundamental right on its own accord as it is an 'enabler' of other rights, including economic, social and cultural rights, such as the right to education and the right to take part in cultural life and to enjoy the benefits of scientific progress and its applications, as well as civil and political rights, such as the rights to freedom of association and assembly. Thus, by acting as a catalyst for individuals to exercise their right to freedom of opinion and expression, the Internet also facilitates the realization of a range of other human rights.'<sup>14</sup> Again, there is a fundamental difference in approach across the Atlantic. The US embraces the free marketplace as an ideal model, allowing for few

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12 MAYER-SCHÖNBERGER and CUKIER 2013, at p. 171.

13 See Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) COM(2012) 11 final.

14 LARUE, F., 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression', UN Doc. A/HRC/17/27, at para. 22.



restrictions to its cherished First Amendment. The idea is that ‘wrong’ expressions are best rebutted in an open discussion, rather than being repressed by criminalizing them. The European approach emphasizes that freedom inevitably comes with responsibility. Some expressions are so harmful to exhaustively listed interests<sup>15</sup> that democratic societies need to proscribe them by law, such as hate speech and child pornography.

It is commonly accepted that sovereign states have the authority to regulate speech that can be accessed from their territory. But how can one find the author of criminal speech? And how can one enforce one’s regulations even if the author can be traced? If the author finds himself in another jurisdiction where whatever he wrote is not considered to be a criminal offence (as may easily happen), then extraterritorial enforcement comes down to the export of norms. This is called a ‘spill-over effect’, and in the context of freedom of expression a successful export of restrictions is taken to result in a ‘chilling effect’.<sup>16</sup> An inability to enforce a state’s legitimate regulations makes the state effectively powerless, thus eroding its sovereignty.

On a more positive note, the opportunities that internet communication opens up for standing up against a repressive government are extremely valuable. Internet communication contributed to the so-called Arab Spring and enabled protesters to inform the rest of the world on what was going on.<sup>17</sup> The empowerment of individuals and minorities is one of the good things that the internet brings. Not necessarily, though, as the well-known Chinese internet-censoring practices show.<sup>18</sup>

The internet enables people to speak their minds, including making (true or false) accusations, using abusive language and bullying. If such cases reach the courts, usually the defendant’s right to freedom of expression has to be weighed against the plaintiff’s right to privacy and a good reputation. In such cases of conflicting rights, the fact that one right outweighs the other inevitably means that, in that particular case, the ‘losing’ right is restricted.

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15 Enumerated in the second paragraph of Art. 10 ECHR.

16 See [www.chillingeffects.org](http://www.chillingeffects.org), a website ‘monitoring the legal climate for internet activity’.

17 See, among others, HOWARD et al. 2011.

18 See, among others, MACKINNON 2008.

#### 4. Equality

The famous cartoon referred to in the title strikingly illustrates the fact that users on the internet cannot only be anonymous, but also their location, sex, age, physical characteristics etc. can be unknown. This means that internet users have the opportunity to free themselves from some of the constraints they experience in everyday life, such as their location, sex, age and physical characteristics: empowerment, liberation and also equality in an unprecedented sense. An elderly, homosexual, shy, overweight American male can present himself in social interactions online (virtual worlds, online communities) as a young, ambitious Lithuanian businesswoman-to-be. In this sense, internet users are equal, and equally free.

The downside of an unfettered, anonymous freedom of expression is that some people may become defenceless victims of very serious forms of harassment, identity fraud and false accusations. These victims may rightly be called the 'outlaws' of modern times, as the law cannot effectively protect them.<sup>19</sup> Some people are worse than dogs, 'homo homini lupus', and apparently this dark side of humans easily surfaces when they feel outside the reach of law enforcement.

Not every person on the planet has internet access, and not everybody who does have access is tech-savvy enough to make optimal use of it. This so-called 'digital divide' creates a new inequality, between new 'haves' and 'have nots'.<sup>20</sup> Those with no effective internet access may with good reason feel excluded, not just from niceties and extras, but also from basic facilities that are required in modern life. Maybe a right to internet access, just like a right to education, work, health-care, etc. should be acknowledged as a new human right?<sup>21</sup>

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19 Very disturbing examples are the cases of Amanda Todd (see [www.foxnews.com/world/2012/10/12/canadian-teen-found-dead-weeks-after-posting-wrenching-youtube-video-detailing/](http://www.foxnews.com/world/2012/10/12/canadian-teen-found-dead-weeks-after-posting-wrenching-youtube-video-detailing/)) and in the Netherlands the case of 'Freek' (see [mijnkindonline.nl/freek/english](http://mijnkindonline.nl/freek/english)).

20 See, among others, NORRIS 2001.

21 See on this issue, among others: BEST 2004 and CERF 2012.

## 5. Conclusion

Even if my cat enjoys playing a mouse game on the iPad, dogs can be chipped and tracked, and cows are fed and milked by automated systems, the use of the internet is reserved for humans (possibly through the use of software agents or bots). '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.'<sup>22</sup> The challenge for the law is to make this true in an environment of anonymous, global communication. Hopefully, this brief overview of some issues suffices to show that it is far from clear how human rights protection on the internet could be realised. We need a fundamental rethinking of what exactly these rights mean and how they can be enjoyed or enforced in a society where technology is everywhere. And this rethinking is a task for legal scholarship. Let's do it!

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22 Article 1 UDHR.

