

# ICELAND, FALUN GONG AND CHINA: A LEGAL OVERVIEW OF THE 2002 EVENTS

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**Abstract:** *The decision of the Icelandic government, in June 2002, to ban foreign practitioners of the Falun Gong spiritual movement during the official visit of the Chinese President caused considerable controversy, as did the compilation and distribution of a blacklist of people who were known or suspected to be Falun Gong members. This article deals with the legal implications of those events. After considering the official reasons for the ban and blacklist, it reviews the legal challenges directed against these measures and questions whether the actions of the Icelandic government are justifiable from an international human rights perspective. While European and international human rights law allow member states considerable discretion when interests of public order and national security are at stake, the piece comes to the conclusion that they also provide a number of limitations in order to circumvent abuses, particularly when the state intervention has the effect, like in Iceland, of directly discriminating against a specific spiritual group.*

**Key words:** *Iceland, Falun Gong, Religious Freedom, Discrimination, Blacklist, Protection of Sensitive Data on Religious Allegiance (or Privacy).*

## A. INTRODUCTION

In June 2002, shortly before the official visit of the Chinese President to Iceland, the government of the arctic nation introduced a formal ban against Falun Gong, a spiritual practice<sup>1</sup> commonly regarded as non-violent—if somewhat vocal<sup>2</sup>—but outlawed and harshly treated

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<sup>1</sup> For a discussion on the spiritual v religious nature of Falun Gong, see *infra*.

<sup>2</sup> Falun Gong practitioners have made a habit of travelling to foreign countries in order to increase awareness of the movement’s plight in China and organize (usually peaceful) protests against visiting Chinese dignitaries. One exception was a shouted intervention on the White House lawn during Hu Juntao’s visit to Washington in April 2006. See “US Protocol Crumbles on Hu Visit”, *BBC*

in China as a dangerous dissident movement.<sup>3</sup> Citing “public order”<sup>4</sup> and “national security”<sup>5</sup> reasons, Icelandic authorities compiled a blacklist of Falun Gong practitioners, sent it to Iceland’s national airline *Icelandair* and distributed it to selected embassies around the world. Although blacklisted people had no criminal records (the majority were women, sometimes with children), the government insisted the ban was necessary in order to avoid incidents and justified by the small size of Iceland’s police force.

As a result, a significant number of people were denied entry into Iceland.<sup>6</sup> Some were refused visas altogether, some had their permits cancelled and some who possessed valid documents and air tickets were denied boarding at European and American airports on the ground that their names appeared on the blacklist. Three practitioners managed to slip through the ban and reach Iceland but were arrested at Keflavik airport and deported back to the United States,<sup>7</sup> while a group of seventy-five people was arrested and detained in a makeshift centre.<sup>8</sup> They refused to be deported and, after thirty-six hours were released and allowed entry into the country.<sup>9</sup> Although the ban was subsequently relaxed, it was lifted only after the end of the official visit.

The spiritual movement insists it does not maintain lists of practitioners and, given the small size of Iceland's Police Force, accuses the Icelandic government of having used a blacklist provided by Chinese authorities.<sup>10</sup> Icelandic officials deny this and argue that the document was the result of the effort of the national police force, and was compiled on the basis of confidential information which cannot be revealed for "national security reasons".<sup>11</sup> After a legal battle between the government and the Icelandic Data Protection Authority (IDPA), the

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*News*, 21 April 2006; see also

<http://www.cbsnews.com/stories/2006/04/19/world/main1515903.shtml>

<sup>3</sup> See Human Rights Watch: *Dangerous Meditation: China's Campaign Against the Falun Gong* (New York: HRW 2002) § II; World Organization to Investigate the Persecution of Falun Gong: *Investigation Reports on the Persecution of Falun Gong* (New York: WOIPFG 2004) 444pp. For a detailed overview of the positions of the Chinese Government, Falun Gong and international observers, see my forthcoming “What is Falun Gong?” in *Arctic Totalitarianism? A Report on the Events Surrounding the Official Visit to Iceland of the Chinese President in June 2002* (Reykjavik: Icelandic Human Rights Center 2007) esp. 24–61. See also my forthcoming *La Diplomazia della Violenza: La Cina, la Religione ed il Falun Gong* (Turin: Centro Studi per le Nuove Religioni 2007) 45pp.

<sup>4</sup> Icelandic Ministry of Justice, Letter to Javier Solana, 7 June 2002. Unless otherwise stated, all unpublished documents are on file with the author.

<sup>5</sup> *Ibid.*

<sup>6</sup> “Iceland Airline Turns Away Falun Gong”, *Miami Herald*, 15 June 2002.

