



FACULTY OF LAW
Lund University

Heidi Rajamäe

Legality of a Contractual Waiver of Human Rights in the European context

Master thesis
30 credits

Professor Karol Nowak

Master's Programme in International Human Rights Law

Spring 2011

Contents

SUMMARY	1
PREFACE	2
ABBREVIATIONS	3
1 INTRODUCTION	4
1.1 Background	4
1.2 Research question and delimitations	5
1.3 Structure and methodology	6
2 THE LEGALITY OF A HUMAN RIGHT WAIVER IN THE CONTEXT OF THE CONVENTION	10
2.1 The ECtHR's test for legality of a waiver of human right	10
2.1.1 <i>The requirement of a right being waivable pursuant to the text and spirit of the Convention</i>	11
2.1.2 <i>The requirement of unambiguity of the waiver</i>	12
2.1.3 <i>The requirement of appropriate safeguards to the waiver</i>	15
2.1.4 <i>The requirement of the waiver being in compliance with the public interest</i>	18
2.2 Legality requirements to the human right waiver arising from the right to personal autonomy	21
2.2.1 <i>Legality requirements to a waiver of a right - limiting the right to personal autonomy or safeguarding enjoyment of private life or acting outside the scope of private life?</i>	22
2.2.2 <i>The requirements of Article 8 as the accompanying test for a lawful waiver</i>	25
3 THE LEGALITY OF A HUMAN RIGHT WAIVER IN PRIVATE LAW	28
3.1 State's positive obligation to protect human rights in private law and the constitutionalisation of private law	28
3.2 The private law principles and the legality of human rights waiver	30
3.2.1 <i>Freedom of contract and efficiency as private law principles reflecting the requirements for a lawful waiver arising from the right to personal autonomy</i>	31
3.2.2 <i>Security and justice as private law principles reflecting the Court's standard test for a lawful waiver</i>	33
3.3 The Court's legality test for a human rights waiver compared to the relevant domestic private law rules	34

4	THE APPLICATION OF THE LEGALITY TEST BY THE COURT TO A HUMAN RIGHT WAIVER CONDUCTED IN A PRIVATE LAW RELATIONSHIP	38
4.1	The applicability of the Court's standard in case a waiver is conducted in a civil law relationship – an exercise	38
4.1.1	<i>The circumstances of Evans case and the Court's decision.</i>	39
4.1.2	<i>The application of the Court's legality test in Evans case</i>	42
4.1.3	<i>The application of the requirements for a lawful waiver arising from Article 8 to the Evans case</i>	45
4.2	Why would the wider use of the Courts legality test be legitimate?	48
4.2.1	<i>The wider application of the standard as taking up analogy would add to the coherency and legitimacy of the Court's decisions</i>	48
4.2.2	<i>The wider use of the standard would be legitimate because the Court would be employing the consensus of the national law and practise of the states as a source of law</i>	53
5	CONCLUDING REMARKS	56
	BIBLIOGRAPHY	58
	TABLE OF CASES	61

Summary

An indication of the problematic consent in a private relationship was given by judge Pettiti in his concurring opinion in *Laskey, Jaggard and Brown v. The United Kingdom*.¹ The applicants were accused and convicted for sado-masochistic acts on themselves and on other, consenting people in private. One of the applicants' claim was that those acts were conducted by willing adult participants.² The Court solved the case by answering positively to the question whether the measure in the criminal law was necessary in a democratic society for the protection of health in the meaning of Article 8 paragraph 2.³ In his concurring opinion, judge Pettiti brought out:

The case could have been looked at differently, both in domestic law and subsequently under the Convention. Can one consider that adolescents taking part in sado-masochistic activities have given their free and informed consent where their elders have used various means of incitement, including financial reward?

The European Court of Human Rights has developed a standard of legality of a waiver of a human right. However this standard is applied only in cases a waiver has been conducted by a person in public law relationship.

If someone wishes to give up the right he is entitled to, he is not absolutely free to do so. Why should the law protect one from oneself? This thesis talks about the protection of human rights when the subject of the right wants to abandon the right. It educes the reasons why it would be important identify a human rights waiver and why it would be legitimate to address human rights waivers, whether conducted in private relationship or public law relationship, the same way.

¹*Laskey, Jaggard and Brown v. The United Kingdom*, 19 February 1997, ECtHR, no. 21627/93; 21826/93 and 21974/93.

²*Ibid.*, para. 34.

³*Ibid.*, para. 50.

Preface

I want to thank my supervisor professor Karol Nowak for the support in writing this thesis. He gave me ideas on how to tackle the research question as well as lead me to some important sources.

Abbreviations

ECHR, Convention	European Convention on Human Rights and Fundamental Freedoms
ECtHR, Court	European Court of Human Rights
DCFR	Draft Common Frame of Reference, <i>see</i> note 109

1 Introduction

1.1 Background

The international conventions prohibiting human trafficking and organ trafficking are just few examples of instruments delimiting absolute human freedom and autonomy. Humans are social beings, the exercise of personal freedom or any other human right may affect other human rights substantially.

The conflicts of human rights are becoming even more frequent and diverse as more rights are considered human rights. This paper will discuss the conflict of rights that appears when a person waives a human right. Here the conflict lies between the positive safeguards of autonomy and the exercise of the autonomy; in addition the right that is being waived is involved as much and this makes the collision of norms even more complicated.

A waiver of human right has not found a firm unitary test in the European Court of Human Rights' (ECtHR) case-law. The Court has developed a standard test for legality of waiving human rights. However, when the case concerns a waiver conducted in a private relationship, the Court, when assessing the domestic norms' compatibility with the European Convention on Human Rights and Fundamental Freedoms (ECHR), uses the necessity test and evaluates if the domestic law has stroke fair balance between rights of the individuals. In these cases the Court does not include the legality test in the reasoning. As a waiver of human rights is identifiable also where the case concerns a contractual relationship, this kind of methodology or approach may appear disappointing. It discards and does not identify the waiver of human rights; not to mention evaluate its lawfulness in the Convention's context.

The Court has developed the legality test for a human rights waiver, *because* it is important. The failure to comply with the test amounts to a violation of a right. In this thesis, I am going to argue that a standard of legality of a human rights waiver could and should be applied also when a waiver of a human right appears in a private law relationship. This kind of approach could be beneficial to the problem of colliding human freedom and human rights. It helps to understand the conflict of norms and to solve it with a unified clear approach. As a result the co-existence of waiving human rights and exercising human rights seem more sensible and we are in a

better position in assessing what the law (the domestic law) ought to be in order to comply with the Convention.

1.2 Research question and delimitations

I have concentrated my work on private law and human rights law. The research concerns the possibility of wider application of a legality test for a human right waiver developed by the ECtHR. The research question is if it would be justified to identify a human rights waiver and apply the same test of legality in where the waiver has been conducted in a private law relationship – by the way of contract.

The paper only discusses the subject in the context of Europe and the European Convention on Human Rights and Fundamental Freedoms.

This thesis stays at the surface of the waiver's legality test and its application, it is about the applicability of the test. While it does discuss the test itself, however abstains from critical analysis to it. Whether or not the test is appropriate in all circumstances or would need complementation, is not the subject of this paper. The paper also will not go in depth to the expression of free will in exceptional circumstances, *e.g.* when a right is waived by a mentally disabled person. These limitations are needed due to the limited scope of the paper and also in order to keep the discussion on the main research question coherent.

I try to answer the research question by analysing the requirements to a lawful waiver in the Convention's context. In addition to the Court's legality test, I deduce the requirements of the lawfulness of a waiver from the safeguards of personal freedom – the requirements arising from Article 8 of the Convention. I will discuss how the personal autonomy as a freedom and the state's positive obligations therein interact and set legality requirements for waiving human rights.

The waiver of a right in a private relationship is mostly conducted in return for a compensation. Be it money, a service, the improvement of another human right or something else. This thesis touches upon the subject only with regard to safeguards of a waiver. It will not provide a thorough analysis of the compensatory schemes in return for waiving a human right and their appropriateness or legality. There will be no detailed discussion as to the balancing human rights, the thesis is focused on the justification of a wider application of identifying and assessing the legality of a human right waiver as a method of solving the conflict of rights.

I have taken a case whereby a waiver of human rights is conducted in a private law relationship as an example from the "other end" of cases concerning waiver of a human right one could think of – that is in relation to a waiver conducted in a public law relationship. I deal with a human rights waiver in private law in the context of contractual obligations, not tort law for waiving a right is by nature an expression of a will, to which the law of contractual obligations is generally applicable and not tort law. Family law or patrimonial law or other specific areas of private law are not covered in this paper. The purpose of this thesis is to point to a general suggestion, not to provide a thorough catalogue of cases where the test is appropriate to use. Therefore, I deal with no possible exceptions to the general rule.

The private law perspective in the analysis turned out to be important as the Court's legality test appears to be analogous to the legal reasoning in private law. While it is possible that other areas (for instance, philosophy of law) would have added to the discussion, they are avoided in order to keep clear focus on the legal reasoning. Therefore, the tackling of the research question from other perspectives – including philosophical – is also left for another research.

1.3 Structure and methodology

Overall, hardly anything has been written on human rights waivers in particular.⁴ I would speculate it is due to tendency to solve conflicts of human rights by balancing them in individual cases rather than identifying the waiver of human rights therein and looking at the conflict from that perspective.

I began my work in search for the case law of the ECtHR and found that actually a legality test for a human rights waiver has been established by the Court. When I found out that the test is only applied in cases concerning procedural rights, I further looked for reasons why this is so. I did not find any answers in the case-law of the Court; the case-law also does not explicitly outrule that the test is applicable to other than procedural rights. Most of the Court's caseload consists of applications concerning procedural rights and the defendant or other private party to the proceedings is obviously in a particularly vulnerable position. I assume these are the reasons why the test has been applied selectively. In my study I also did not

⁴Even outside Europe, the articles published concern procedural rights – *see e.g.* M. E. Horn, 'Confessional Stipulations: Protecting Waiver of Constitutional Rights' 61:1 *The University of Chicago Law Review* (1994), pp. 225-251.

find any other reasons for the selective application of the test, which is why this paper strongly supports the argument that the test is ought to apply more widely.

The thesis consists of three main parts. Chapter two (the first chapter after the introduction) analyses the lawfulness of a waiver of a right in the Convention's context. The first part is devoted to analysis of case-law of the ECtHR in order to identify what in the Court's view are the conditions of a lawful waiver of the Convention rights. Using search engine of the Court's case-law information system HUDOC, all cases from 1996 up to date where a word "waive" is used as a whole word or as a part of another word, were studied. In addition, all the Court's references to earlier case-law in the relevant cases were studied. I bring out the legality test and my conclusion from the study that the legality test is not applied in cases where the human rights waiver has been conducted in a private law relationship.

The Court's test of legality of a waiver of a right treats the waiver from the perspective of an abandonment of a right. In the second part of chapter two I view the waiver from the perspective of *exercising* a right, the right to waive. This right, almost always, falls within the scope of the right to private life. The purpose of this kind of inversion of perspective is important when the goal is to identify all the aspects of a waiver in the Convention's context. I am going to suggest that the test of a legality of a waiver must include also a "negative" test to the restrictions on a waiver – a test whereby it is established that the requirements on legality of a waiver are compatible with the requirements of Article 8 paragraph 2.

Critiques on the concept of autonomy vary: some claim the choices not being genuine because they have been formed in social connections not chosen by an individual; others do not set autonomy in conflict with social context and acknowledge the latter in the concept of perception of oneself and making the decisions.⁵ However this thesis does not go into the philosophical debate on the genuinity of the will of a person. Individuals can and do make choices, even within constrained circumstances and situations.⁶ I deal with the right to personal autonomy in the context of current understanding of its meaning in private law.

⁵J. Marshall, *Personal freedom through Human Rights Law: autonomy, identity, and integrity under the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009) pp. 57 – 67.

⁶J. Marshall, 'Giving birth but refusing motherhood: inauthentic choice or self-determining identity?' 4:2 *International Journal of Law in Context* (2008) p. 183.

The aim of the third chapter is to bring out the legality requirements of a waiver of a right in private law in order to find justification for the claim made in the research question. To connect to the main subject I start by explaining the state's positive obligations in private law. I then move on to the relevant European private law principles and a domestic law regulation and identify the legality requirements to a waiver of a right arising from those. I have chosen Estonian private law as a mainstream European representative regulation. This choice is not incidental – I have chosen it for convenience as I have some expertise in Estonian private law. I conclude that the Court's legality standard shows obvious similarities with private law principles and this supports the view that it is legitimate to apply the Court's test to contractual waivers of human rights.

In the fourth chapter I will bring out and weigh the arguments that would favour the view that the ECtHR could or even should apply the standard of legality of a waiver in cases where the waiver takes place in a civil law relationship. As the results of the study show that the standard of a lawful waiver is used by the Court solely in cases of procedural rights, it is firstly analysed via a case-study whether the standard could be applicable in case a waiver of a right is conducted in a private law relationship – in a contract with another person. *Evans* case,⁷ as a case where the human rights of two persons collide in a contract, is picked out in order to demonstrate this possible applicability. The analysis in the exercise is quite critical of the Court's judgement in *Evans*. This is purposive because this analysis intends to bring out the possible differences in the conclusions of the solution, to contest the reasoning of the Court. The best way to do that is to point out the drastic points where the reasoning could amount to a different conclusion or where the different reasoning would have been more legitimate. The exercise is not meant to prove that the Court should have come to a different judgement; nor is it an attempt to provide a thorough criticism of the judgement. I conclude that the application of the standard, as a more detailed and coherent approach in legal reasoning *could* lead to a different solution of the case.

One might ask, what is gained of such equal treatment of human rights waivers. This is the question I try to answer in the remaining part of chapter four by finding support in the theory of legal reasoning and legitimacy of international courts. I conclude that a unified approach and theoretical understanding of a concept of a waiver of a right and the adherence to precedent, the use of analogy by the way of application of the legality test would add to the coherence and legitimacy of the Court's decisions. I also

⁷*Evans v. The United Kingdom*, 10 April 2007, ECtHR, no. 6339/05.

find support to the wider application of the standard in the theory of legal sources at the Court's hand.