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## Part IV

Equality and human rights:  
how they may come about in practice



# The roots of Dutch strategic human rights litigation: comparing ‘Engel’ to ‘SGP’

Wibo van Rossum

## 1. Individuals and institutions are needed to make law work

It is a socio-legal truism that the law in itself cannot achieve anything. The law and thus also human rights law needs actors to mobilize it, and those actors most of the time need institutional embedding, and are helped by (some) moral support from and upcoming new ideas in society. The role of individual actors in the mobilization of the law should not be overestimated, yet they cannot be left out of theorizing about changes in law and society, since individual actors indeed ‘pull’ or ‘push’ the law in a certain direction.<sup>1</sup> Yet again, as single individuals they can achieve nothing if they do not make use of the (sometimes rudimentary) organizations and institutions that are already there. New ideas in society, a hint of changing norms, or indignation over people who appear to be ‘unnecessary victims’ of one thing or another, are helpful support. An actor can ‘row upstream’ and against dominant discourse in society, but this is only possible if the system is principally open to the critique that (even radically) different views on ‘reality’ and ‘truth’ are possible.<sup>2</sup>

Titia Loenen has always had an interest in the problematic aspects of and the tensions that exist between law and society. In the few years I worked with her, we developed research on the advantages and disadvantages of

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1 The Dutch and Flemish journal for socio-legal studies *Recht der Werkelijkheid* (‘Reality’s Law’) recently devoted a special issue to ‘The Actor as a Factor in the Development of Law’ (*De actor als factor in de rechtsontwikkeling*, 2013 no. 3). It has articles devoted to, for example, Raphael Lemkin and his involvement in the introduction of the concept of genocide, Beate Sirota’s involvement in gender equality in Japan, Eddie Mabo in indigenous land rights in Australia, and Hugo Sinzheimer in collective agreements in labour law.

2 See FOQUÉ and ’T HART 1990.

'framing' multicultural issues in terms of human rights.<sup>3</sup> Human rights law may be strategically used or evaded by actors, and may have desirable legal consequences but undesirable social consequences (or the other way around). Human rights law may find fertile ground in the dominant discourse in society, but at the same time may backfire on ethnic or religious minorities that may be labelled as 'backward', for example when they 'lack' the ideal of gender equality. All these strategic and problematic aspects of mobilizing human rights law came to the fore in the much-debated case of the SGP, the political party that held as one of their rules that women should not be allowed to stand for election for public office. Titia Loenen defended the decision of the Dutch Supreme Court on principled grounds.<sup>4</sup> Most interesting for my research, however, focusing on actors in the legal process, is that she also discussed briefly the role of 'outsiders' in the SGP debate, especially the Stichting Proefprocessenfonds Clara Wichmann that (together with other organizations) initiated the case. The Stichting Proefprocessenfonds Clara Wichmann is a privately funded organisation that aims to improve the legal and social position of women. To that end it provides financial guarantees for people going to court, and it wants to influence the legal and law-making process in a broad sense, as well as public opinion.<sup>5</sup> In her article on the SGP case Titia counters arguments against the 'interference of outsiders', and she does so with the help of empirical research that shows that consensus among SGP women does not exist and that SGP women who want to change things from the inside out have a hard time when they do try, and they meet resistance from conservative forces in their community. At the same time Titia stresses the fact that the treatment of women within SGP circles has 'gendered repercussions' in society at large. Both arguments show the need for activist lawyers and supporting organizations to develop law.<sup>6</sup> This may

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3 See the special issue in the *Utrecht Law Review*, LOENEN, VAN ROSSUM and TIGCHELAAR 2010 and VAN ROSSUM 2012.

4 The Supreme Court (HR 9 April 2010, ECLI:NL:PHR:2010:BK4549) stated that the SGP violated the Dutch Constitution and several treaties. See also LOENEN 2010. On 10 July 2012 the European Court declared the application of the SGP inadmissible.

5 See [www.clara-wichmann.nl](http://www.clara-wichmann.nl).

6 I presume that 'enemies' of human rights law are needed as well, to prevent possible derailment. See LARSON, VAN ROSSUM and SCHMIDT 2014.



seem obvious, but it is not. In this contribution I want to reflect on this role of actors, institutions and social ideas in developing human rights law by describing the process that led to the very first case against the Netherlands at the European Court of Human Rights (ECtHR or the Court): the Engel case.<sup>7</sup> The underlying question in the Engel case was whether conscript soldiers could fully invoke human rights, especially the fair trial principle; in other words: whether conscript soldiers are legally equal to other human beings. Apart from this central question, the case just as importantly gives insights into the role of activist lawyers, their supporters, and dominant views in society.

## 2. **Alkema, Van der Schans, and the construction of ‘Engel’**

The European Convention on Human Rights (ECHR) was adopted in 1950 and ratified by the Netherlands in 1954. The Court has functioned since 1959, and already in 1960 the Netherlands recognized the right of individuals to complain to the Court. The interesting thing is that it took rather a long time before cases were actually brought before the Court. The first case was in 1961, and it took another fifteen years for the first case against the Netherlands. Why did the ‘human rights arguments’ take so long to develop (see table 1 for the cases up until 1990; the Netherlands had eleven cases in this period)? We can find part of the answers in the context of the Engel case.

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7 ECtHR, *Engel and others v. the Netherlands*, 8 June 1976, (Appl.nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72). Actually five applicants had lodged their application with the Commission in 1971, namely Cornelis J.M. Engel, Peter van der Wiel, Gerrit Jan de Wit, Johannes C. Dona and Willem A.C. Schul.