<sup>7</sup> Falun Gong-Iceland Dialogue Committee: *Complaint to the Parliamentary Ombudsman*, 2003, 20.

<sup>8</sup> “Falun Gong-iðkendur gista í flugstöðinni og Njarðvík” (“Falun Gong Members sleep in Keflavik Airport Terminal and in Njarðvík”), *Morgunblaðið*, 11 June 2002.

<sup>9</sup> “Meðlimum Falun Gong heimiluð landganga” (“Falun Gong Members allowed Entrance into the Country”), *Morgunblaðið*, 12 June 2002.

<sup>10</sup> Falun Gong-Iceland Dialogue Committee, cit, 6.

<sup>11</sup> Icelandic Ministry of Justice, Letter to Passengers Wishing to Travel to Iceland, 11 June 2002.

documents instituting the ban were made public and the existence of the blacklist formally acknowledged—yet the list remains secret and doubts persist over its sources<sup>12</sup> and the legality and proportionality of the means used to conceive and enforce the ban.<sup>13</sup>

This article deals with the legal implications of the Icelandic events. It firstly considers the official reasons and legal grounds brought by the Icelandic government to defend the ban and blacklist; it then reviews the legal challenges attempted by Falun Gong as well as their outcome; it thirdly questions whether the ban and blacklist are legally justifiable from an international human rights perspective; and it finally draws some conclusions from the Icelandic events.

## B. OFFICIAL REASONS AND LEGAL GROUNDS FOR BAN AND BLACKLIST

### I. THE BAN AND BLACKLIST OF “KNOWN OR SUSPECTED MEMBERS OF FALUN GONG”

On June 10, 2002, the Icelandic Ministry of Justice sent a confidential letter to *Icelandair* and informed the airline, a private company, that it had been “empowered to give *Icelandair* strict instructions to refuse carriage to Iceland during the above period to known or suspected members of the Falun Gong movement”.<sup>14</sup> “The issuing of Visas to Falun Gong members”, the letter continued, “has been suspended and passport control in Iceland has been strengthened. Those who are known or suspected Falun Gong members will be denied entry to Iceland at the Keflavík airport”.<sup>15</sup> The Government attached to the document a list of names, flight numbers and passport numbers of people who were either known or suspected to be Falun Gong practitioners—“See lists attached”, the letter concluded. The following day the Ministry issued a second memo to *Icelandair*, which in all but one respect was an English translation of the Icelandic text<sup>16</sup>: it, too, ordered *Icelandair* to refuse carriage to “known or suspected members”<sup>17</sup> of Falun Gong but added that this should be done “[...] according to lists already submitted to you”.<sup>18</sup>

From the outset, the government refused to render these documents public by quoting national security reasons and referring to the Icelandic Information Act no. 50/1996<sup>19</sup> which

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<sup>12</sup> See *infra*, Part D, § II.

<sup>13</sup> For a short overview of the Icelandic events see my “Independent People? Iceland, Falun Gong and the Visit of the Chinese President in 2002”, *Nordic Journal for Human Rights*, Vol. 23, no. 3/2005, 245–261. For a comprehensive treatment of the June 2002 events see my forthcoming *Arctic Totalitarianism? A Report on the Events Surrounding the Official Visit to Iceland of the Chinese President in June 2002* (Reykjavík: Icelandic Human Rights Center 2007) 208 pp.

<sup>14</sup> Icelandic Ministry of Justice, Letter to *Icelandair*, 10 June 2002.

<sup>15</sup> *Ibid.*

<sup>16</sup> Icelandic Ministry of Justice, Letter to *Icelandair*, 11 June 2002.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> Icelandic Data Protection Authority (‘Persónuvernd’), *Ruling in Case A-152/2002—11-27*, 8 August 2002 (“What Happened”, § 2).

allows authorities “to restrict the access of the public to files when important interests of the public so demand and information about the safety of the state ... is involved”.<sup>20</sup> “The letter is related to the security precautions that the police authorities thought necessary because of the public visit of the Chinese president to Iceland”, the Ministry wrote. “This information relates to the safety of the state, that is, to security measures of police authorities in relation to the public visit of a Head of State to Iceland [and cannot be released].”<sup>21</sup> Repeatedly invited by the IDPA to provide additional information, the Ministry insisted that “[i]n accordance with the safety interests of the Icelandic nation it [is] not possible to state specifically in more details the circumstances related to the organization of the visit.”<sup>22</sup>