2 The legality of a human right waiver in the context of the Convention

In this search for support for a wider application of the standard, I start off with the standard itself. In the first sub-chapter I will analyse the case-law of the ECtHR in order to identify and explain the standard the Court uses for a waiver of a right enshrined in the Convention. In the second sub-chapter I am going to look at the legality of a waiver from the perspective of personal freedom, because the right to personal life and autonomy therein governs the right to waive a right.

2.1 The ECtHR's test for legality of a waiver of human right

The ECtHR has worked out a standard for a lawful waiver in dealing with procedural rights. The case-law indicates that the Court does not use this standard of legality to a waiver in a private law relationship. I conclude this from the study of the Court's case-law.

The whole standard of an acceptable waiver is very well brought out in *Scoppola v. Italy (No. 2)*:

Neither the letter nor the spirit of Article 6 prevents a person from waiving them of his own free will, either expressly or tacitly. However, such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance [...]. In addition, it must not run counter to any important public interest [...].⁸

Impliedly, this standard should be applicable to other waivers of human rights. In the case of *Albert and Le Compte v. Belgium* the Court has repeated that "... the nature of some of the rights safeguarded by the Convention is such as to exclude a waiver of the entitlement to exercise them [...], but the same cannot be said of certain other rights".⁹ A careful study of the Court's case-law since 1996 and earlier case-law as reflected in these cases, show that the Court uses the standard solely in the cases concerning waivers of procedural rights. By procedural rights here I mean

⁸*Scoppola v. Italy (No. 2)*, 17 September 2009, ECtHR, no. 10249/03, para. 135.

⁹*Albert and Le Compte v. Belgium*, 10 February 1983, ECtHR, nos. 7299/75 and 7496/76, para. 35.

the rights enshrined in Article 6 as well as in Article 5 of the Convention. Article 5 stipulates personal liberty and security rights. I have included those rights under procedural rights, because the deprivation of these rights are safeguarded with special procedural rights. The criteria of the Court's standard for a lawful waiver are now discussed in detail.

2.1.1 The requirement of a right being waivable pursuant to the text and spirit of the Convention

According to the first criterion, it must be established that the text or spirit of a right does not prevent waiving them of one's own free will. The most obvious example of a case, in which the waiver would be prohibited, would be the right to not to be tortured. Pursuant to Article 3 of the Convention no one shall be subjected to torture or to inhuman or degrading treatment or punishment. However, one could think of an example where one can waive the right to not to be treated inhumanly or even waive (*e.g.* tacitly accept waiving) the right to life. This kind of waiver could be deduced from the case of organ donors – organ donors admit the possibility harsh consequences, the side-effects that could even lead to death.

In *De Wilde, Ooms and Versyp v. Belgium* the ECtHR unanimously declared that voluntary reporting by the applicants, of their state as vagrants, does not preclude their right to lawfulness of detention (Article 5 of the ECHR)¹⁰. The Court noted that above all, the right to liberty is too important in a democratic society within the meaning of the Convention for a person to lose the benefit of the protection of the Convention for the single reason that he gives himself up to be taken into detention.¹¹ When the matter is one which concerns *ordre public* within the Council of Europe, a scrupulous supervision by the organs of the Convention of all measures capable of violating the rights and freedoms which it guarantees is necessary in every case¹². It has thus been established that a right to a lawfulness of a detention (right to not to be deprived of liberty except in the cases of exceptions, listed in Article 5 of the ECHR) is not a right one can waive. Reference is made in regards to the public interest; not as a matter of assessing it in each individual case, but with regard to the essence and nature of the right.

¹⁰*De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, ECtHR, nos. 2832/66, 2835/66 and 2899/66, paras. 64-65.

¹¹*Ibid.*

¹²*Ibid.*

Public interest (the fourth criterion, below) is thus weighed also in the stage where it is considered whether the text or spirit or the nature of the right is such that it can be waived. As it is brought below in section 2.1.4, under the fourth criterion, it is not quite clear how the notion of public interest should be assessed in each individual case.

2.1.2 The requirement of unambiguity of the waiver

Pursuant to the second criterion, a waiver must be established in an unequivocal manner. In the case of *Neumeister v. Austria*, the Court observed that particularly in the specific field covered by the Convention, the waiver of a right, even the mere right to a sum of money, must result from unequivocal statements or documents.¹³

There is no requirement, that the waiver should be written. In *Borotyuk v. Ukraine*, the Court stated that:

[...] neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, his entitlement to the guarantees of a fair trial. However, such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance [...].¹⁴

On the other hand, a waiver in writing does not pass the test of legality *per se* either. In *Salduz v. Turkey* the Court has stated that no inferences could be drawn from the mere fact that the applicant had been reminded of his right to remain silent and signed the form stating his rights.¹⁵

In *Zagorodnikov v. Russia* the Court found that a valid waiver (written or tacit) is not given in case the applicant has the right (to a public hearing) in criminal procedure by the law and he is considered to have waived this right by not requesting it (by not requesting a hearing).¹⁶ On the other hand, a failure to request a hearing when the law establishes such a requirement in an administrative procedure, can amount to an unequivocal waiver.¹⁷

¹³*Neumeister v. Austria (Article 50)*, 7 May 1974, ECtHR, no. 1936/63, para. 36.

¹⁴*Borotyuk v. Ukraine*, 16 December 2010, ECtHR, no. 33579/04, para. 80.

¹⁵*Salduz v. Turkey*, 27 November 2011, ECtHR, no. 36391/02, para. 59.

¹⁶*Zagorodnikov v. Russia*, 7 June 2007, ECtHR, no. 66941/04, para. 25.

¹⁷*Kysilková and Kysilka v. the Czech Republic*, 10 February 2011, ECtHR, no. 17273/03, para. 26.

In *A.S. v. Finland*¹⁸ the Court gave an assessment on the applicant's waiver of his procedural right in criminal proceedings. The Court came to a conclusion that the waiver to object to presenting a video-taped witness statement as evidence in the court cannot be extended to a waiver of a right to put questions to the witness.¹⁹ The Court has reiterated that before an accused can be said to have impliedly, through his conduct, waived an important right under Article 6 it must be shown that he could reasonably have foreseen what the consequences of his conduct would be.²⁰

In *Sakhnovskiy v. Russia* the accused refused the services of a defence-counsel, for the reason that he perceived her participation in the proceedings as a mere formality, but had not asked to be assigned somebody else as a lawyer; neither had he asked for additional time to meet the court-appointed lawyer or to find a lawyer of his own choosing²¹. The Court noted that in that context the applicant could not be expected to take procedural steps which normally require some legal knowledge and skills and was satisfied that the applicant did what an ordinary person would do in his situation: he expressed his dissatisfaction with the manner in which legal assistance was organised by the Supreme Court²². In such circumstances, the applicant's failure to formulate more specific claims cannot count as a waiver.²³

In *Pishchalnikov v. Russia* the Court did not accept confession of guilt as a lawful waiver of a right to a lawyer, the government had claimed it to be an *implicit* waiver.²⁴ The Court took the view that a waiver of the right, once invoked, must not only be *voluntary*, but must also constitute a *knowing* and *intelligent* relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be.²⁵ The Court considered that the right to a counsel, being a fundamental right among those which constitute the notion of fair trial and ensuring the effectiveness of the rest of the foreseen guarantees of Article 6 of the Convention, is a prime example of those rights which require the special protection of the knowing and intelligent waiver standard.²⁶ The Court did not rule out that, after initially being advised of his rights, an accused may himself validly waive his rights and

¹⁸*A.S. v. Finland*, 28 September 2010, ECtHR, no. 40156/07.

¹⁹*Ibid.*, para. 74.

²⁰*Ibid.*, para. 79.

²¹*Sakhnovskiy v. Russia*, 12 November 2010, ECtHR, no. 21272/03, para. 91.

²²*Ibid.*, para. 92.

²³*Ibid.*

²⁴*Pishchalnikov v. Russia*, 24 September 2009, ECtHR, no. 7025/04, paras. 76 and 77.

²⁵*Ibid.*, para. 77.

²⁶*Ibid.*, para. 78.

respond to interrogation; in this connection the Court indicated that *additional safeguards* are necessary when the accused asks for a counsel because if an accused has no lawyer, he has less chance of being informed of his rights and, as a consequence, there is less chance that they will be respected.²⁷ The Court was not convinced, that the accused waived his right to a lawyer in a *knowing, explicit, and unequivocal* manner by giving replies to the investigator's questions during interrogations, even if he had been advised of his rights; no further investigative steps should be taken after the accused has stated that he wishes to participate only through counsel *unless the accused himself initiates it*.²⁸ The Court did not find that under those circumstances the applicant's statements, made without having had access to a counsel, amounted to a valid waiver of his right.²⁹

The requirement of unequivocal consent does not always mean that the consent would have to be explicit as opposed to implicit. In *O'Halloran and Francis v. The United Kingdom* the Court accepted a compulsion, criminal in nature, to provide incriminating, even self-incriminating evidence where the compulsion flowed from a regulatory regime, which is known to all who own and drive motor cars.³⁰ In other words, the Court considered that those who choose to keep and drive motor cars can be taken to have accepted certain responsibilities and obligations as part of the regulatory regime.³¹ It must be noted that in this case, the Court also considered the existence of any relevant safeguards in the procedure, and the use to which any material so obtained was put.³² Nevertheless, the test of an unequivocal waiver does not necessarily mean that the consent would have to be explicit and not implicit; in fact, an implicit, tacit consent can qualify as explicit.

The requirement of unequivocality of the waiver also means that the person of the right is *informed* of his or her right. This can be drawn from *Dorozhko and Pozharskiy v. Estonia*, where the Court was unable to conclude that the applicants unequivocally waived their right to request the disqualification of the judge.³³ The state had claimed that the defendants had tacitly waived their right to disqualify the judge as they had the knowledge of the judge being married to an investigator of the case.³⁴ The

²⁷*Ibid.*

²⁸*Ibid.*, para. 79.

²⁹*Ibid.*, para. 80.

³⁰*O'Halloran and Francis v. The United Kingdom*, 29 June 2007, ECtHR, nos. 15809/02 and 25624/02, para. 57.

³¹*Ibid.*

³²*Ibid.*, para. 55.

³³*Dorozhko and Pozharskiy v. Estonia*, 24 April 2008, ECtHR, nos. 14659/04 and 16855/04, para. 49.

³⁴*Ibid.*, para. 34.

Court was not satisfied that the defendants knew of the marriage solely on the ground that they had suspicions about it; the Court took into consideration that the defendants had difficulties in obtaining reliable and official information about it because they were detained³⁵ and raised the issue in the appeal; the second applicant had also voiced the doubt in the first instance proceedings.³⁶

The same is confirmed in *Kaya v. Austria*, where the applicant was duly summoned to a hearing via his counsel who had been required to inform the applicant.³⁷ Summons via counsel in itself would not constitute a violation on the right to be present at a hearing, however in case the counsel did not inform the applicant of the hearing and told the panel that in fact the applicant was not aware of the hearing and applied the applicant to be heard, it cannot be considered that the applicant had unequivocally waived his right to be heard in person.³⁸

The Court has also noted that the waiver must be *genuine*. In *Bortnik v. Ukraine* the Court assessed as not genuine a waiver of legal representation, conducted in the authority of investigative body by a person who has a physical disability, was suffering from chronic alcoholism and belonged to a socially disadvantaged group; this could amount to the conclusion that he was *particularly vulnerable*, legally ignorant and susceptible to outside influence.³⁹ The Court noted in this context that immediately, when the accused was outside the authority of investigative body – in the court – he asked for a lawyer and pleaded not guilty.⁴⁰

2.1.3 The requirement of appropriate safeguards to the waiver

Under the third criterion, the waiver must be attended by minimum safeguards to commensurate with its importance. It was hard to identify from the case-law, what exactly the Court considered those safeguards to be or how those should work. The meaning of the minimum safeguards are somewhat explained in *Poitrimol v. France*.⁴¹ In the case, Mr. Poitrimol waived, on his own free will, his right to be present in the hearings before the court. According to French law, for this reason, he lost the right of

³⁵*Ibid.*, para. 48.

³⁶*Ibid.*, para. 49.

³⁷*Kaya v. Austria*, 8 June 2006, ECtHR, no. 54698/00, para. 30.

³⁸*Ibid.*, para. 31.

³⁹*Bortnik v. Ukraine*, 27 January 2011, ECtHR, no. 39582/04, paras. 42 – 44.

⁴⁰*Ibid.*, para. 42.

⁴¹*Poitrimol v. France*, 23 November 1993, ECtHR, no. 14032/88.

appeal the court-decision. The ECtHR found a violation, saying among other, that it was a disproportionate consequence for Mr. Poitrimol.⁴²

In *Sigbatullin v. Russia*, the Court pointed out that in waiving the right to be present at the hearing, one of the safeguards is the duly notification of the hearing.⁴³ In *Colozza v. Italy* the Court held that where a person charged with a criminal offence had not been notified in person, it could not be inferred merely from his status as a “fugitive” (*latitante*), which was founded on a presumption with an insufficient factual basis, that he had waived his right to appear at the trial and defend himself.⁴⁴ A person charged with a criminal offence must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to force majeure.⁴⁵

In *Sejdovic v. Italy*, the Court confirmed its position in previous case-law by accepting that the accused can be regarded as waived his right to be present at a trial, but for the waiver to be lawful, the accused has to be sufficiently informed of the trial in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused’s rights, vague and informal knowledge about the trial cannot suffice.⁴⁶ The Court however did not rule out the possibility that certain established facts might provide an unequivocal indication that the accused is aware of the existence of the criminal proceedings against him and of the nature and the cause of the accusation and does not intend to take part in the trial or wishes to escape prosecution.⁴⁷ In order to establish the latter, there has to be certain evidence, for example, the accused states publicly or in writing that he does not intend to respond to summonses of which he has become aware through sources other than the authorities, or succeeds in evading an attempted arrest or when materials are brought to the attention of the authorities which unequivocally show that he is aware of the proceedings pending against him and of the charges he faces.⁴⁸

In *Grigoryevskikh v. Russia* the Court took the view that in the criminal procedure the national court may be required to verify (double-check) whether there is a valid waiver of the right to a defence counsel.⁴⁹

⁴²*Ibid.*, paras. 35 and 38.