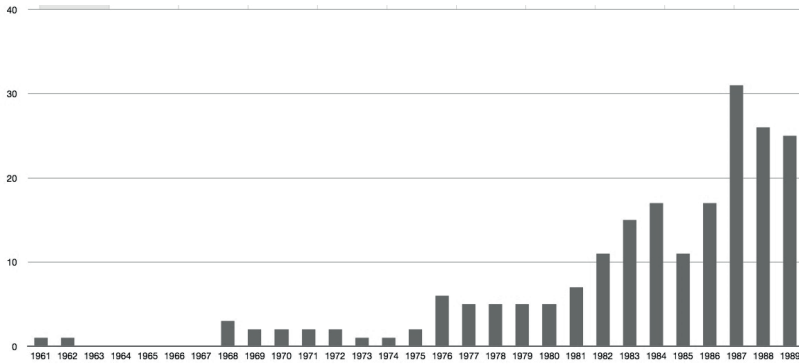


Table 1

The Engel case resulted in a condemnation on 8 June 1976. The procedure in the military courts ‘behind closed doors’ was said to violate the fair trial principle (Article 6 ECHR), and some disciplinary sanctions did not meet the requirements of being meted out by a judicial official (Article 5 ECHR).<sup>8</sup> On several occasions in 1970 and 1971 the soldiers had had penalties meted out to them by commanding officers. Engel, for example, had pretended to be ill but in the meantime went to a meeting of the VVDM (Vereniging van Dienstplichtige Militairen, Conscript Servicemen’s Association), a very critical (towards the state) association that had as its main goal the liberation and emancipation of conscript soldiers. Others were late for duty or had driven an army vehicle irresponsibly, or had written and distributed a critical article about high-ranking officers. Higher-ranked officers decided on sanctions ranging from ‘light arrest’ to ‘aggravated arrest’ with additionally ‘committal to a disciplinary unit’. The applicants had all appealed to the complaints officer and finally to the Supreme Military Court which in substance confirmed the original decisions.

8 Article 14 on the prohibition of discrimination hardly ever figures prominently in human rights cases. This is because the anti-discrimination principle could only be used to ‘back up’ claims on substantive rights based on other articles of the Convention (see DE VRIES 2013, especially chapter 8). Recently ‘Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms’ of 4 November 2000 provides for a general prohibition of discrimination.

Their applications to the European Commission of Human Rights in 1971 were based on the allegations that the state had violated Article 5 (impartial tribunal, the right of liberty and security of the person) and Article 6 (fair trial). Until 1999 the Commission was an intermediary between complaining individuals and the Court. The Commission would hear cases and then decide to reject the complaint or to bring the case before the Court. The Commission joined the separate complaints of the five applicants, and referred the case to the Court in October 1974. The oral hearings were held a year later. The Court found that most forms of disciplinary sanctions remained 'more or less, within the ordinary framework of their army life'. Some sanctions, however, amounted to a violation of Article 5 because they did not serve 'the purpose of bringing him before the competent legal authority' and exceeded the time allowed in the Military Discipline Act. As regards Article 6, the Court found that *some* of the disciplinary sanctions meted out could be said to lie within the criminal sphere, and this meant that the procedure in the Military Court should have been public, and not 'in camera' as it was. The Netherlands was in violation of the Convention. Engel was offered a 'token indemnity' of 100 Dutch Guilders, in accordance with his claim for a purely symbolic compensation.

'Military disciplinary law deemed contrary to human rights' and 'Human rights also valid in the military' were some of the headlines in the newspapers after the Court decision.<sup>9</sup> Earlier the VVDM had already reported on the Court session in its journal called *Twintig* (Twenty) of 11 November 1975 under the headline 'The state in the dock'. But even though the headlines were quite bold, the articles substantively concluded that the violations only regarded minor issues and were easy to repair by a minor change in the law. At first sight, one may think that the conscript soldiers involved were hardliners fighting for an acceptable legal position. Up to a certain level this is true. However, below that anti-authoritative atmosphere of the emancipatory 1970s were other, legal forces at work. One of the main characters was Evert

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9 NRC 18 and 19 June 1976.

Alkema, who turned out to be the 'hidden driving force' behind the Engel case.<sup>10</sup>

Evert Alkema had studied law in Groningen and started working in Leiden at the European Institute of the university in 1966.<sup>11</sup> In that institute he had to work on the 'leftovers' from his colleagues, which basically amounted to him studying human rights and the rest of the world outside Europe. He became a specialist in the European Convention and, among others, had contact with the Dutch judge at the European Court at that time, Van Asbeck. Van Asbeck wanted to promote the Convention but as a judge had never had a case. According to Alkema, the Commission was the biggest hurdle to overcome, in general but also in the Engel case.<sup>12</sup>

Alkema: So we had to get past the Commission. We needed to get the system going. And after the Commission, onwards to the Court, preferably with a case that would lead to the Court's finding of a violation. But that case also needed to be deemed 'acceptable' by the state. This was my strategy: I was looking for cases that would get past the Commission, that would amount to a violation of the Convention, and that the state would be willing to accept and repair. So that you would not have too much resistance from the sovereign state in Strasbourg. The Engel case was a good case.<sup>13</sup> There was some commotion in the news [about conscript soldiers that were 'wrongfully punished'; WvR] that originated with the VVDM. The then minister of the justice department Van Agt also had the idea that things needed to change. I contacted the president of the VVDM and suggested to him to take action. That is what he did. He called on the conscript soldiers to report disciplinary sanctions to him, he collected them, and contacted the lawyer Van der Schans whom they already knew. I also called a Member of Parliament whom I knew and asked him to put the issue on the parliamentary agenda for debate. I

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10 While writing, I learned that Evert Alkema was one of the supervisors of Titia Loenen's PhD research.