Following to a request by an Icelandic journalist, the IDPA appealed this decision in August 2002 and, after another series of failed attempts to gather information, received copies of the documents instituting the ban and formally ordered the Ministry to release them.<sup>23</sup> “[I]nformation about the safety of the state is only referred to [as] the most important interests related to the role of the state to ensure its safety inward and outward”, the Authority wrote. “When this phrase is interpreted, one has to keep in mind that it is supposed to protect very important interests. If information related to it would leak out it could have very serious consequences.”<sup>24</sup> The Authority emphasized that as the documents held by the Ministry did not fall into this category, the two letters were in the public domain. The existence of the blacklist was thus publicly exposed. “The Authority believes that the existence of such a list is confirmed”, it wrote, “and also that the Ministry has used it, including sending it to a certain private enterprise, *Icelandair*”.<sup>25</sup> As for the blacklist, however, it remains to this day secret because the IDPA, on the basis of the Information Act,<sup>26</sup> considered the data therein unrelated to national security yet too private to be released to the press.<sup>27</sup> “[The list] consists of names of individuals who had ordered a flight with the air company to this country during the days 3 to 14 of June”, the Authority wrote. “The Icelandic government thought that these were either members of the Falun Gong movement or that they were related to it in some way.”<sup>28</sup>

## II. THREE OFFICIAL JUSTIFICATIONS FOR THE BAN

Icelandic authorities defended the ban on three grounds, the first and most important of which was “public policy and national security”. “It is our opinion that public policy and national security require that national border checks be reinstated for a limited period at the Keflavik

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<sup>20</sup> Ibid. (“Conclusion”, § 2).

<sup>21</sup> Ibid. (“What Happened”, § 3).

<sup>22</sup> Ibid. (“What Happened”, § 4).

<sup>23</sup> “Bréf ráðuneytis til Flugleiða gerð opinber” (“A Letter from the Ministry of Justice is Made Public”), *Morgunblaðið*, 10 August 2002.

<sup>24</sup> Icelandic Data Protection Authority, cit. “Conclusion”, § 3 .

<sup>25</sup> Icelandic Data Protection Authority, Letter to Ministry of Justice, 19 September 2002.

<sup>26</sup> Icelandic Law on Personal Information, § 5.

<sup>27</sup> Icelandic Data Protection Authority, cit., “What Happened”, § 8.

<sup>28</sup> Ibid., § 7.

airport”<sup>29</sup>, the Ministry of Justice wrote in June 2002 to Javier Solana, the EU High Representative for Foreign and Security Issues. This was later explained also in the Ministry’s letter to the IDPA, where it was stated that “[d]uring the Chinese president’s visit to Iceland, the police had, for security reasons, to check on people visiting Iceland since possible actions from individuals or groups could have interrupted the visit or endangered public safety and public peace.”<sup>30</sup> As regards the blacklist, the Ministry followed the same line of defence and argued that “the communication of this information was necessary to prevent a serious and oncoming danger of disturbance to the public order and safety in connection with the state visit”.<sup>31</sup>

The second justification for the ban was intimately connected to the first one and focused on the fact that the country does not have enough human and financial resources to handle large events. “As the Icelandic police force is small and the expected number of protesters large”, the Ministry wrote, “it is deemed necessary by the government to secure public order by limiting the influx of Falun Gong members into Iceland from 12 to 16 June [2002].”<sup>32</sup> The government also reiterated these concerns in a letter to *Icelandair* passengers where it emphasized that “[t]he Icelandic Police force are few in number and there is a very real danger that the planned protest . . . would get out of control and pose a danger to the public”.<sup>33</sup>

Thirdly and finally, officials acknowledged that Falun Gong is non-violent but stressed that demonstrations could have turned violent because of the large security apparatus that always accompanies the Chinese President. “We know from our resources that Falun Gong is a peaceful movement”, the Permanent Secretary of the Justice Ministry stated during a press conference, “but a dangerous situation could result because the Chinese President’s twenty-nine bodyguards are armed and will use their guns if they think his safety is being threatened.”<sup>34</sup> On 8 June 2002 the Icelandic newspaper *DV* reported the Icelandic Minister of Justice as saying that “even though the protests were peaceful, anything can always happen and therefore the decision to keep the people away from Iceland had been made in order to protect [Falun Gong practitioners] themselves”.<sup>35</sup>

### III. LEGAL GROUNDS FOR BAN AND BLACKLIST

As regards the legal basis given by the government to justify the ban and blacklist, the Ministry broadly replied that “[p]ermissions by law for the collection of information of this kind is to be found in the Police Law, especially § 1, where it says among other things that the role of the police is to ensure the safety of the public and to keep up law and order.”<sup>36</sup> Public order and

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<sup>29</sup> Icelandic Ministry of Justice, Letter to Javier Solana, 7 June 2002.