⁴³*Sigbatullin v. Russia*, 23 April 2009, ECtHR, no. 32165/02, paras. 46 – 49.

⁴⁴*Colozza v. Italy*, 12 February 1985, ECtHR, no. 9024/80, para. 28.

⁴⁵*Ibid.*, para. 30.

⁴⁶*Sejdovic v. Italy*, 1 March 2006, ECtHR, no. 56581/00, para. 99.

⁴⁷*Ibid.*

⁴⁸*Ibid.*

⁴⁹*Grigoryevskikh v. Russia*, 22 March 2009, ECtHR, no. 22/03, paras. 89-91.

In *Bell v. The United Kingdom* the Court considered the applicant's waiver in a trial by court-martial conducted at a summary-hearing where he had no access to an adviser as not valid.⁵⁰ In the context of a waiver to be safeguarded by minimum guarantees to commensurate with the waiver's importance, the Court maintained that the surrounding circumstances of the waiver deprived it of any validity from the point of view of the Convention for the following reasons: (1) the applicant was directly subordinate, and in close structural proximity to his commanding officer, a factor which undoubtedly would have affected the free and unambiguous nature of any choice between a summary trial and a court-martial; (2) the applicant could also have been influenced by the fact that a summary procedure involved a maximum sentence of 28 days (and 60 days only if extended powers were granted) whereas trial by a district court-martial could have in theory led to a sentence of up to two years' imprisonment; (3) the fact that the option was presented to him at all meant that his commanding officer considered him to be guilty as charged and, further, that he warranted more than a minor punishment.⁵¹ The Court noted in the reasoning that the applicant, as a layman, was not in a position to evaluate his legal position or, consequently, the options to be pursued by him.⁵²

In *Scoppola v. Italy (No. 2)*, the applicant, as an accused in criminal procedure opted for so-called summary procedure, a simplified procedure, by which he unequivocally waived his rights to a public hearing, to have witnesses called, to produce new evidence and to examine prosecution witnesses.⁵³ The waiver was made in exchange for advantages, which included non-imposition of life imprisonment, by law the sentence would be reduced by one third and life imprisonment in that simplified procedure was to be replaced by a thirty-year sentence.⁵⁴ A new law enacted after the waiver had been conducted provided that, where a judge considered that the appropriate sentence should be life imprisonment with daytime isolation, the penalty to be imposed in that simplified procedure should be life imprisonment without isolation.⁵⁵ The Court took the view that a person charged with an offence must be able to expect the state to act in *good faith* and take due account of the procedural choices made available by law.⁵⁶ According to the Court's judgement, it is contrary to the principle of *legal certainty* and the protection of the legitimate trust of persons engaged in

⁵⁰*Bell v. The United Kingdom*, 16 January 2007, ECtHR, no. 41534/98, paras. 45 – 50.

⁵¹*Ibid.*, para. 47.

⁵²*Ibid.*, para. 48.

⁵³*Scoppola v. Italy (No. 2)*, *supra* note 8, para. 136.

⁵⁴*Ibid.*, para. 137.

⁵⁵*Ibid.*, para. 138.

⁵⁶*Ibid.*, para. 139.

judicial proceedings for a State to be able to reduce unilaterally the advantages attached to the waiver of certain rights inherent in the concept of fair trial.⁵⁷ The Court did not consider altering a crucial element of the *agreement* between the State and the defendant to the latter's detriment without his consent fair.⁵⁸ The Court also contended that the applicant's right to withdraw his request for adoption of the summary procedure was not capable of remedying the prejudice he suffered.⁵⁹ Although the applicant would thus have had the benefit of the rights he had waived, he would not have been able to compel the State to honour the agreement previously entered into, whereby the waiver of procedural safeguards was to be offered in exchange for a reduced sentence.⁶⁰ In the Court's opinion it would be excessive to require a defendant to give up the possibility of a simplified procedure accepted by the authorities which had resulted at first instance in his obtaining the advantages he had hoped for and had legitimate expectation in, because of the circumstances beyond his control.⁶¹

The safeguard of a waiver of a right must warn or draw the person's attention to the right, the substance and importance of the right and him or her waiving that right. These safeguarding measures are aimed at ensuring that the waiver has been conducted in *free will* and also that the waiver has legitimate (predictable) consequences. The state must act in good faith, respect the agreement and the person's legitimate expectation if the waiver has been given in exchange for an advantage.

2.1.4 The requirement of the waiver being in compliance with the public interest

Under the fourth criterion, a waiver must not run counter to any important public interest. This requirement is somewhat unclear; it is not clear whether the instant case should involve a subject that is of public interest or if waiving the particular right as such must not run counter to an important public interest. For instance, the Court describes the lack of public interest in *Schuler-Zgraggen v. Switzerland*, where there was a question whether the right to a public hearing in a civil procedure was breached (there was no oral hearing and the case was dealt by the national authorities in a written procedure).⁶² The Court noted that above all, it does not appear that the dispute raised issues of public importance such as to make a hearing

⁵⁷*Ibid.*

⁵⁸*Ibid.*

⁵⁹*Ibid.*, paras. 141 and 143.

⁶⁰*Ibid.*, para. 143.

⁶¹*Ibid.*, paras. 144 and 145.

⁶²*Schuler-Zgraggen v. Switzerland*, 24 June 1993, ECtHR, no. 14518/89.

necessary.⁶³ In the case of *Håkansson and Sturesson v. Sweden*,⁶⁴ the Court was satisfied that the applicants had tacitly waived their right to public hearing. The Court was satisfied on the ground that among other, the litigation involved no questions of public interest which could have made a public hearing necessary.⁶⁵

Judge Walsh's partly dissenting opinion in *Håkansson and Sturesson v. Sweden*, supports a view whereby public interest to public hearing can be general and the public interest in the particular case should not be decisive. He argues:

[t]he public-hearing requirement of Article 6 para. 1 (art. 6-1) is enshrined in the Convention because the Contracting States thought it was important, not because a party may think that it is important. The administration of justice in public is a matter of paramount importance in every democracy and is one of the cornerstones put in place by the Convention to guarantee the impartial administration of justice and the defence of the rights guaranteed by the Convention. The fact that the public may not manifest any particular interest in a given case is not a consideration. Equally a lack of interest in having a hearing in public on the part of one or both parties to a suit does not alter the matter. Only where both parties agree to a hearing other than in public can the mandatory provisions of Article 6 para. 1 (art. 6-1) be waived. Any such waiver of a guaranteed right must be manifested by clear and unambiguous words or by conduct from which the only reasonable inference to be drawn is that both parties were so agreed. There is no such evidence in the present case. In my opinion silence cannot amount to such waiver, particularly, as in this case, where there is no evidence that the applicants ever contemplated a joint or several waiver.⁶⁶

The criterion of compatibility with public interest (like the other criteria) arises from the Court's case-law and not from any specific regulation in the Convention. The Convention provides exceptions based on public interest with regard to protection of rights. These public interest limitations under the Convention are not identical under each article. Some rights name the rights and freedoms of others.⁶⁷ The majority of legitimate purposes are either 'pure' public interests (protecting public safety, public order, health, morals, national security, preventing crime and maintaining the economic well-being of the country) or benefit the public generally as well as identifiable individuals (maintaining the authority and impartiality of the judiciary, protecting the interests of justice, preventing the disclosure of

⁶³*Ibid.*, para. 58.

⁶⁴*Håkansson and Sturesson v. Sweden*, 21 February 1990, ECtHR, no. 11855/85.

⁶⁵*Ibid.*, para. 67.

⁶⁶*Ibid.*, para. 4 of the Partly Dissenting Opinion of Judge Walsh.

⁶⁷*e.g.* Articles 8-11 of the Convention.

information received in confidence and maintaining territorial integrity).⁶⁸ The ECtHR has found the relationship between human rights and public interest problematic, failing to develop a coherent set of tests for determining when rights prevail over the public interest or *vice versa*.⁶⁹

Taking into account the interpretation of the first criterion (the requirement that text and spirit of the right allow a waiver of the right) above, one might interpret the notion of public interest, appearing in both the first and the fourth criterion, as follows:

- under the first requirement, the text and spirit as such must be considered and overall public interest weighed asking in particular: would, in a case like that generally, the society be interested in not allowing a waiver of a right;
- under the fourth criterion it is asked if there are any exceptional circumstances in the case that arise special public interest, whereby, as an exception, the waiver should not be allowed.

This suggestion takes into consideration that undoubtedly, public interest is weighed under the first criterion and that determining public interest should not only be based on the text and the spirit of an article only, but also as applied to a circumstances of the case.

The Court applies the legality standard only with regards to procedural rights – where the waiver is conducted in a public law relationship. There are no indications in the case-law that would contend that the standard is applicable only in public law relationship or only regarding procedural rights. The waiver appears problematic and also most obviously identifiable in procedural issues like waiving the right to fair hearing and the right to defence council. The position of an accused in criminal procedure is specially vulnerable. It may therefore be the case that the test, generated in this framework of procedural issues, has only found re-application in the same type of cases. The next sub-chapter looks at the waiver as exercising personal autonomy in order to find out more requirements the Convention sets to a waiver of a Convention right.

⁶⁸A. Mcharg, ‘Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights’, 62:5 *The Modern Law Review Limited* (1999) p. 684.

⁶⁹*Ibid.*, p. 695.

2.2 Legality requirements to the human right waiver arising from the right to personal autonomy

The Court's legality standard discussed above treats the waiver from the perspective of an abandonment of a right, focusing on the requirements of a waiver aimed at the verification or the genuinity of the waiver and the overall waivability of the right. In this sub-chapter, a waiver is viewed from the perspective of *exercising* a right, the right to waive. The purpose is to discuss how far a state can or should go on limiting or regulating the right to waive. This kind of inversion of perspective is important for identifying other aspects of a waiver in the Convention's context. I am going to suggest that the test of legality of a waiver must include also a "negative" test – a test whereby it is established that the waiver's legality requirements are compatible with the requirements of Article 8 paragraphs 1 and 2 in that they would not amount to an impermissible intrusion into private life.

Pursuant to Article 8 paragraph 1 of the Convention, everyone has the right to respect for his private and family life, his home and his correspondence.

The Court has made it clear that that the right to private life is a broad term, encompassing, *inter alia*, aspects of an individual's physical and social identity including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world; also, private life includes a person's physical and psychological integrity.⁷⁰

It has been said that the core business of privacy law is about protecting personal autonomy.⁷¹ The right to personality implies the widest possible freedom of choice and the minimum of coerced choices for individuals.⁷² Regardless of the partner in the legal relationship (state or private person) or whether it would be a case of a one-sided expression of will, a waiver of a right falls within the sphere of private life – right to self-realisation, self-determination, right to live the life the way it is wanted, right to develop one's identity, right to autonomy. The right to private life in terms of the Convention has some limits in terms of scope and these are discussed below.

⁷⁰*Tysiac v. Poland*, 20 March 2007, ECtHR, no. 5410/03, para. 107.

⁷¹H. Nieuwenhuis, 'The Core Business of Privacy Law: Protecting Autonomy' in K. S. Ziegler (ed.), *Human Rights and Private Law. Privacy as Autonomy* (Hart Publishing, Oxford, 2007) p. 17.

⁷²Marshall, *supra* note 5, p. 205.

2.2.1 Legality requirements to a waiver of a right - limiting the right to personal autonomy or safeguarding enjoyment of private life or acting outside the scope of private life?

When a state is lawfully regulating personal freedom, the freedom to enter into contracts and to waive human rights therein, by setting safeguards for a waiver of human rights (a legality test), there are two aspects we can detect at first glance. The state's regulation is either interference in private life or fulfilling the positive obligation to safeguard it. I am discussing these below; I am also going to point out that there exists the third option – the legality test might not fall under the scope of Article 8 of the Convention in exceptional cases.

Firstly, the state can be limiting personal freedom in that it is interfering in the right to respect for private life based on the reasons brought in Article 8 paragraph 2. Article 8 paragraph 2 determines the conditions which would justify an interference in private life: there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In the course of justification of a *prima facie* interference with a right, the following questions are addressed by the Court: was the interference in accordance with and prescribed by law; was it a genuine pursuit of the legitimate purposes at the issue; was it necessary in a democratic society for those ends?⁷³ The democratic necessity test involves evaluative framework of three elements: the nature of democratic necessity, proportionality, margin of appreciation allowed to member states.⁷⁴ In the necessity test, the Court weighs, among other, the fair balance of private and public interest and if needed, the fair balance between the rights of two individuals.

The second aspect is that the state could be fulfilling its positive obligation to safeguard the right to personal freedom in that it is safeguarding that the will of the person is genuinely free and is understood accurately. In other words, it is safeguarding that the expression of the will of a person is free, calculated, informed, well-established, perceived accurately etc. Given the

⁷³McHarg, *supra* note 68, p. 685.

⁷⁴*Ibid.*, p. 686.

existence of positive obligation, inaction of the state amounts to a violation of the right to personal life.

Other intrusions in private sphere, *i.e.* the intrusions *not* falling within the positive obligation of a state or within the scope of exceptions listed in Article 8 paragraph 2, are impermissible within the meaning of the Convention. However, there is a view according to which the right to private life cannot be expected to be absolute in itself and there are limits inherent in the right to private life.