11 I interviewed Evert Alkema about his role in the development of human rights in the Netherlands on 30 November 2011.

12 Apparently at one moment in the 1970s the judges of the Court complained publicly that the Commission allowed too few cases to pass through.

13 Another good case was ECtHR, *X and Y v. The Netherlands*, 26 March 1985 (Appl.no. 8978/80), which came about in more or less the same vein.

instructed him how to push the minister in order to make him submit that the Dutch government would not resist if the Commission would accept the complaint. The minister gave the right answer and I took care that that answer eventually arrived with the Commission, because then the Commission had one argument less to consider. And then we went to Strasbourg!

The Engel case was thus carefully constructed or maybe one should say ‘orchestrated’ by the academia, more specifically by one academic.<sup>14</sup> He sensed how to play the game and get past the difficult posts. The advantage was that the lawyer Enno van der Schans was involved.<sup>15</sup> He knew the VVDM from the inside out. He had studied law and then fulfilled his duty as a conscript soldier. He was idealistic and not an anti-authoritarian activist, as he said himself. He became very active in the VVDM by helping find legal ways to improve the inferior position of soldiers. Soldiers sometimes refused to follow orders, their hair was too long, and their public writings encouraged resistance so they met with interference from the authorities etcetera. In the legal commission of the VVDM, the idea came up that it should not be allowed to treat soldiers differently from ordinary human beings. Van der Schans:

Human rights were not yet ‘alive’ in society. The Netherlands had not yet discovered them. But in that Commission we had an eye on Strasbourg. There were contacts between our head Reintjes and Bergamin who worked in Rotterdam and Alkema in Leiden. Alkema was very young then but he stood behind us and helped us. They decided to collect some cases for a pilot case for the European Court. In 1970 my conscript duty was done and I started a career as an idealist lawyer in a rather large, liberal law

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14 Academic life and legal practice with some people are intermingled. For example, the later European Court judge Egbert Myjer (2004-2012) first worked at Leiden University in the criminal law department, while he was inspired by his Utrecht law professor Toon Peters who put much stress on the humane character of law and the need for human rights. Myjer left academia in 1979 to work at the judges’ academy and as a part-time judge in Zutphen. From 1981 he was a full-time judge and from 1991 worked full time at the public prosecution office. As a judge in Zutphen he had acquired the nickname ‘The Supreme Court of Zutphen’. In the meantime he was also appointed endowed human rights professor at the Free University in Amsterdam (in 2000).

15 I interviewed Enno van der Schans about his role in the Engel case on 1 September 2011.

firm. I still had contact with the VVDM so that is probably why they contacted me in 1972 and asked me to take this case. Reintjes had started it in 1971 and 1972 with the Commission, but they said that this needed to be done by a lawyer. I needed to think for some time because all I dealt with was criminal law, divorce, and contracts. But my idealism said to go ahead. After all I had also initiated, together with a small group of young lawyers, the first 'piket service', which entailed giving legal aid to suspects as early as possible at the police station. I went to Leiden to talk to Alkema, and I spent days at the European Institute in Amsterdam to study. Fortunately my employer supported me. They could not help me but they gave me all the space I needed because I continued to deal with my ordinary cases well.

Of course the type of case – conscript military pushing against traditional authorities and working on emancipation – is typically a sign of the times. The revolt from below in the 1960s had resulted in a liberal atmosphere where the 'old' had to be done away with and the 'new' was in fashion. 'Power to imagination' was the most radical of the slogans in those days. Developing human rights law and getting it on the agenda was part of the movement, because human rights could be a 'partner' in the liberation and emancipation of minorities and sub-cultural groups. Still, the Engel cases were selected due to their reasonableness. If they had been too extreme, the Dutch government would have probably shown opposition. It is interesting what Alkema says about this period and about how the game was played, especially when keeping in mind that the SGP case was completely the opposite:

We did not have a fight with the Dutch government! We needed to get the system going and we needed the cooperation of the state. The government was already working on the new military law and they were just as interested as we were about what was allowed in terms of the Convention. Engel was a case that worked, because the sharp edges had already been smoothed out. I did try other cases as well, but they did not work. One of the cases I tried to get to Strasbourg was that of the

COC, the Dutch organization for gays.<sup>16</sup> At the beginning of the 1970s they wanted to change their by-laws in order to legalise the admittance of married people, who were excluded from membership. Married! In those days those by-laws had to be approved by the minister of justice and he just said, 'I will not agree to that!' The appeal was with the Crown and I said to their lawyer that he had to argue that the Administrative Litigation Division of the Council of State was not a tribunal in the sense of Article 6 of the Convention. He did not dare to do this. He said 'Mr. Alkema, I have to plead there again one day'. In the end the case did not make it to Strasbourg. The general meeting of the COC decided not to pursue the case, because they did not want to damage the liberal and gay-tolerant image of the Netherlands. 'Suppose the Netherlands would be condemned for violating the human rights of gay people', they said, 'then the progressive image of our country will be gone.'

Apart from the societal context, the right lawyer at the right time, and support from academic circles, the Commission and the Court themselves also helped in facilitating their discovery. Van der Schans, for example, mentioned that the administration in Strasbourg was very helpful in providing information, forms for legal aid, it reimbursed travel costs, and other forms of help. Members of the Commission took their time to provide information about their roles and the procedure. The Commission also made clear that they found the case important not only because it was the first case against the Netherlands, but also because it was a matter of great interest for all conscript soldiers in Europe. The Court also seemed eager to 'settle its position in Europe', said Van der Schans, and they wanted to show this 'by handling the case with all thirteen judges and not just five'. Van der Schans also said that the head clerk of the Court signalled to him that it would please the Court if he would ask permission to argue the case himself. The Court wanted to strengthen the position of the claimants by allowing them have their own lawyer. Van der Schans was officially merely an assistant with the Commission, but granting him the right to argue the case would set the procedural rules in motion. Van der Schans was also signalled to ask the Court to allow for his pleadings to be made in Dutch.

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16 See their website, available at: [www.coc.nl/engels](http://www.coc.nl/engels).

For the hearing in Strasbourg, Van der Schans asked Alkema to join him. He also managed to persuade the five ex-soldiers to come to Strasbourg too. 'They were on the front row. The Court asked me all kinds of detailed questions about who had said what and how much pressure had been exerted on the soldiers. I could ask them during a break and so directly had the answers.'<sup>17</sup> Alkema recalled that the soldiers held up a clenched fist to show that they still had a fighting spirit, and that despite the unruly times with the Baader-Meinhof Group and other violent movements, there were no security measures at all at the Court.

### **3. Four reflections in comparing 'Engel' to 'SGP'**

Reflecting on the role of outside actors in developing human rights law and comparing the SGP case with the Engel case, I first want to note the obvious, namely that outsiders frame a case deliberately in terms of human rights in order to achieve a further-lying goal. Ordinary, lay people most of the time just want to see 'justice being done', while outsiders also use the case to reach specific purposes. Sometimes we may suspect that the 'state' as an actor is more or less complicit: there may be a state interest not to resist or even to cooperate. Ordinary people like Engel and his colleagues were put on a stage in order to function as a battering ram to change the situation for a whole group, including those in the rest of Europe.<sup>18</sup> Not Engel himself, but Alkema had set the case in motion. The SGP case was similarly constructed by outsiders. Their goal was not only to change the by-laws of the SGP, but also the position of women in society in general. The idea with this was, according to Titia Loenen, that women in general are affected even if only a small group is excluded from some functions in a political party. It will probably lead to women being excluded from local politics where the SGP

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17 Note that the case was constructed by legal professionals, and that the soldiers themselves – even if the case bears their name – were hardly involved. See for that same mechanism of legal professionals 'juridifying' social conflicts in order to get them to the Supreme Court, BRUINSMA 2010.

18 Alkema for example said that at the court session certain people from Switzerland were extensively taking notes and back home quickly worked on bringing the law into line with the European Convention.



has a strong voice, and it might even work as a signal to society at large that gender equality is not always a very serious principle after all.<sup>19</sup>

Second, mobilizing human rights law sometimes needs specialists and academics who see it as their task to further the development of human rights and who keep track of interesting discussions in the media. When they know there is a possibility to push a door open and to make a change, they will organize people and suggest making a case out of it. If necessary, their network is put to use to get media coverage and questions asked in Parliament. This is true not only of human rights law, but of every law that aims to change social structures and values, like, for example, laws on the equal treatment of men and women, the inclusion of minorities, but also the protection of the environment.<sup>20</sup> The Engel case is one of the first Dutch examples in human rights law of what is usually called ‘cause lawyering’, ‘strategic litigation’ or ‘public interest litigation’, that has today become a well-known practice and strategy.<sup>21</sup>

Third, the use of human rights law needs ‘the right time’. Without the emancipatory and flower-power youth movement in the 1960s and the ‘anti-authoritarian winds of change’, changing the status of subordinate groups like conscript soldiers would not have become such an issue at the time. The state realized this too and was willing to go along, even though not too quickly. A comparison with today’s times, however, is tricky. The idea and relevance of human rights seems to be fully settled and accepted, but at the same time their scope and preferred impact on national law and policy is contested. Moreover, people are aware of the fact that rights may conflict, and that in balancing them political ideas seep through. It is not very clear, therefore, that the ‘times were right’ for the SGP case. In fact there was a lot of opposition against bringing the case to court. As Titia Loenen and others

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19 LOENEN 2010, at p. 2273.

20 See for example the Gender Equality Network of the European Commission (available at: [www.uu.nl/faculty/leg/EN/organisation/schools/schooloflaw/organisation/departments/europa/institute/gender/Pages/default.aspx](http://www.uu.nl/faculty/leg/EN/organisation/schools/schooloflaw/organisation/departments/europa/institute/gender/Pages/default.aspx) and [ec.europa.eu/justice/gender-equality/index\\_en.htm](http://ec.europa.eu/justice/gender-equality/index_en.htm)) and the European Network against Racism (available at: [enar-eu.org](http://enar-eu.org)).