The scope of Article 8 has expanded in the Court's case law over time.⁷⁵ In *X v. Iceland* the Commission contended that it cannot accept that the protection afforded by Article 8 extends to the protection of everybody to keep a dog.⁷⁶ In *Tysiack* definition of private life⁷⁷ however the Court has abandoned this view. In the 1970s, it was contended that the claim to respect for private life is automatically reduced to the extent that the individual himself brings his private life into contact with public life or into close connection with other protected interests.⁷⁸ By 1992, the Court found in *Niemetz v. Germany* that a search in the applicants office constituted a violation of his rights under Article 8 because 'it would be too restrictive to limit the notion to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle; the respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.'⁷⁹

An indication of the not-absolute scope of the rights enshrined in Article 8 was also given by judge Pettiti in his concurring opinion in *Laskey, Jaggard and Brown v. The United Kingdom*.⁸⁰ The applicants were accused and convicted for conducting sado-masochistic acts (on themselves and on other, consenting people) in private. The applicants claimed that those acts were conducted by willing adult participants in private and held that the criminal law and the criminal punishment breached their right to private life.⁸¹ The Court solved the case by answering positively to the question whether the measure in the criminal law was necessary in a democratic society for the protection of health as within the meaning of Article 8

⁷⁵See generally Marshall, *supra* note 5.

⁷⁶*X. v. Iceland*, 18 May 1976, European Commission of Human Rights, no. 6825/74.

⁷⁷See section 2.2 and note 70 above.

⁷⁸*Bruggemann and Shceuten v. Germany*, 12 July 1977, European Commission of Human Rights, Report, no. 6959/75, para. 56.

⁷⁹*Niemetz v. Germany*, 16 December 1992, ECtHR, no. 13710/88, para. 29.

⁸⁰*Supra* note 1.

⁸¹*Ibid.*, paras. 34 and 38.

paragraph 2.⁸² Judge Pettiti found in his concurring opinion that the application should have been inadmissible with regard to Article 8 by noting that the protection of private life means the protection of a person's intimacy and dignity, not the protection of his baseness or the promotion of criminal immorality.⁸³

The individual choice within self-determination needs to avoid becoming an untrammelled freedom to all to do whatever they want.⁸⁴ When considering the state's obligations, the limits inherent in the rights listed in the Convention need to be taken into consideration. As for examples from the Court's case-law, the right to life and to be free from degrading treatment does not include the right to die,⁸⁵ the right to not to be subjected to torture and degrading treatment does not include the right to assisted anaesthesia or any action of the state aimed at terminating life,⁸⁶ the waiver of a right to lawful detention does not have an effect on the enjoyment of that right.⁸⁷

In *Pretty v. The United Kingdom*, the Court gave a consideration to the State's pleading that the right to assisted suicide does not fall within the scope of Article 8. The Court contended that it was not 'prepared to exclude' that the law preventing the exercise of a choice (assisted suicide) to avoid what the applicant considered an undignified and distressing end to her life, constitutes an interference with her right to respect for private life as guaranteed under Article 8 § 1 of the Convention.⁸⁸ In other words, the Court considered that the matter falls within the scope of Article 8 and therefore analysed whether this interference conformed with the requirements of the second paragraph of Article 8. However the wording in the reasoning of the Court - "not prepared to exclude" - indicates that there could be areas of private life that Article 8 would not cover.

Freedom and autonomy in private law and those in human rights law do not completely overlap. In private law, freedom should be understood as being more than an ability to act according to the values of basic rights.⁸⁹ Both freedom and autonomy are based on liberty; the substance of freedom and autonomy means to be able to act according to your own will.⁹⁰ The will

⁸²*Ibid.*, para. 50.

⁸³*Ibid.*

⁸⁴J. Marshall, *supra* note 5, p. 200.

⁸⁵*Pretty v. The United Kingdom*, 29 April 2002, ECtHR, no. 2346/02, paras. 40 and 55.

⁸⁶*Ibid.*, para. 55.

⁸⁷*De Wilde, Ooms and Versyp v. Belgium*, *supra* note 10, paras. 64-65.

⁸⁸*Pretty v. The United Kingdom*, *supra* note 85, para. 67.

⁸⁹L. Fastrich, 'Human Rights and Private Law' in K. S. Ziegler (ed.), *Human Rights and Private Law. Privacy as Autonomy* (Hart Publishing, Oxford, 2007) p. 29.

⁹⁰*Ibid.*

may be strange, wrong, emotional, subjective or imprudent; the will in private law is not unlimited.⁹¹ One can thus describe the conflict between individual freedom and application of human rights in this simple way: human rights law restricts private law by pursuing objective values; private law in contrast must accept that individuals pursue subjective values and their own happiness.⁹² One could disagree with this view by noting that the overall freedom, including the freedom to make irrational decisions in private relations, is also covered by Article 8.

At the end however, we come down to a question, if it is important at all to qualify the exact scope of private life in Article 8. The requirements set in the second paragraph may as well cover all the necessary exceptions. On the example of the sado-masochism acts: whether we would regard the exercise of sado-masochism as not falling within the scope of private life or we consider the law prohibiting it being compatible with the requirements in Article 8 paragraph 2 – we would arrive at the same result resolving the case.

2.2.2 The requirements of Article 8 as the accompanying test for a lawful waiver

Based on the analysis above I bring out the following conclusions regarding the requirements on the regulation of a human right waiver arising from Article 8 of the Convention. This is applicable when Article 8 of the Convention covers and is applicable to the legality requirement, i.e. their material scope overlaps.

When it is established that the waiver of a particular human right falls within the scope of private life, it has to be determined if there is a positive obligation on a state to safeguard the waiver. In that case the absence of the safeguard is a violation of the right enshrined in Article 8 of the Convention. When a peaceful enjoyment of the right to private life is intruded by the legality requirement of a human right waiver, the legality requirement must have a legitimate excuse, an excuse included in Article 8 paragraph 2.

The Court's standard test for legality of a human rights waiver⁹³ in itself expresses most obviously the positive obligation of a state. For instance, by establishing that the waiver should be attended by additional safeguards to commensurate with its importance (the third requirement), the Court has established that a state has the positive obligation to enact legislation that

⁹¹*Ibid.*, pp. 29, 30.

⁹²*Ibid.*, p. 30.

⁹³See section 2.1. above.

ensures the freedom of the will of the person and legitimate consequences of a waiver of a right. The Court's standard test reflects this also in the fourth requirement – the waiver must not run counter to an important public interest. Overriding public interest is seen by the Court as raising the state's positive obligation. Under this option, where the state has the positive obligation, inaction amounts to the violation of the right to private life.

A view whereby freedom of contract may only be limited by domestic law as far as domestic law meets the three conditions for exceptions in Article 8 paragraph 2: legality, necessity and justification in the sense of that provision⁹⁴ is almost correct. *Correct* because there are very few issues in the private law that are not covered by Article 8 of the Convention. Also the difference in the State's actions safeguarding the rights under Article 8 (fulfilling its positive obligation) and an intrusion into privacy under the conditions in Article 8 paragraph 2 are almost inseparable. *Almost* correct because as said, exceptions exist.

When we take the other human right into play – the right that is being waived – we find ourselves in even more complex situation. How do we take into account the particularities of the law of this right? Here fair balancing seems to help us out.

This is quite directly confirmed in *Keenan v. The United Kingdom*,⁹⁵ the case concerned a prisoner who committed a suicide, was mentally ill and had suicidal tendencies. The respondent state argued that to require the State to protect a person against himself would be an approach inconsistent with the principles of individual dignity and autonomy underlying the Convention.⁹⁶ The Court noted that there are general measures and precautions which ought to be available to diminish the opportunities for self-harm, without infringing personal autonomy.⁹⁷

From the discussion in this chapter dedicated to analysing the legality test of a waiver of human rights in the context of personal autonomy, I conclude that the legality test must comply with the requirements of Article 8 as far as material thematic scope overlaps with the issue at hand, in that the regulation does not amount to illegal intrusion in private life.

⁹⁴H. J. Snijders, 'Privacy of Contract' in K. S. Ziegler (ed.), *Human Rights and Private Law. Privacy as Autonomy* (Hart Publishing, Oxford, 2007) p. 116.

⁹⁵*Keenan v. The United Kingdom*, 3 April 2001, ECtHR, no. 27229/95.

⁹⁶*Ibid.*, para. 87.

⁹⁷*Ibid.*, para. 92.

When we come back to the question of a possible wider application of the Court's legality test for a waiver of human right, there is something we can conclude from the discussion about autonomy rights. As brought out, the sphere of private life has expanded over time and covers almost all aspects of human life. Human rights are ought to be protected by a state in both public and private spheres. The same human rights law generally applies to the exercise of personal freedom in public law relationship as to that in a private law relationship. This supports my claim in this thesis – the same law should apply to the legality of a human rights waiver regardless of the nature of the legal relationship where the waiver was conducted. The next chapter is analysing a human rights waiver in European private law in order to identify the requirements private law has set for the waiver of a right.

3 The legality of a human right waiver in private law

In this chapter I am going to identify how private law looks at the legality of a waiver of a right. I will use the principles of European private law and specific norms of a domestic private law to do that. I will compare the private law view to the Court's legality test. As the research question concerns the possibility of application of the Court's legality test to a human rights waiver conducted in a private law relationship, this analysis is important; we are interested in the similarities and possible counter-arguments to the research question. The discussion should lead us to an understanding if these views – that of private law and human rights law are compatible or comparable. Firstly as an introductory part, I will discuss the relation of private law and human rights law to establish or rather, to remind ourselves that states have obligations to protect human rights in private relations and therefore, the law of the Convention applies.

3.1 State's positive obligation to protect human rights in private law and the constitutionalisation of private law

The Court has made it clear that a state is obliged to protect human rights in private sphere. Mowbray's study has revealed growing importance of positive obligations in ECtHR jurisprudence.⁹⁸ The duty upon states to take reasonable measures to protect individuals from infringement of Convention rights by other private persons has been called as one of the most prevalent types of positive obligations.⁹⁹ One of the reasons in the Courts case-law developing the implied positive obligations has been to ensure that the relevant rights are 'practical and effective' in their exercise.¹⁰⁰ The most basic way of such a safeguard is criminalising the conduct which threatens another's human rights.¹⁰¹ Domestic private law norms, which limit the freedom of contract, *e.g.* formative requirements for contracts, are aimed at the protection of individuals' rights.

⁹⁸A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, 2004) p. 229.

⁹⁹*Ibid.*, p. 225.

¹⁰⁰*Ibid.*, p. 221.

¹⁰¹*Ibid.*, p. 225.

Human rights and private law have originally been two separate legal orders; fundamental rights were considered to be individual's defence against the state and did not have impact on private law and conduct.¹⁰² As the time has passed on, private law has been opened up for constitutionalisation – influence of fundamental rights and it is increasingly hard to draw a line between fundamental rights and private law; between private and public law in general.¹⁰³ For our discussion it is important to shortly remind ourselves of how the fundamental rights enter private law. It is a prerequisite to understand how private law and human rights law interact in domestic law.

The indirect horizontal effect, first introduced by German Federal Constitutional Court in 1958 in *Liith*, requires private law to be interpreted in the light of constitutional law; whereas the general clauses of Civil code, such as the principle of good morals, are considered to be the entrance gates through which constitutional values may gain access to the private law sphere.¹⁰⁴ The second concept – the state's duty to protect constitutional rights - was introduced in private law by the German Federal Constitutional Court in 1990 in *Handelsvertreter*; thus far the concept had been used only in the sphere of public law.¹⁰⁵ According to this second concept, the state has the duty to balance individuals' rights in private relations, to protect when individual's rights are violated by another individual. The failure to act in such a way (to provide the appropriate legal framework) – to balance constitutional rights of private parties can be the basis for invoking the constitution. In the cases the legislator has failed to provide the legal framework where the constitutional rights of private parties would be balanced, a party can raise the issue of constitutionality of legislation. Raising the issue of constitutionality, if successful, means that Constitutional Court (in some countries, Supreme Court) would declare the relevant norm or the lack of it unconstitutional and therefore void.

The constitutionalisation of private law has been criticised among other with an argument that the fundamental rights do not offer enough guidance in order to be gainful in private law.¹⁰⁶ From the sceptical view, fundamental rights can be a source of what is considered to be a just society, including

¹⁰²O. Cherednychenko, 'EU Fundamental Rights, EC Fundamental Freedoms and Private Law', 1 *European Review of Private Law* (2006) p. 24.

¹⁰³*Ibid.*

¹⁰⁴*Ibid.*, p. 30.

¹⁰⁵*Ibid.*, p. 31.

¹⁰⁶J.M. Smits, 'Private law and fundamental rights: a sceptical view' published in: T. Barkhuysen and S. Lindenbergh (eds.) *Constitutionalisation of Private Law* (Leiden/Boston 2006), p. 5.

among private persons; also, fundamental rights can serve as a warning sign for the private law court that human dignity is at stake.¹⁰⁷

As brought out above in section 2.2 of this paper, the restrictions on personal freedom generally fall within the material scope of the rights enshrined in Article 8 of the Convention. Although private law principles are much older than human rights law, private law principles are nowadays viewed through the human rights law. This concerns also the rights of Article 8 which is of our interest in this paper. A substantial and at least indirect horizontal effect of the provisions of Article 8 between private persons is an assumption which is in conformity with the views in the ECHR Countries.¹⁰⁸

Therefore, the private law regulating the contractual waiver of human right must comply with the requirements of Article 8 of the Convention and the other provisions in the Convention. The next sub-chapters are aimed at looking for connections between the Courts standard and private law standard of legality of a human rights waiver.

3.2 The private law principles and the legality of human rights waiver

Freedom of contract does not mean unlimited freedom in human relations. Domestic private law norms safeguard the functioning of private relations. In this sub-chapter I will argue that the substance of the Court's legality test for a human rights waiver is related to private law principles. It can even be said that the Court has expressed important private law principles in the test. This supports the main argument of this thesis – the test of legality of the human rights waiver should be applied by the Court whenever such a waiver occurs, including to a contractual waiver of human rights.

In order to address European private law principles in general, I will use the Draft Common Frame of Reference (DCFR)¹⁰⁹ as a source. The DCFR contains principles, definitions and model rules of European private law. It amounts to the compression into rule form of decades of independent

¹⁰⁷*Ibid.*, p. 8.

¹⁰⁸A. Colombi Ciacchi, 'Horizontal effect of Fundamental rights, Privacy and Social Justice' and H. J. Snijders, 'Privacy of Contract' in K. S. Ziegler (ed.), *Human Rights and Private Law. Privacy as Autonomy* (Hart Publishing, Oxford, 2007) pp. 56 and 105.

¹⁰⁹C. von Bar *et al.* (eds.), the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, outline edition.

research and co-operation by academics with expertise in private law, comparative law and European Community law.¹¹⁰

The European private law has four underlying principles: freedom, security, justice and efficiency.¹¹¹ As pointed out above in section 2.2, we must assume that the waiver of a right falls within a sphere of personal freedom. Therefore, in order to bring out how the private law addresses waiver of human rights, I will firstly address the issue from the point of view of contractual freedom and the closely connected principle of efficiency. The other two underlying principles of private law are also relevant in our discussion about a waiver of a right and will be discussed thereafter.

3.2.1 Freedom of contract and efficiency as private law principles reflecting the requirements for a lawful waiver arising from the right to personal autonomy

The assumption in the freedom of contract is that party autonomy should be respected unless there is a good reason to intervene.¹¹² Under the legitimate restrictions to the contractual freedom, the DCFR brings out, among other, limitations with regard contracts harmful to third persons and society in general, interventions when the consent is defective.¹¹³

The limitations avoiding contracts harmful to third persons and society in general entails the legislator's right to invalidate contracts which might harm third persons or society at large (*e.g.* is contrary to public policy).¹¹⁴ With regard to the legality of intervention in the freedom of contract on the basis of defective consent, the following is important for our discussion. Taking an obligation or giving up a right, both concern a consent and a waiver of a right. A defective consent can be translated as a defective waiver of a right as in a contract people trade their rights and obligations. In DCFR, the defective consent is recognised as a ground of invalidity of the contract; the defective consent can be either misinformed or not free (for instance, a result of distress, unfair exploitation, fraud, mistake).¹¹⁵ Just as the state's positive obligation to safeguard the freedom of will in human rights law is explained, the authors of DCFR bring out that these grounds of

¹¹⁰*Ibid.*, p. 6.

¹¹¹*Ibid.*, p. 60.

¹¹²*Ibid.*, p. 61.

¹¹³*Ibid.*, pp. 63-65.

¹¹⁴*Ibid.*, pp. 64-65.

¹¹⁵*Ibid.*, p. 65.

invalidity are explained in terms of justice as well as designed to ensure that contractual freedom was genuine freedom.¹¹⁶

According to the principle of freedom of contract, the restrictions have to be minimal. The interference with freedom of contract should be the minimum that will solve the problem while providing the other party with sufficient guidance to be able to arrange its affairs efficiently.¹¹⁷

With regard to the relationship between human rights law and freedom of contract, the latter is acknowledged as a part of the first. As Snijders puts it, the significance of freedom of contract as a substantial element of the right to privacy is enormous, both in its content and – in particular – in its consequences for domestic law exceptions to this right.¹¹⁸ This means that the Convention's legality test for a human rights waiver, in particular the requirements arising from Article 8 paragraph 2, are applicable also from the private law perspective.

Efficiency as the underlying principle in European private law has two overlapping aspects: efficiency for the purposes of the parties who might use the rules and efficiency for wider public purposes.¹¹⁹ Efficiency for wider public purposes are intended for the better functioning of markets and promoting economic welfare.¹²⁰ For instance, consumer protection rules are not only for the protection of the vulnerable, but also favourable to general welfare because they may lead to better competition thus a better functioning of the market.¹²¹ Efficiency for the purposes of the parties includes minimal formal and procedural restrictions; minimal substantive restrictions and provision of efficient default rules.¹²² The notion of efficiency appears analogous to the state's obligation within the right to personal life, the negative obligation to respect private life and the positive obligation to facilitate the enjoyment of the right to private life. In other words, we can infer that the state has the positive obligation under the Convention to provide private law regulation which would facilitate the functioning of the private relations.

¹¹⁶*Ibid.*

¹¹⁷*Ibid.*, p. 68.

¹¹⁸Snijders, *supra* note 94, p. 116.

¹¹⁹von Bar *et al.* (eds.), *supra* note 109, p. 94.

¹²⁰*Ibid.*, p. 96.

¹²¹*Ibid.*, p. 97.

¹²²*Ibid.*, pp. 94-95.

3.2.2 Security and justice as private law principles reflecting the Court's standard test for a lawful waiver

The other two underlying principles of European private law – security and justice – also contain relevant aspects of private law with regard to the legality of a waiver of a right.

The contractual security contains, among other, the obligatory force of contracts, duties flowing from contractual loyalty, the right to enforce performance of the contractual obligations, the availability of adequate remedies for non-performance of the contractual obligation.¹²³ For our discussion about the waiver of a right, here it is important to note that all these concepts are safeguarding the waiver, the human will.

For instance, if a waiver is conducted in return for an advantage, this advantage has to be upheld. In a private relationship, the self-interest in the contract acts as a guardian for legality for a waiver. We find the same in a public relationship: *e.g.* in military, where the soldiers waive their rights, it brings about the state's particular obligation to safeguard soldiers' rights.

According to Smith, restrictions of freedom of contract are justified in two types of cases.¹²⁴ First, where the voluntary entrance into contract has severe consequences on the persons future freedom – it limits freedom unnecessarily.¹²⁵ Secondly, in case the self-interest in contract provides a weak safeguard against unnecessary restraints of freedom¹²⁶ and limits freedom disproportionately.¹²⁷ The law that restricts individuals' freedom of contract by prohibiting the unnecessary or disproportionate limits of freedom is justified because the state should not help individuals to limit their freedom unduly.¹²⁸ The lack of reciprocity in a legal relationship may thus require additional safeguards. The Court's legality test expresses the same view. For instance, in *Scoppola v. Italy (No. 2)* the Court held that where the accused has waived right to full fair trial in exchange for an advantage, the withdrawal of this advantage by the State is simply impermissible and would breach the principle of legal certainty.¹²⁹

¹²³*Ibid.*, p. 72.

¹²⁴S. A. Smith, 'Future Freedom and Freedom of Contract', 59:2 *The Modern Law Review* (1996) pp. 179-180.

¹²⁵*Ibid.*, pp. 185, 180.

¹²⁶*Ibid.*, p. 186.

¹²⁷*Ibid.*, p. 180.

¹²⁸*Ibid.*, p. 179.

¹²⁹See section 2.1.3 and *supra* note 8.

Justice is an all-pervading principle, which can refer to ensuring that like are treated alike, not allowing to rely on one's own unlawful, dishonest or unreasonable conduct, not allowing to take undue advantage of the weakness, misfortune or kindness of others, not making grossly excessive demands, holding people responsible for the consequences of their own creation of risks.¹³⁰ Even more importantly for our discussion – justice can also refer to protective justice, whereby protection is afforded to those in a weak or vulnerable position.¹³¹ One of the reasons the ECtHR has developed the standard of legality in the matters dealing with procedural rights, is obviously the particularly vulnerable position of the accused or a party to a civil litigation. A person in such a situation is obviously exposed to outside influence and therefore the genuine freedom and autonomy has to be carefully safeguarded. The principle of justice is also embedded in Article 8 of the Convention - the right to private life. As brought above in section 2.2 the states' positive obligations – obligations to protect and fulfil – and the obligation to respect private life are closely related and have to be determined weighing different rights of different individuals.

3.3 The Court's legality test for a human rights waiver compared to the relevant domestic private law rules

As we learned, the special legality requirements on waiving a right are not unknown to European legal *acquis* on private law. In this sub-chapter I am explaining this claim even further by demonstrating that the legality requirements, similar to those established by the Court, exist in concrete domestic private law. As brought in the introduction, Estonian private law as a typical European or a continental European domestic private law is used for that purpose.

As we learned above,¹³² the ECtHR's standard of legality of a waiver includes, among other, two similar concepts. It must be established that the text or spirit of a right does not prevent waiving them of one's own free will and the waiver must not run counter to any important public interest.

In Estonian domestic law, this principle is enshrined in the Constitution. Pursuant to article 19 of the Estonian Constitution,¹³³ everyone shall honour

¹³⁰C. von Bar *et al.* (eds.), *supra* note 109, p. 84.

¹³¹*Ibid.*

¹³²See sections 2.1.1 and 2.1.4 above.

¹³³The Constitution of the Republic of Estonia, passed by a referendum held on 28 June 1992, entered into force 3 July 1992.

and consider the rights and freedoms of others, and shall observe the law, in exercising his or her rights and freedoms and in fulfilling his or her duties. This establishes the prohibition of abuse of rights and is a constitutional principle of private law.

The Constitution also establishes the principle of indirect horizontal effect of constitutional rights, which overlaps with human rights law enshrined in the Convention. According to first section of Article 152 of the Constitution, courts shall not apply any law or other legislation that is in conflict with the Constitution. Pursuant to the second section of the same article, the Supreme Court shall declare invalid any law or other legislation that is in conflict with the provisions and spirit of the Constitution.

Also, the principle of good faith establishes the prohibition of abuse of rights, thus working *inter alia* as a safeguard for the waiver in contractual relationship not to run against public interest. Pursuant to Article 138 of the General Part of the Civil Code Act¹³⁴ rights shall be exercised and obligations shall be performed in good faith; it is prohibited to exercise a right in an unlawful manner or with the objective to cause damage to another person. An action in contrary to the principle of good faith may be the basis to leave the contractual claim unsatisfied in the civil proceedings.¹³⁵

Importantly for the waivability of a right, the private law establishes conditions under which the waiver of a right within a transaction, is limited by public interest. Pursuant to the sections 1 and 2 of Article 86 of the General Part of the Civil Code Act, a transaction which is contrary to good morals or public order is void; a transaction is contrary to good morals, *inter alia*, if a party knows or must know at the time of entry into the transaction that the other party enters into the transaction arising from his or her exceptional need, relationship of dependency, inexperience or other similar circumstances, and if: (1) the transaction has been entered into under conditions which are extremely unfavourable for the other party or (2) the value of mutual obligations arising for the parties is out of proportion contrary to good morals.

The ECtHR's standard of legality further contains the requirement of a waiver being unequivocal and the requirement of being attended with safeguards to commensurate with its importance. These safeguards are

¹³⁴Passed 27 March 2002, entered into force 1 July 2002.

¹³⁵*Janson v. Golubev*, 29 March 2004, Estonian Supreme Court, no. 3-2-1-41-04, para.24.

directed towards the person's free will and also making sure that the waiver has legitimate (predictable) consequences. In Estonian private law, we find many such safeguards.

For instance, an ostensible¹³⁶ transaction is void pursuant to section 2 of Article 89 of the General Part of the Civil Code Act.

Section 1 of Article 83 of the General Part of the Civil Code Act stipulates the consequences of the failure to comply with the format prescribed by law. Upon failure to comply with the format provided for a transaction by law, the transaction is void unless otherwise provided by law or the objective of the formal requirements.

Article 90 of the General Part of the Civil Code Act establishes grounds for cancellation of a transaction. A transaction entered into under the influence of a relevant mistake, fraud, threat or violence may be cancelled pursuant to the procedure provided by law. The Law of Obligations Act¹³⁷ prescribes legal remedies in case of non-performance by an obligor, pursuant to Article 101 section 1, the obligee may: (1) require performance of the obligation; (2) withhold performance of an obligation which is due from the obligee; (3) demand compensation for damage; (4) withdraw from or cancel the contract; (5) reduce the price; (6) in the case of a delay in the performance of a monetary obligation, demand payment of a penalty for late payment.

Private law principles of course, existed long before the Court established the legality of a waiver test in its case-law. Both of them regulate the transactions of individuals. As shown, the Court's criteria for the waiver of human right echoes private law and its principles. Taken together, the comparison of a private law legality standard and the Court's legality standard to a human rights waiver we see the obvious similarities. We can also see that the level of precision of the Court's standard test for legality of a waiver and testing the waiver from the personal autonomy perspective, is well above the necessity-standard usually applied in cases concerning collision of individuals' rights. This leads us on to the next chapter, where I am going to claim that the application of the standard test in the Court's

¹³⁶Pursuant to section 1 of Article 89 of the General Part of the Civil Code Act, an ostensible transaction is a transaction upon which the parties have agreed that the declarations of intention made upon entry into the transaction do not have the legal consequences corresponding to the intention expressed since the parties wish to create an impression of the existence of a transaction, or to conceal the transaction they actually wish to enter into.

¹³⁷Passed 26 September 2001, entered into force 01.07.2002.

reasoning, in stead of abstract necessity and margin of appreciation tests, would add to the legitimacy of the Court's rulings.

4 The application of the legality test by the Court to a human right waiver conducted in a private law relationship

In this chapter I have gathered arguments, specifically related to the role of ECtHR, that would support the application of the Courts legality test for a human rights waiver in case the waiver has been conducted in a private law relationship. In other words this chapter is going to provide ECtHR-specific arguments for the wider use of the standard. I will provide arguments from the theory of legal reasoning, the legitimacy of an international court and the sources available to ECtHR. I will however start with an example which should persuade the reader that the test is appropriate to use in the reasoning of the ECtHR in cases concerning human rights waiver conducted in a private law relationship.

4.1 The applicability of the Court's standard in case a waiver is conducted in a civil law relationship – an exercise

I have provided above that the Court's legality test is similar to private law legality test for a waiver of a right. The role of ECtHR is different than that of a domestic court – it only evaluates the domestic court's decision and domestic law taking into consideration the requirements of the Convention and the obligations of the state. One might thus ask if the legality test for a human right waiver is suitable for the ECtHR to use when its primary business is not to evaluate the private legal relationship in particular. In this sub-chapter I am going to demonstrate that the Court's legality test for a human right waiver is applicable in cases before the Court concerning a contractual waiver of a right. In fact, the Court can use the standard in the very same way it uses it in cases concerning public law relationship – by evaluating if the domestic law that governs the human right waiver is in conformity with the test. I have picked *Evans v. The United Kingdom*¹³⁸ as an example of the Court's ruling concerning a waiver of human right in private sphere. Ms Natallie Evans waived the future right to have biological

¹³⁸ *Supra* note 7.

children in very obscure circumstances. She chose to freeze only embryos and not her eggs before her ovaries were removed; she was stressed and in a hurry, her partner had promised her that he would not withdraw his consent to use the embryos. The domestic law however did not recognise such an agreement as valid. Ms Evans' partner reconsidered his decision.