21 See for example SARAT and SCHEINGOLD 1998, and the recent initiative by the Dutch Section of the International Commission of Jurists (NJCM) to start the ‘Public Interest Litigation Project’ (available at: [pilpnjcm.nl/over-pilp/](http://pilpnjcm.nl/over-pilp/)). An internet search using the terms ‘cause lawyering’ or ‘strategic/public litigation’ also renders many interesting active organizations in this field.

made clear, there was discussion over whether playing it the 'legal way' was the right way, whether the effect of 'juridifying' this 'essentially political and religious issue' could be the alienation of a traditional minority from the Dutch political landscape, and also whether the liberal and emancipatory principles of the Enlightenment were being used as a fundamentalist stick with which to beat religious minorities. As a matter of fact, orthodox religious communities do complain about anti-religious sentiment, which is shown in discussions on ritual slaughter, the access of openly homosexual teachers to religious schools, vaccination in religious communities, and civil servants refusing to conclude same-sex marriages.<sup>22</sup> It may well be that the dominant discourse in society today favours equality over religious freedom, which may have been supportive for the SGP case in the background. Support, however, was not as clear-cut as in the 1970s for the conscript soldiers' case. Fourth, the Court as a social institution in the 1970s helped in promoting its own discovery by showing a great willingness to help. The administration provided documents on legal aid and the reimbursement of travel costs, and all kinds of information on procedure. The Head Court clerk even took the time to convene with Van der Schans about his expectations and about what he should request in order to further the procedural rules of the Court. The friendlier the Court shows itself, the more willing lawyers are to take the next steps, and the more it attracts attention. This is one thing that has really changed in the times of the SGP case. Recently, both the Supreme Court of the Netherlands and the ECtHR were given new procedural rules in order to be able to deal with their overwhelming popularity. The roots of the Engel case have apparently grown into a dense bush in SGP times. Outsiders are therefore still needed: no longer to get human rights law going, but to help push through the bushes of procedural rules that in some cases may hinder access to the court.

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22 There is an abundance of Dutch legal literature on these topics, but the perspective of religious minorities themselves is mostly absent. See for an exception for example OOMEN, GUIJT and PLOEG 2010. The 'anti-religious atmosphere' might be overstated, since in a recent survey Christians hardly reported any discrimination because of their religious conviction (while Muslims did). See ANDRIESEN, FERNEE and WITTEBROOD 2014, at p. 76.

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# Rights and the city: does the localization of human rights contribute to equality?

Barbara Oomen

## 1. Introduction

One interesting new development in human rights law is the explicit local engagement with international human rights.<sup>1</sup> The city of San Francisco, for instance, passed a CEDAW ordinance in 1998 promoting the equitable treatment of all persons by the city government.<sup>2</sup> As a result, labour conditions for women improved and streets were made safer.<sup>3</sup> Other American cities, like Portland, Oregon and Berkeley California, have followed suit.<sup>4</sup> A part of the rationale behind these developments is to stimulate nation states to ratify unratified treaties, as is the case with the CEDAW in the United States. An important reason, however, is a desire to strengthen the meaning of international human rights at the local level.<sup>5</sup>

In line with Professor Loenen's long-standing interest in the practice of human rights law, this note will sketch how local authorities increasingly engage with international human rights to subsequently explore the relationship between the localization of human rights and equal treatment. Here, it is necessary to first give a brief overview of the increasing relevance of international human rights at the local level in general, and to offer specific Dutch examples pertaining to the UN Convention on the Rights of Persons

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1 This note is based on ongoing research into human rights and the city. The research has been funded by the Interuniversity Attraction Poles Programme initiated by the Belgian Science Policy Office, more specifically the IAP 'The Global Challenge of Human Rights Integration: Towards a Users' Perspective' ([www.hrintegration.be](http://www.hrintegration.be)) and Platform31/Nicis.

2 With this ordinance, the city expressed commitment to realize the CEDAW rights at the municipal level and put in place a number of measures to achieve this. LOZNER 2004; WEXLER 2006.

3 SINGH 2005, at p. 547.

4 SOOHOO, ALBISA and DAVIS 2007.

5 OOMEN and BAIMGARTEL Forthcoming.

with Disabilities (CRPD). This, then, forms the basis for an assessment of the extent to which such developments strengthen equal treatment.

Before this, however, it is necessary to dedicate a few words to the interrelationship between human rights and equal treatment, and their institutional rapprochement. The complex relationship between human rights in general, and equal treatment in particular, has often been explored.<sup>6</sup> Equality, like human dignity, is one of the pillars of the entire human rights system. As such, it is connected to all other rights. This is in line with the approach, for instance, initially taken in the European Convention on Human Rights, in which Article 14 prohibits discrimination with respect to the rights and freedoms in the Convention.<sup>7</sup> Similarly, virtually every human rights treaty includes a specific non-discrimination clause, as does the Universal Declaration of Human Rights. Over the years, the principle of equal treatment and the right to non-discrimination have increasingly grown into independent rights.<sup>8</sup>

The crowning glory of this development in the Netherlands was the inclusion of a non-discrimination clause as Article 1 of the Dutch Constitution of 1983, its specification in the Equal Treatment Act and its institutionalization with an Equal Treatment Commission, causing some observers to speak of a 'super-right'.<sup>9</sup> Over the years, however, there seems to have been a tendency to institutionally reconnect equal treatment and other human rights. The Dutch Constitutional Review Commission, for instance, proposed to commence the Constitution with a general provision stating, amongst other things, that the government respects and guarantees human dignity, fundamental rights and fundamental legal principles.<sup>10</sup> The Equal Treatment Commission became a general National Human Rights Institution in 2012. It could well be that, in the foreseeable future, local anti-discrimination

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6 See, for instance, HIRSCH BALLIN 2009.

7 It has been long-standing case law that Art. 14 can also be infringed when there has not been a substantive breach of another Convention article, cf. ECtHR, *Relating to certain aspects of the laws on the use of languages in education in Belgium v. Belgium*, 23 July 1968 (Appl.no. 2126/64).