4.1.1 The circumstances of *Evans* case and the Court's decision.

Evans v. The United Kingdom has been cited by the Court as a case where there court established that Article 8 includes the right to respect for both the decisions - to have and not to have a child.¹³⁹

Ms Natallie Evans ("the applicant") was informed during a treatment in a clinic that her ovaries would have to be removed due to a medical condition. It was possible, quickly, to first to extract some eggs for in vitro fertilisation ("IVF"). As regards to creating and freezing embryos, under the domestic law and according to the forms to be signed, it would be possible for either of the parties to withdraw his or her consent at any time before the embryos were implanted in the applicant's uterus. Freezing and saving unfertilised eggs mean lower rate of success in becoming pregnant; also it couldn't have been conducted in that clinic. J, the applicant's partner reassured the applicant that they were not going to split up and that he wanted to become the father of her children. The couple signed forms required by the law and the fertilisation of embryos was conducted successfully; the embryos were frozen. Ms Evans underwent a surgery whereby her ovaries were removed. When ready to have embryos implanted in her uterus, J withdrew his consent. The couple's relationship had ended. The law had established, as a matter of public policy, that it would have been impossible for J to give an unequivocal consent to use the embryos, no matter how the circumstances change. In other words, J's assurance that he would not withdraw his consent to use the embryos was void.

I will now provide a summary of the reasoning of the Court and the dissenting judges. The summary is quite lengthy and this is purposive. In order to persuade the reader that another way of reasoning would be more appropriate, we'd need a starting point to be able to judge and compare.

With regard to possible violation of Article 8, in its judgement, the Grand Chamber¹⁴⁰ attached importance to the following:

¹³⁹*E.B. v. France*, 22 January 2008, ECtHR, no. 43546/02, para. 43.

¹⁴⁰*I.e.* the majority of the Grand Chamber, nine votes out of thirteen.

- the legislation in question served a number of wider, public interests, in upholding the principle of the primacy of consent and promoting legal clarity and certainty, for example¹⁴¹;
- positive obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves¹⁴²;
- regard must be had to the fair balance which has to be struck between the competing interests; and in both contexts the State enjoys a certain margin of appreciation¹⁴³;
- the principal issue, is whether the legislative provisions as applied in the present case struck a fair balance between the competing public and private interests involved;¹⁴⁴
- where a particularly important facet of an individual’s existence or identity is at stake, the margin allowed to the State will be restricted. Where, however, there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider. There will also usually be a wide margin if the State is required to strike a balance between competing private and public interests or Convention rights;¹⁴⁵
- there is no consensus among member States as to the stage in IVF treatment when the gamete providers’ consent becomes irrevocable; there is no clear consensus that in the very circumstances, Ms Evans’ rights under article 8 should take precedence over J’s;¹⁴⁶
- it is legitimate – and indeed desirable - for a State to set up a legal scheme which takes this possibility of delay in IVF treatment (compared to fertilisation through sexual intercourse) into account;¹⁴⁷
- while the pressing nature of the applicant’s medical condition required her to make a decision quickly and under extreme stress, she knew, when consenting to have all her eggs fertilised with J’s sperm, that these would be the last eggs available to her, that it would be some time before her cancer treatment was completed and any embryos could be implanted, and that, as a matter of law, J would be free to withdraw consent to implantation at any moment;¹⁴⁸

¹⁴¹ *Evans v. The United Kingdom*, *supra* note 7, para. 74.

¹⁴² *Ibid.*, para. 75.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*, para. 76.

¹⁴⁵ *Ibid.*, para. 77.

¹⁴⁶ *Ibid.*, paras. 78 and 79.

¹⁴⁷ *Ibid.*, para. 84.

¹⁴⁸ *Ibid.*, para. 88.

- the absolute nature of the rule served to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case by case basis. Also the absolute rule served to promote respect for human dignity and free will, as well as a desire to ensure a fair balance between the parties to IVF treatment, underlay the legislature’s decision to enact provisions permitting of no exception to ensure that every person donating gametes for the purpose of IVF treatment would know in advance that no use could be made of his or her genetic material without his or her continuing consent;¹⁴⁹
- the applicant’s right to respect for the decision to become a parent in the genetic sense should not be accorded greater weight than J’s right to respect for his decision not to have a genetically-related child with her. It would have been possible for Parliament to regulate the situation differently. However, the central question under Article 8 is not whether different rules might have been adopted by the legislature, but whether, in striking the balance at the point at which it did, Parliament exceeded the margin of appreciation afforded to it under that Article.¹⁵⁰
- the Parliament had struck fair balance, because there is no European consensus and the clear rules were brought to applicant’s attention.¹⁵¹

The dissenting opinion of judges Türmen, Tsatsa-Nikolovska, Spielmann and Ziemele found a violation of the rights enshrined in both, Article 8 and that in conjunction with Article 14.¹⁵² Their arguments, concerning the violation of Article 8, were:

- the case should have been analysed not as one concerning state’s positive obligations, but as an interference in the applicant’s private life;¹⁵³
- it is uncontested that the interference had a legitimate aim, was prescribed by law. However, it was not proportionate, because the rule was absolute and provided no flexibility and the applicant’s right’s eradication;¹⁵⁴
- the British law failed to strike fair balance and take special circumstances into consideration – J knew about the applicant’s last

¹⁴⁹*Ibid.*, para. 89.

¹⁵⁰*Ibid.*, paras. 90 and 91.

¹⁵¹*Ibid.*, para. 92.

¹⁵²Joint Dissenting Opinion of Judges Türmen, Tsatsa-Nikolovska, Spielmann and Ziemele. in *Evans v. The United Kingdom*, *supra* note 7, p. 30.

¹⁵³*Ibid.*, para. 5.

¹⁵⁴*Ibid.*, para.6.

- chance and she, in good faith relied on his assurance; the act of destroying an embryo involved destroying the applicant's eggs;¹⁵⁵
- the wide margin of appreciation should not prevent the Court from exercising its control – namely whether a fair balance between all competing interests has been struck at a domestic level;¹⁵⁶
 - where the effect of the legislation is such that, on the one hand, it provides a woman with the right to take a decision to have a genetically related child but, on the other hand, effectively deprives a woman from ever again being in this position, it inflicts such a disproportionate moral and physical burden on a woman that it can hardly be compatible with Article 8 and the very purposes of the Convention protecting human dignity and autonomy.¹⁵⁷

From the majority's and the dissenting judges' reasoning we see that the adjudication only involved evaluating domestic regulation through the conventional general principles like the margin of appreciation, striking fair balance, etc. The dissenting judges paid more precise attention to the matter if a fair balance has been struck in the concrete individual case, but neither the majority or the dissenting judges have commented on Ms Evans's waiver of her human right and its lawfulness within the meaning of the Convention. In the next sub-chapter, it is explained, what exactly was the waiver in *Evans* and this waiver is put through the test the Court has worked out for waivers of Convention rights.

4.1.2 The application of the Court's legality test in *Evans* case

With signing the forms in order to get the IVF treatment, Ms Evans waived her right to become a genetic parent in case J withdrew his consent. When analysing Ms Evans waiving her right to become a genetic parent, we must consider the circumstances of the time when she did that. She was under a stressful situation (because of her medical condition and hurrying) and J persuaded her that they should pick the more certain way of having children – freezing embryos and not her eggs only. The service of egg freezing was not available at the clinic. Let us apply the ECtHR's test for human rights waiver to Ms Evans's waiver of the right to become a genetic parent. It should show us, if it would be possible to apply the test in cases where the waiver is given in a private relation. It should also demonstrate if this kind of reasoning could change the outcome of the decision of the Court or add legitimacy to the reasoning of the judgement.

¹⁵⁵*Ibid.*, para. 8.

¹⁵⁶*Ibid.*, para. 12.

¹⁵⁷*Ibid.*, para. 13

As brought above, under the legality of a waiver test, it must firstly be established that the text or spirit of a right included in the ECHR does not prevent waiving them on one's own free will. The text of Article 8 paragraph 1 goes as follows: everyone has the right to respect for his private and family life, his home and his correspondence. As the Court noted in *Evans*, the right to respect for a decision to become a parent in genetic sense is included in the scope of Article 8.¹⁵⁸ It is obvious that the text of Article 8 nor the spirit of it do not prevent waiving the right to respect for a decision to become a genetic parent. Even a tacit decision, a choice not to have children, can be interpreted as waiving this right.

It is not clear from the Court's established standard, whether it should be established that the text of an article and spirit of the right prevent a waiver in the certain circumstances of the case or as a general inference from the text. As there might be many ways or circumstances of waiving a right – temporarily or eternally; purely on a free will or under a stressful situation – it is here presumed that it should be examined whether the particular waiver *in the given case* is compatible with the text and spirit of the right.

What we are dealing with, is the decision to waive the right for the rest of the life depending *only* on a decision of another person. As the applicant waived her right to become a genetic parent in case J did decide so, it can be inferred that really, J was entitled to waive her right to become a genetic parent. Furthermore, the decision was in hands of a person who had persuaded the applicant that it would not happen;¹⁵⁹ he also had self-interest in the matter. It could be doubtful if it is compatible with the spirit of Article 8 to waive the right to become a genetic parent in a way that an authorisation for waiving that right is given to another person and it only depends on this person's will.

According to the second criterion, a waiver must be established in an unequivocal manner. The waiver in *Evans* was conducted in written form. However, as the circumstances of the case tell us, the will of Ms Evans was quite the opposite – she did not want to waive the right for a biological child; she wanted to have one. She was sure, while signing the forms, that these embryos created would never be unavailable for her. In fact, the couple had agreed orally that the consents would not be withdrawn; the domestic law just didn't recognise this kind of contract as legal. One would

¹⁵⁸*Supra* note 7, para. 72.

¹⁵⁹The dissenting opinion in the case also brings out, that the majority failed to give J's assurance any weight at all. *Supra* note 152, para. 8.

have to accept that a waiver conducted under these circumstances could be regarded as *not* unequivocal.

Pursuant to the third standard, the waiver must be attended by minimum safeguards to commensurate with its importance.

It could be argued, that the waiver was safeguarded by the written forms and information given in writing to the applicant. It may however be questioned, if a legislation, which puts such a restriction on one's autonomy – it would not allow an agreement between two persons even in special circumstances – has enough balancing safeguards. Let us remind ourselves that the judges of the dissenting opinion pointed out, among other, that the legislation in question, providing a chance at the same time as totally erasing the chance to become a genetic parent, can hardly be compatible with, in addition to Article 8, the very purposes of the Convention protecting human dignity and *autonomy*.¹⁶⁰ The state had interfered in the private area of life, allowing no exceptions from the rule that the consent of implanting an embryo can be withdrawn any time. This argumentation could very well indicate, that in the exceptional case like in *Evans*, the safeguards did not balance Ms Evans's waiver enough, considering its importance in her case.

The fourth criterion demands that the waiver must not run counter to any important public interest.

With regards to *Evans* case, the Court found the law serving public interest in that:

- the absolute nature of the rule served to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case by case basis;¹⁶¹
- the absolute rule served to promote respect for human dignity and free will, as well as a desire to ensure a fair balance between the parties to IVF treatment, underlay the legislature's decision to enact provisions permitting of no exception to ensure that every person donating gametes for the purpose of IVF treatment would know in advance that no use could be made of his or her genetic material without his or her continuing consent.¹⁶²

When we return to the waiver, we must look, if the waiver itself ran counter to any public interest and that is definitely a different one from the content

¹⁶⁰*Ibid.*, para. 13.

¹⁶¹*Supra* note 7, para.89.

¹⁶²*Ibid.*

of public interest observed by the Court in *Evans* case. We must assess if there are any exceptional circumstances in the case that arise special public interest whereby, as an exception, the waiver should not be allowed. The purpose of our exercise is not to solve the issue in its entirety, but to point out the circumstances that may be taken into consideration under those lines of arguments. Therefore, may it be pointed out here that these particular circumstances may refer to a public interest whereby, as an exception, the waiver should not be allowed and the exception to the general rule should exist because:

- there was an effective eradication of the right;
- the person waiving a right was relying in good faith on another person's assurance that the right would not be eradicated.

4.1.3 The application of the requirements for a lawful waiver arising from Article 8 to the *Evans* case

Now I will address the relevant domestic law's intrusion into the parties' privacy in terms of contractual freedom in *Evans*. I am going away from the Court's standard test for a human right waiver and test the domestic law with the requirements of the Convention with regard to autonomy, the freedom of contract therein. As indicated above, the waiver of a right most probably¹⁶³ falls within the scope of right to private life, personal autonomy.

From the perspective of the freedom of contract, I observe two aspects. The domestic law allowed either of the parties to withdraw from the contract at any time and for whatever reason. The law did *not* allow the parties to deviate from that rule, i.e. the parties could not agree on an exception that the withdrawal of this contract was not permitted.

As mentioned, the Court found with regard to the private law relationship between Ms Evans and J, that the state had acted within the margin of appreciation in striking fair balance between public and private interests. As the Court pointed out, it was legitimate and even *desirable* for a State to set up a legal scheme which takes the possibility of delay in IVF treatment (compared to fertilisation through sexual intercourse) into account.¹⁶⁴ As the Court noted, there is no consensus among member States as to the stage in IVF treatment when the gamete providers' consent becomes irrevocable; there is no clear consensus that in the very circumstances Ms Evans'es

¹⁶³As indicated in section 2.2.2 there could be marginal areas of private life to which the scope of Article 8 does not extend.

¹⁶⁴*Evans v. The United Kingdom*, *supra* note 7, para. 84.

rights under article 8 should take precedence over J's.¹⁶⁵ The absolute nature of the rule served, in the Court's opinion, to promote legal certainty, human dignity and free will, as well as a desire to ensure a fair balance between the parties to IVF treatment; the provisions permitting no exceptions served to ensure that every person donating gametes for the purpose of IVF treatment would know in advance that no use could be made of his or her genetic material without his or her continuing consent.¹⁶⁶

Taking the perspective of private law freedom of contract, as a right also guaranteed under Article 8 of the Convention, we can identify two important aspects in the Court's reasoning.

The first one is about legal certainty. The Court's finding that the rule served to promote legal certainty contravenes the provision's inner nature: a consent that a party to the contract can withdraw at any time. A withdrawal from the contract and cancelling a contract are ordinarily a remedy in the cases of a breach of a contract. This exception contravenes the very general and important private law principle *pacta sunt servanda*, agreements exist to be kept, the contract is ought to be fulfilled. This principle serves as the main principle for legal certainty in private relations. When this principle is erased for this particular kind of contracts, one would expect it to be balanced, for instance by the provisions of exceptions. One would have to be satisfied with the Court's reasoning that given this exceptional medicinal area of IVF treatment and the areas of personal life involved, this requirement of continuing consent could be justified. But could the absence of exceptions be justified? Hardly, I would say. Let us think of the worst case scenario: the misuse or abuse of this so-called continuing consent; which was what happened in *Evans* – J had promised Ms. Evans that he would not withdraw his consent. He did however. This promise was not recognised by the law and thus this agreement had zero consequences to either of the sides. One would expect however that the law does not ignore abuse of rights.

The second aspect is about the Court's view that the absolute nature of the rule served in this case to protect human dignity, free will and represented the state's desire to ensure a fair balance between the parties to IVF treatment. From the point of view of contract law, at the very least, this is argument appears dramatically one-sided. The absolute rule was designed to regulate a conflict situation. If one party to the contract withdraws the consent, the contractual rights of the other party cease to exist. Thus

¹⁶⁵*Ibid.*, paras. 78 and 79.

¹⁶⁶*Ibid.*, para. 89.

certainly, the legislator, ruling in this very particular area of life, and enacting the provision for the very particular situation, must have foreseen that this is a conflict situation and indeed there is another party to it. In other words: when the legislator created this rule, it imagined the conflict situation whereby one person from a couple, who has freezed embryos, wants to use the embryo and the other one has changed his or her opinion. Otherwise there would not have been even a need for this rule. Further, the legislator should have foreseen that this particular one side of the contract, who would raise such a conflict situation by demanding to still use the embryo, is a woman – a man could not make use of an embryo for biological reasons. When we think just one step forward – what would be the reasons for a woman to desire a baby in the situation where the man does not want it anymore? This would not be an ordinary or easily made decision for women; I would suggest that the situation of Ms Evans, a woman to whom this chance represents the last chance to become a biological mother, would become to one's minds among the first answers. Because this is all very obvious, the legislator should have thought of the dignity and safeguards of the free will of this woman as well. The state is in that situation under a positive obligation to protect that woman's right to become a biological mother. Surely, one could think that the written agreement and informed consent worked as safeguards for that purpose. However, these safeguards come short when we deal with abuse of rights. Again, the law is ought to regulate abuse of rights and the regulation under discussion here fell short of that.

Allow me to add that in the judgement in *Evans*, the Court stressed that the right to become a biological mother and the decision not to become a father stay at the same level, neither of them stands higher. This reveals another controversy in the judgement: if these rights are equal, why is the law that protects only one of them and not the other, in abidance with the Convention? That said, I find that even from the more or less abstract perspective of the margin of appreciation, this absolute domestic rule could be criticised. It would be highly legitimate to question if the law which leaves the rights of one side in a very *obvious* situation of conflict of rights totally unprotected, could be justified by the allowed margin of appreciation in striking fair balance between individuals rights.

The short exercise of applying the Court's test of a legal waiver in *Evans* in the previous sub-chapter demonstrated that the test is applicable, at the very least. The aim of the exercise was not to persuade the reader that the outcome of the judgement in *Evans* would certainly have been a different one. The aim was to point out that compared to the application of the

necessity standard (including striking fair balance between rights), the identification and testing a waiver of a human right raises completely *different* questions and aspects of the case. The indication that the waiver is unlawful within the meaning of the Convention, constitutes a violation of a human right therein. Fairly enough it can thus be stated that the outcome of the decision could be different if the waiver is put through a legality test. When we put the domestic private law regulation in *Evans* into the perspective of personal autonomy, freedom of contract, we saw that even more ways to go about the case come up and these also raise matters that could lead to a different result of a judgement. Most importantly the analysis brought out that the legitimacy of the absolute rule as an intrusion in private autonomy could be questionable because the probable conflict situation was easily identifiable for the lawgiver and because this conflict situation obviously refers to a particular victim in case of an abuse of rights – a woman to whom it is a last chance to become a mother.

4.2 Why would the wider use of the Courts legality test be legitimate?

4.2.1 The wider application of the standard as taking up analogy would add to the coherency and legitimacy of the Court's decisions

This sub-chapter is going to provide a claim concerning legitimacy. The concept of legitimacy has a sociological and a normative dimension, it may refer to popular attitudes of authority (popular legitimacy).¹⁶⁷ On the other hand, the normative meaning of legitimacy refers to whether a claim for authority is well-founded – whether it is justified in some objective sense.¹⁶⁸ The two aspects are closely related since persuasion is one of legitimacy's functions, if not its primary function.¹⁶⁹ I use the concept of legitimacy in the context of both, the Court's role and its reasoning in individual cases, because the Court's decisions also provide precedent law and the reasoning of the Court thus has a wider influence or a different type of legitimacy. These contexts are thus here indeed inseparable.

¹⁶⁷D. Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?', 93:3 *The American Journal of International Law* (1999) pp. 596 – 624. p. 601.

¹⁶⁸*Ibid.*

¹⁶⁹*Ibid.*

I am bringing out the legitimacy of the Court's rulings as an argument that supports the wider use of a unified standard test to a human right waiver. Legitimacy of the Court's reasoning is particularly important for the ECtHR, because the Court itself does not enjoy a system of coercive powers. As Helfer and Slaughter bring it out, international courts, given the lack of coercive mechanisms, need to rely among other, on 'their own legitimacy and the legitimacy of any particular judgment reached'.¹⁷⁰ The Court has, compared to domestic courts, very little of law at their hands. The articles in the Convention do not say much. Pursuant to Article 32 paragraph 1 of the Convention the jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47. The Court's role is not only to apply the Convention, but also give the Convention as a 'living instrument' a present-day meaning.¹⁷¹

When we add to it the widely known facts that the caseload of the Court is very high and the time of the procedure very long, we see that the particular importance of the Court's rulings lie in the *quasi-lawgiving* function in the field on human rights in Europe, and not so much as an effective procedure for individuals.

A 'checklist' for effective supranational adjudication, according to Helfer and Slaughter, includes three sets of factors: those in control of the states party to an agreement of establishing a tribunal, those within the control of the tribunal itself and those that are often not subject to the control of either states or jurists.¹⁷² We are interested in the set of factors in control of the tribunal itself, because this paper talks about a suggestion with regard to the legal reasoning of the Court. The factors in control of the tribunal itself include the tribunals' awareness of their audiences, their demonstrated autonomy from political interests, their incremental style of decisionmaking, *the quality of their legal reasoning*, their dialogue with other supranational tribunals, and the forms of their opinions.¹⁷³

Importantly for our discussion, the quality of legal reasoning is important for an effective supranational adjudication. Judges on supranational tribunals also tend to attribute their relative success or failure, according to

¹⁷⁰L. R. Helfer and A.-M. Slaughter, 'Toward a Theory of Effective Supranational Adjudication', 107 *Yale Law Journal* (1997) p. 285.

¹⁷¹*Marckx v. Belgium*, 13 June 1979, ECtHR, no. 6833/74, para.41.

¹⁷²Helfer and Slaughter, *supra* note 170, p. 387.

¹⁷³*Ibid.*, p. 308. According to the authors, many of these factors overlap; many may strike readers as the standard elements of "good judging".

their own measures, to the quality of their legal reasoning.¹⁷⁴ According to observers, the ECtHR has benefited substantially from the quality of its reasoning.¹⁷⁵ All scholars would probably acknowledge the value of “systemic and temporal coherence” as elements or attributes that make legal reasoning good.¹⁷⁶ In particular, adherence to precedent, even when used only as authoritative guidepost and not as binding obligation, ensures a minimum degree of both temporal and systemic consistency; consistency with earlier decisions provides an autonomous bulwark of legitimacy.¹⁷⁷ An additional increment of legitimacy flows from the quality of the decisions themselves, both past and present.¹⁷⁸ Helfer and Slaughter suggest that the precise nature of the reasoning involved, whether deductive, syllogistic, analogical, or some combination of these styles, is less important than that judicial decisions *be reasoned* in the first place: reasons should explain why and how a particular conclusion was reached.¹⁷⁹ They call the giving-reasons requirement a prerequisite for the exercise of persuasive rather than coercive authority; a reasoned opinion assures individual litigants that their day in court was meaningful, in that their arguments were actually heard by the judge; the judge’s opinion both disseminates their arguments and dignifies them with a response.¹⁸⁰

The development and firm application of a coherent standard in jurisprudence of the Court would certainly add to the legitimacy of the Court’s rulings, as well as the predictability of the Court’s decision. This was pointed out by McHarg, who found the Court’s failure to develop a coherent test for determining when rights prevail over the public interest or *vice versa*.¹⁸¹ According to McHarg, a fuller understanding at a conceptual level can help make sense of the inconsistencies at doctrinal level; a clear methodology would be preferable to what McHarg calls “confusion and disarray” in Strasbourg jurisprudence.¹⁸² Fudging the conceptual issue causes inconsistency and unpredictability, which represent a greater threat to judicial legitimacy than opting unequivocally for one or other methodological approach.¹⁸³ McHarg contends that in the absence of a theoretical solution to the problem of reconciling conflicting rights and public interest, greater procedural certainty and doctrinal clarity should be

¹⁷⁴ *Ibid.*, p. 318.

¹⁷⁵ *Ibid.*, p. 319.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*, p. 320.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*, p. 320-322.

¹⁸¹ McHarg, *supra* note 68, p. 695.

¹⁸² *Ibid.*

¹⁸³ *Ibid.*, p. 696.

chosen, in order to provide the best available foundation for judicial legitimacy (in the context).¹⁸⁴

In essence, the Court's legality test is a rule created in case-law, in other words, a rule based on precedence. As indicated above, the Court has not limited the area of application of this rule literally. It has even mentioned that the rule is applicable to waivers of the rights listed in the Convention. Yet the Court has not applied the test to all the human rights waivers but only to those conducted in procedural matters. Our question is, would it be justified and would it add to the legitimacy of the Court's decisions if the test would be applied extensively by the way of analogy?

I answer that question affirmatively. We are in the situation where we have to decide whether to apply the rule, created in precedents, by analogy to other cases. Aleksander Peczenik has dealt with this issue of choice between analogy and *argumentum e contrario*.¹⁸⁵

Although Peczenik dealt with analogy and *argumentum e contrario* in the context of statutory law, the same principles can be extended to a rule created in case-law. One of Peczenik's contentions, as we shall see, even concerns only a rule created in precedence.

The traditional origin of statutory analogy is that a so-called gap occurs in the statute.¹⁸⁶ As I have indicated in above, in the cases involving a conflict of individuals' rights, the Court resorts to undefined arguments of margin of appreciation and striking the fair balance between rights of individuals. In such situation, it is justified to consider that there is a gap in law and we are in the position to assess if the resort to analogy would be justified.

The prerequisites for an application of a rule by the way of analogy presupposes relevant resemblance of cases; an estimation of relevant resemblance can involve three steps.¹⁸⁷ The first step is to establish that persons, things, documents, rights, duties, circumstances concerning space and time, etc., which occur in case bear a resemblance to the circumstances in the cases regulated by the provision.¹⁸⁸ The second step is a prediction, based on these similarities, that an application of provision to case will produce relevantly similar social effects to those produced in cases which

¹⁸⁴*Ibid.*

¹⁸⁵A. Peczenik, *On Law and Reason* (Springer Science + Business Media B. V. 2009) p. 323.

¹⁸⁶*Ibid.*, p. 321

¹⁸⁷*Ibid.*, p. 321.

¹⁸⁸*Ibid.*

are regulated by this provision and the third step is to conclude that case thus should be treated similarly to cases regulated by the provision.¹⁸⁹

Analogy can be justified by the principle "like should be treated alike" and thus by considerations of justice and universalisability, the latter is a criterion of coherence.¹⁹⁰

Argumentum e contrario on the other hand is a legal mode of reasoning arguing against the use of analogy; it is based on the assumption that the law should be respected.¹⁹¹ This demand is further supported by the value of fixity in the law and predictability of legal decisions.¹⁹² Peczenik has worked out reasoning norms which help one to make choice between the use of analogy and *argumentum e contrario*, which he stresses to be argument forms, supported by different set of reasoning norms and other principles which a judge has to weigh and balance and which enable to reach the conclusion justifiable in the circumstances.¹⁹³ We are interested in these reasoning norms specifically when they relate to precedent law, because we are dealing with a rule created by case law. Luckily one of these rules is touching upon this issue. As the last rule, the rule number A10, Peczenik brings out that when interpreting rules based on precedents one may utilise *argumentum e contrario* only in exceptional cases.¹⁹⁴

The reason why one should prefer analogy in interpreting precedent law, are:

- the precedent decision does not establish any limit for the sphere of application or the rule it supports;
- the point of precedent law is to obtain a pattern for analogous cases; to facilitate the creation of a general legal rule and not the precise scope of it;
- since generality is a criterion for coherence, the practise of following precedents contributes to the coherence of the legal system and also to the fixity of the law.¹⁹⁵

Peczenik concludes that a general rule covering the precedent *is to be* extended to analogous cases.¹⁹⁶ This is very important for our discussion. As brought out, the legality test for human rights waiver is brought out in

¹⁸⁹*Ibid.*

¹⁹⁰*Ibid.*

¹⁹¹*Ibid.*, p. 323.

¹⁹²*Ibid.*

¹⁹³*Ibid.*, p. 324.

¹⁹⁴*Ibid.*, p. 327.

¹⁹⁵*Ibid.*

¹⁹⁶*Ibid.*

the case-law of the Court as a *general* rule. The Court refers to the test as applicable to a waiver of a right enlisted in the Convention and speaks of the test not indicating that the test is applicable only to certain rights and not the others.