8 LOENEN and RODRIGUES 1999.

9 VAN BERKUM 2002.

10 STAATSCOMMISSIE GRONDWET 2010, at p. 40. It is not yet clear whether, and how, the Dutch government has indicated that it will follow this proposal. See, for instance, *Kamerstukken I* 2013/14, 31570, I. and *Kamerstukken I* 2013/14, 31570, J.

bureaus will also be transformed to include attention for all human rights. Whereas there are no explicit policy proposals to this effect, this would be in line with the increase in the explicit local engagement with human rights to be discussed in the following sections.

## 2. Rights and the city

Out of all the actors that can play a role in implementing human rights, local authorities are a surprising new ‘kid on the block’. After scholarly and policy emphasis on the role of NGOs, businesses and other non-state actors in rights implementation, there is an increased recognition at both the international and the local level of the potential that explicit attention to human rights at this local level holds for their realization. The Congress of Local and Regional Authorities of the Council of Europe, for instance, passed a resolution on the local and regional implementation of human rights in 2010, emphasizing how ‘The state as a whole is not the only guarantor of human rights. Local and regional authorities also deal with human rights issues on an everyday basis and politicians and civil servants at the local or regional level are closer to citizens’ everyday needs.’<sup>11</sup> The EU Fundamental Rights Agency, in turn, issued a toolkit on implementing human rights at the local level. Teaming up with local actors allows international bodies to bypass nation states and to work directly with those authorities that, as a result of decentralization policies, are more and more often in a position to directly realize these rights. Cities, in turn, engage with human rights in a variety of ways and for a variety of reasons. Some of them, as described above, symbolically ratify a specific human rights charter or pass a local ordinance to this extent. Chicago, to give one example, passed a resolution in which the city council resolved to take the Convention on the Rights of the Child as a basis for its policy-making, just like Graz is an active member of ECCAR, the European Coalition of Cities against Racism that works towards the implementation of CERD.<sup>12</sup> Other cities adopt the label of being a ‘human rights city’ and

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11 CG 18(6), 2010, The role of local and regional authorities in the implementation of human rights, at para. 79.

12 The Convention on the Elimination of All forms of Racial Discrimination. On Chicago, and other US examples, see: THE HUMAN RIGHTS AT HOME CAMPAIGN 2012.

engage with the whole catalogue of international human rights. Utrecht, for instance, wrote a policy report in which it compared ten policy fields, dealing with topics ranging from poverty to gay rights, with treaty obligations in the fields concerned.<sup>13</sup> In some cases the development is strongly NGO-driven, and follows the methodology of the People's Decade on Human Rights Education (PDHRE) in setting up a human rights council with all stakeholders as a first step.<sup>14</sup> Cities often also take the step of signing the European Charter for the Safeguarding of Human Rights in the City.<sup>15</sup> In terms of the practical implementation of the commitments there are cities with human rights commissions, but also with human rights budgeting or another form of monitoring.<sup>16</sup>

Urban actors propose a variety of reasons for turning towards human rights. For one thing, they consider human rights to be a promising, inclusive standard on which to base urban policies.<sup>17</sup> They also find, in human rights, a discursive umbrella under which to unite a variety of actors and interests.<sup>18</sup> Another motivation for explicit local engagement with international human rights can be that reference to international obligations strengthens the local position in deviating from national policies, for instance in the field of immigration law.<sup>19</sup> The Hague, for instance, refused to implement national budget cuts on domestic support for people with disabilities in referring to the European Convention on Human Rights, the European Social Charter and the CRPD.<sup>20</sup> Through an emphasis on human rights cities also access international networks, engage in city marketing, open the way to sources of funding and give their cities a more cosmopolitan appeal.

A key question in these developments is to what extent the fact that some cities, these days, explicitly engage with human rights whilst others do not contributes to equality in general and to what extent these policies exacerbate

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13 GEMEENTE UTRECHT 2011.

14 PDHRE 2007.

15 European Charter for the Safeguarding of Human Rights in the City, Adopted at St Denis, 18 May 2000, available at: [www.idhc.org/cat/documents/Carta\\_ingles.pdf](http://www.idhc.org/cat/documents/Carta_ingles.pdf).

16 VAN AARSEN et al. 2013.

17 INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY 2005; MEYER 2009.

18 MERRY et al. 2010.

19 See, for instance, HOFF, VAN AARSEN and VAN GERVEN 2013 and chapter 7 of OOMEN 2014.

20 BAATS 2013.



differences between urban and rural areas. In order to make this assessment, the following section will first focus on one case in particular.

### 3. Dutch cities and the rights of the disabled

One specific subset of rights, closely related to equal treatment in general, is that of disability rights. The Convention on the Rights of People with Disabilities, adopted in 2006, embodied the conceptual shift from a social-welfare to a rights-based approach to the rights of the disabled.<sup>21</sup> It also introduces substantive equality measures, like the obligation to make reasonable arrangements for impairment and disability-related needs. In defining disabled people as those with ‘long-term physical, mental, intellectual or sensory impairments’ States ratifying the CRPD take on the obligation to ‘promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by *all* persons with disabilities...’ (Art. 1). This has to be done by reasonable accommodation: necessary and appropriate modifications and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights (Art. 2). General principles here include respect for the inherent dignity of persons with a disability, non-discrimination, and the full and effective participation of persons with a disability in society (Art. 3). States agree to work on changing social attitudes (Art. 8) and the environment in the broadest sense (Art. 9). In addition, the Convention sets out specific obligations in the field of civil, political, social, economic and cultural rights.