Thus, the theory of methods of legal reasoning supports the argument that the legality test of a human rights waiver, as a rule created by precedence law, should be used by analogy in similar cases. This would contribute to the coherence of the legal system as well as add to the fixity of the law.

4.2.2 The wider use of the standard would be legitimate because the Court would be employing the consensus of the national law and practise of the states as a source of law

The wider application of the test, as brought above, is possible and it could affect the result as well as the legitimacy as well as the predictability of the decisions of the Court. These reasons – the feasibility of the standard and potential to have an effect on the outcome of the procedure, however may fall short and we need more direct support in order to establish that a unified approach to all human right waivers is desirable. We are thus remained with the question if the application of the same test would be legally substantively justified. The Court does not explain why it is using the legality test for a human rights waiver nor does the Court explain why it is applying the test in selected cases. The Court is casuistic; deciding individual cases does not lend itself to broad statements of theory and it has been up to commentators to synthesise a set of principles which the Court uses in interpreting the Convention.¹⁹⁷ I am going to look into the sources of law at the Court's hand and the methods of interpretation of the Convention in order to establish if the wider application of the test would be justifiable also arising from those viewpoints. In other words, I am going to look for justifications amongst the Court's methodologies of interpretation.

The Court, whose role is to interpret and apply the Convention,¹⁹⁸ has established the principles of interpretation of the Convention in its case law. The most basic principles are concerned with the text of the Convention – regard must be had to the ordinary meaning of the words, the interpretation

¹⁹⁷R. C. A. White and C. Ovey, *The European Court of Human Rights* (Oxford University Press Inc, New York, 2010) p. 81.

¹⁹⁸Pursuant to Article 32 (1) of the Convention: The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.

must be in harmony with the context of the Convention and in the way the object and purpose of the treaty is best realised.¹⁹⁹ Pursuant to Article 1 of the Convention the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention. The test is however not arising from the text of the Convention as a primary source of law for the Court. It has been developed by the Court in its case-law.

Another methodology of the Court in interpreting the Convention in its jurisprudence is the comparative interpretation. It is based on the principle that the interpretation of the Convention may legitimately be based on common tradition of constitutional laws and a large measure of legal tradition common to the countries of the Council of Europe.²⁰⁰ The Court pays special attention to the role of the consensus of the national law and practise of the States Parties in the sources of law and methods of interpretation²⁰¹ and incorporates the consensus as the law of the Convention.²⁰²

As brought above, the test reflects the elements of the legality test for a waiver of a right in private law of European states. The test reflects the common ground among the States Parties to the Convention²⁰³ and may therefore be used as a source of law in the comparative interpretation of the Convention.

This brings me to a conclusion on why the application of the test is appropriate and legally justified to apply in cases concerning human rights waiver in private law relationship. It is rooted in the common consensus of the States Parties and can thus legitimately be used in the comparative interpretation.

As brought out in section 2.2.2, the sphere of private life has expanded over time and covers almost all aspects of human life. The same human rights law applies to the exercise of personal freedom in public law relationship as to that in a private law relationship. The constitutionalisation of private law, as brought above in section 3.1, indicates that the private law regulating the contractual waiver of human right must comply with the requirements of

¹⁹⁹White and Ovey, *supra* note 197, pp. 68-73.

²⁰⁰*Ibid.*, p. 77.

²⁰¹H. C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Martinus Nijhoff Publishers, Dordrecht, 1996) p. 185.

²⁰²*Ibid.*, p. 194.

²⁰³I say *most probably* because a more thorough research is needed in order to claim that in affirmative.

Article 8 of the Convention and the other provisions in the Convention. This further supports my claim in this thesis – that the same human rights law should apply to a human rights waiver regardless of the nature of the legal relationship – public or private.

5 Concluding remarks

This thesis looks at a conflict situation of human rights norms – a situation whereby a person is waiving a human right *while* exercising the right to autonomy. The Court has developed a special legality standard to a human rights waiver in cases concerning procedural rights most probably because of the extremely vulnerable situation of an accused in criminal proceedings. Additionally, the waiver must comply with the requirements of Article 8 of the Convention.

I suggest that stretching the ECtHR's legality test for a human rights waiver, currently only used in the cases where the waiver has been conducted in a public law relationship, to other human rights waivers would provide a coherent framework for solving this conflict of norms.

There is no presupposed difference in the weight or nature of human rights in public relationship or in private relationship. The areas of public law and private law can cover and do concern the same human rights. Equally, the waivers of the human rights, whether conducted in a private law relationship or in a public law relationship, should weigh the same. The human rights protection in a private relationship may in some cases be even more important - the partner in that relationship can be unreliable.

Finding what is “necessary in democratic society” and “striking fair balance” between the rights of individuals or those and the public interest is a vague principle that the Court uses when deciding a case concerning competitive rights of individuals. The identification of a waiver of a right and the application of the test of lawfulness of a waiver would add to the legitimacy of the Court's decisions. This methodology can also lead to a different outcome in solving the case. The legality test is equally applicable in cases where the waiver is conducted in a private law relationship even when taking into consideration the specific role of the ECtHR.

Substantial justifications for a unified application of the test are found in the idea of personal autonomy as a human right. The comparison of the Court's test for legality of a waiver and the private law principles demonstrated that the essential criteria are analogous and it could even be claimed that the Court's test for legality of a waiver is rooted in private law principles. This provides another justification - as the test is analogous to the test of legality of a waiver of a right in European private law, it is available to be used as a

source of law for the Court, for there is a consensus among the member-states.

It is not possible to draw a clear standard of a waiver of a right, which could be applicable in all circumstances. Waivers have different weight, volume and timeline. A human right waiver concerns the right to personal autonomy as well as the other human right – the right being waived. However, a standard with a varying extent could be applied in all cases, taking into account the particularities of the rights concerned and the circumstances of the case. It would bring about more clarity and legitimacy when compared to the use of the principle of striking fair balance between individual rights.

The European Court of Human Rights could develop its case-law by extensive application of the legality standard for a waiver of a human right. This would benefit the coherency of the legal reasoning of the Court and add to the legitimacy of the decisions.

Bibliography

Books

C. von Bar *et al.* (eds.), The Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, outline edition, <http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf> visited on 31 March 2011.

K. S. Ziegler (ed.), *Human Rights and Private Law. Privacy as Autonomy* (Hart Publishing, Oxford, 2007).

J. Marshall, *Personal freedom through Human Rights Law: autonomy, identity, and integrity under the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009).

A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, 2004).

A. Peczenik, *On Law and Reason* (Springer Science + Business Media B. V. 2009).

R. C. A. White and C. Ovey, *The European Court of Human Rights* (Oxford University Press Inc, New York, 2010).

H. C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Martinus Nijhoff Publishers, Dordrecht, 1996).

Articles

D. Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?', 93:3 *The American Journal of International Law* (1999) pp. 596 – 624.

O. Cherednychenko, 'EU Fundamental Rights, EC Fundamental Freedoms and Private Law', 1 *European Review of Private Law* (2006) pp. 23-31.

A. Colombi Ciacchi, 'Horizontal effect of Fundamental rights, Privacy and Social Justice'; in K. S. Ziegler (ed.), *Human Rights and Private Law. Privacy as Autonomy* (Hart Publishing, Oxford, 2007) pp. 53-63.

L. Fastrich, 'Human Rights and Private in K. S. Ziegler (ed.), *Human Rights and Private Law. Privacy as Autonomy* (Hart Publishing, Oxford, 2007) pp. 23-34.

L. R. Helfer and A.-M. Slaughter, 'Toward a Theory of Effective Supranational Adjudication', 107 *Yale Law Journal* (1997) pp. 273-391.

M. E. Horn, 'Confessional Stipulations: Protecting Waiver of Constitutional Rights' 61:1 *The University of Chicago Law Review* (1994), pp. 225-251.

J. Marshall, 'Giving birth but refusing motherhood: inauthentic choice or self-determining identity?' 4:2 *International Journal of Law in Context* (2008) pp. 169-185.

A. Mcharg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights', 62:5 *The Modern Law Review Limited* (1999) pp. 671-696.

H. Nieuwenhuis, 'The Core Business of Privacy Law: Protecting Autonomy' in K. S. Ziegler (ed.), *Human Rights and Private Law. Privacy as Autonomy* (Hart Publishing, Oxford, 2007) pp 15-20.

S. A. Smith, 'Future Freedom and Freedom of Contract', 59:2 *The Modern Law Review* (1996) pp. 167-187.

J.M. Smits, 'Private law and fundamental rights: a sceptical view' published in: T. Barkhuysen and S. Lindenberg (eds.) *Constitutionalisation of Private Law* (Leiden/Boston 2006), <<http://ssrn.com/abstract=928560>> visited on 31 March 2011.

H. J. Snijders, 'Privacy of Contract' in K. S. Ziegler (ed.), *Human Rights and Private Law. Privacy as Autonomy* (Hart Publishing, Oxford, 2007) pp. 105-116.

Treaties, Conventions, Laws and other legal documents

Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe. 4 November 1950, entry into force: 3 September 1953
United Nations, *Vienna Convention on the Law of Treaties*. Done at Vienna on 23 May 1969. Entered into force on 27 January 1980, Treaty Series, vol. 1155, p. 331

The Constitution of the Republic of Estonia, passed by a referendum held on 28 June 1992, entered into force 3 July 1992, <<https://www.riigiteataja.ee/akt/12846827>>, visited on 16 May 2011.

General Part of the Civil Code Act, Estonian Parliament, passed 27 March 2002, entered into force 1 July 2002, <<https://www.riigiteataja.ee/akt/106122010012>>, visited on 11 May 2011.

The Law of Obligations Act, Estonian Parliament, passed 26 September 2001, entered into force 01.07.2002, <<https://www.riigiteataja.ee/akt/104022011004>>, visited on 16 May 2011.

Table of Cases

All links to cases visited on 27 May 2011

The European Court of Human Rights

A.S. v. Finland, 28 September 2010, ECtHR, no 40156/07,
<<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=874585&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

Albert and Le Compte v. Belgium, 10 February 1983, ECtHR, no. 7299/75 ; 7496/76, <<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695299&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

Bell v. The United Kingdom, 16 January 2007, ECtHR, no 41534/98,
<<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=812820&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

Borotiyuk v. Ukraine, 16 December 2010, ECtHR, no. 33579/04,
<<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=878709&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

Bortnik v. Ukraine, 27 January 2011, ECtHR, no. 39582/04,
<<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=880557&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

Bruggemann and Shceuten v. Germany, 12 July 1977, European Commission of Human Rights, Report, no. 6959/75,
<<http://cmiskp.echr.coe.int/tkp197/view.asp?action=open&documentId=816971&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

Colozza v. Italy, 12 February 1985, ECtHR, no. 9024/80,
<<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695339&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

De Wilde, Ooms and Versyp v. Belgium, 18 June 1971, ECtHR, no. 2832/66 ; 2835/66 ; 2899/66, <<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695483&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

Dorozhko and Pozharskiy v. Estonia 24 April 2008 ECtHR no 14659/04 ; 16855/04, <<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=834387&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

E.B. v. France, 22 January 2008, ECtHR, no. 43546/02, <<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=827961&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

Evans v. The United Kingdom, 10 April 2007, ECtHR, no. 6339/05, <<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=815166&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

Grigoryevskikh v. Russia, 22 March 2009, ECtHR, no. 22/03, <<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=849155&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

Håkansson and Sturesson v. Sweden, 21 February 1990, ECtHR, no. 11855/85, <<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695515&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

Kaya v. Austria, 8 June 2006, ECtHR, no 54698/00, <<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=805572&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

Keenan v. The United Kingdom, 3 April 2001, ECtHR, no. 27229/95, <<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=697242&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

Kysilková and Kysilka v. the Czech Republic, 10 February 2011, ECtHR, no. 17273/03, <<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=881282&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

Laskey, Jaggard and Brown v. The United Kingdom, 19 February 1997, ECtHR, no. 21627/93; 21826/93 and 21974/93, <<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695898&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

Marckx v. Belgium, 13 June 1979, ECtHR, no. 6833/74,
<<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695411&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

Neumeister v. Austria (Article 50), 7 May 1974, ECtHR, no. 1936/63,
<<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695420&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

Niemetz v. Germany, 16 December 1992, ECtHR, no. 13710/88,
<<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695764&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

O'Halloran and Francis v. The United Kingdom, 29 June 2007, ECtHR,
no.15809/02 ; 25624/02, <<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=819526&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

Pishchalnikov v. Russia, 24 September 2009, ECtHR, no. 7025/04,
<<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=854576&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

Poitrimol v. France, 23 November 1993, ECtHR, no. 14032/88,
<<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=836307&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

Pretty v. The United Kingdom, 29 April 2002, ECtHR, no. 2346/02,
<<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=698325&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

Saknovskiy v. Russia, 12 November 2010, ECtHR, no. 21272/03,
<<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=876608&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

Salduz v. Turkey, 27 November 2011, ECtHR, no. 36391/02,
<<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=843647&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

Schuler-Zraggen v. Switzerland, 24 June 1993, ECtHR, no. 14518/89,
<<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695717&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

Scoppola v. Italy (No. 2), 17 September 2009, ECtHR, no. 10249/03,
<<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=853866&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

Sejdovic v. Italy, 1 March 2006, ECtHR, no. 56581/00,
<<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=792978&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

Sigbatullin v. Russia, 23 April 2009, ECtHR, no. 32165/02,
<<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=849657&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

Tysiac v. Poland, 20 March 2007, ECtHR, no. 5410/03,
<<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=814538&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

X. v. Iceland, 18 May 1976, European Commission of Human Rights, no. 6825/74, <<http://cmiskp.echr.coe.int/tkp197/view.asp?action=open&documentId=804613&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

Zagorodnikov v. Russia, 7 June 2007, ECtHR, no. 66941/04,
<<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=818559&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

Estonian Supreme Court

Janson v. Golubev, 29 March 2004, Estonian Supreme Court, no. 3-2-1-41-04, <<http://www.nc.ee/?id=11&tekst=RK/3-2-1-41-04>>.