Whereas States become a party to the Convention, the CRPD came about with the realization that its implementation is strongly dependent on stakeholders other than States alone.<sup>22</sup> As with many other human rights treaties, the Convention came about largely as a civil society initiative. In addition, the Convention monitoring process provides for regional engagement and stimulates cooperation with NGOs. The Dutch Coalition

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21 KAYESS and FRENCH 2008.

22 STEIN and LORD 2010.

advocating the ratification of the Convention in the Netherlands involved many stakeholders, and followed an essentially local strategy, with meetings on the meaning of the Convention in every province.<sup>23</sup> In the meeting in the province of Zeeland, for instance, a motion was adopted urging municipalities to bring their policies into line with the treaty.

All this took place before the ratification of the CRPD. Even if the Dutch government indicated that it wanted to ratify the treaty in 2012, it has still not done so.<sup>24</sup> On the contrary: in the process of decentralization and passing key tasks in the field of social support, child care and education for children with disabilities onto municipalities, the CRPD played virtually no role as a frame of reference.<sup>25</sup>

In line with the trends described above, a number of Dutch cities have explicitly taken the Convention as a basis in the implementation of changes. Zwolle and Wierden, for instance, symbolically ratified the Convention.<sup>26</sup> As part of the ratification, the municipalities organized a discussion on how to implement the CRPD locally, and decided to focus upon accessibility, awareness raising, communication, getting to know each other and demonstrating the costs of exclusion. Another municipality, Middelburg, referred to the Convention in drawing up its policies on the disabled, but also the elderly and other vulnerable people. It also put in an extra effort to enable people with (mental) disabilities to vote in referring to the Convention.<sup>27</sup> In addition, the municipality resolved to move towards inclusive education as part of a broader commitment to becoming a human rights city.<sup>28</sup> This

23 See [www.vnverdragwaarmaken.nl](http://www.vnverdragwaarmaken.nl).

24 The CRPD did lead to an amendment to the Elections Act (Kieswet) and the Equal Treatment of People with a Disability and a Chronic Disease Act (Wet Gelijke Behandeling op grond van Handicap of Chronische Ziekte), cf. Concept Wet tot uitvoering van het op 13 december 2006 te New York tot stand gekomen Verdrag inzake de rechten van personen met een handicap (Trb. 2007, 169). See for the consequences of ratification: *STUDIE- EN INFORMATIECENTRUM MENSENRECHTEN* 2012.

25 See the lack of any reference to the CRPD in the advice given by the Council of State on the Participatiewet, the Wet Maatschappelijke Ondersteuning and the Jeugdwet and the critique by, for instance, the Coalition for Inclusion on [www.vnverdragwaarmaken.nl](http://www.vnverdragwaarmaken.nl).

26 PLATFORM VG 2013.

27 Motion 10-104, 2a, 7 June 2010, on implementing the right to vote for persons with a mental disability.

28 This was decided via motion 11-143, point 22, on 7 November 2011.

entailed a visit, together with stakeholders, to Graz, in Austria, as a city in which inclusive education has largely been realized, and implementing the ‘Wet Passend Onderwijs’ (the Suitable Education Act) in the light of the CRPD obligation to progressively realize inclusive education.

#### **4. Human rights and equal treatment**

How, then, do such developments relate to the principle of equal treatment? It is clear that an explicit focus on human rights can lead to more equality *within* cities. Looking at local policies through the lens of human rights obligations and the obligation of respecting, protecting and promoting human rights can force local authorities to include the most vulnerable people in a municipality in these policies. This includes undocumented migrants, who might well suffer from the austerity of national immigration policies, but can benefit when their rights as human beings are recognized at the local level. On the other hand, a movement in which some cities become human rights cities and others do not runs the risk of contributing to inequality *between* cities. It could well be that these movements, in combination with the expansion of municipal functions in a number of social domains, leads to a situation in which the disabled, migrants, children and women, but also other minorities, are much better off in one city than they are in a neighbouring municipality, or in an urban area than in the countryside.

There is also potential, however. The fact that municipalities rally in ratifying and implementing human rights treaties can create bottom-up pressure on the national government to truly realize the rights concerned for all treaties. The process also adds to the legitimacy of human rights: instead of being ‘international’ impositions, agreed upon in Geneva or New York, they become the demands of the local population. Another distinct promise of implementing human rights at the local level is very pragmatic. Cities often comment on how difficult it is to turn abstract statements into specific realities. In doing so, however, they also give real meaning to these rights at the local level, and thus make equal treatment a reality in places in which it matters most. The road to realizing both equal treatment and human rights is, after all, not international but essentially local.

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This volume in honour of Professor Titia Loenen, upon her departure from the Utrecht School of Law, offers challenging perspectives on a number of related human rights debates, all of which are closely linked to fundamental challenges in today's world. The book consists of four parts, which represent the different angles from which the authors have looked at the core issue of this book: the close but complicated relationship between equality and human rights. Among the themes that cut across these approaches is the debate on the meaning of the universality of human rights in a 'world of conflict and diversity' (the title of the human rights research programme that Titia Loenen directed in Utrecht). A second theme deals with the relation between human rights and democracy, and between human rights and sovereignty. A recurring topic is religion and its position in human rights law as both an autonomous fundamental right (the freedom of religion) and as protection against discrimination because of beliefs. The increasing complexity of the debate itself is caused by the emergence of new human rights systems and institutions, new technologies and new concepts and this is also explored. A final theme is the shift from standard setting and monitoring to the effective implementation of both equality and (other) human rights.