<sup>30</sup> Icelandic Ministry of Justice, Letter to Data Protection Authority, 10 September 2002.

<sup>31</sup> Icelandic Ministry of Justice, Letter to Data Protection Authority, 4 November 2002.

<sup>32</sup> Icelandic Ministry of Justice, Letter to *Icelandair*, 11 June 2002.

<sup>33</sup> Icelandic Ministry of Justice, Letter to *Icelandair* Passengers, 11 June 2002.

<sup>34</sup> “Falun Gong not Let Into the Country”, *DV* (from visir.is), 7 June 2002.

<sup>35</sup> “Falun Gong Kept Away Because of Information from Germany”, *DV* (from visir.is), 8 June 2002.

<sup>36</sup> Icelandic Ministry of Justice, Letter to Data Protection Authority, 4 November 2002.

national security, therefore, figured prominently among the reasons brought by Icelandic authorities to justify not only the highly unusual measures but also the necessity to maintain all related documents secret. These reasons surfaced repeatedly during the legal actions brought by Falun Gong practitioners after the official visit, a matter to which we shall now turn.

## C. LEGAL CHALLENGES TO THE BAN AND BLACKLIST

### I. COMPLAINT TO THE ICELANDIC DATA PROTECTION AUTHORITY (JUNE 2003)

Shortly after the end of the official visit, Falun Gong representatives started an informal ‘dialogue’ with the Icelandic authorities with the purpose of obtaining an apology and some form of monetary compensation for the damage caused by the ban and blacklist.<sup>37</sup> When these discussions failed to produce satisfactory results, however, the movement filed a complaint with the IDPA contesting the legality of the collection and circulation of personal data relating to religious convictions: “We believe that gathering, holding and distributing a list of names of people of a particular common spiritual belief, without their permission, is in itself a violation of the laws and rules of gathering and storing sensitive information on individuals”, the movement wrote. “We also believe that individuals have a right to know if their name is on the list, [yet] representatives of Falun Gong have so far been denied access to the contents of the list.”<sup>38</sup>

On 5 June 2003 the IDPA acknowledged that certain provisions of Icelandic law allowed authorities to “deny a foreigner entry if it was considered necessary with regard to public order, national security or the international relations of Iceland,”<sup>39</sup> but also recognized that, in the specific circumstances, “[t]he Ministry of Justice’s distribution of information about Falun Gong to *Icelandair* Ltd and to the embassies of Iceland in the USA, Norway, Denmark, United Kingdom and France in order to hinder the arrival of Falun Gong practitioners in Iceland was illegal.”<sup>40</sup> The Authority indicated that, irrespective of the reasons it was distributed, the fact that this information referred to sensitive data such as religious beliefs posed a problem in terms of its compliance to Icelandic as well as international law, a point which will be more extensively considered below.

### II. COMPLAINT TO THE ICELANDIC PARLIAMENTARY OMBUDSMAN (JUNE 2003)

In June 2003 the spiritual movement also filed a formal complaint with the Icelandic Parliamentary Ombudsman (IPO) lamenting a variety of human rights violations, such as freedom

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<sup>37</sup> Falun Gong-Iceland Dialogue Committee, cit, 1.

<sup>38</sup> *Ibid.*, 6.

<sup>39</sup> Icelandic Parliamentary Ombudsman (Umboðsmaður Alþingis), *Decision on Case 3820/2003: Summary (English)*, First Part, 5 January 2004, § 2.

<sup>40</sup> “Distribution and Usage of the ‘Blacklist’ of Falun Gong Ruled Illegal”, *Falun Gong-Iceland Dialogue Committee*, 9 June 2003.

of thought, conscience and religion<sup>41</sup>; freedom of opinion and expression<sup>42</sup>; freedom of peaceful assembly<sup>43</sup>; freedom of travelling<sup>44</sup> and the right to privacy.<sup>45</sup> “We consider [the Icelandic authorities’] actions unethical, discriminatory and unjust”, the movement wrote, “targeting a number of individuals with a common spiritual belief. We ... ask the Ombudsman to consider all sides of this case.”<sup>46</sup> The document also lamented the fact that practitioners were required, as a condition of their release and entry into Iceland, to sign a pledge<sup>47</sup> that read as follows: “I, the undersigned, hereby declare that I will obey and observe all conditions and instructions set by the Icelandic Police authorities relating to the state visit in Iceland of the President of the People’s Republic of China.”<sup>48</sup> Falun Gong maintained that this declaration was too wide ranging and violated practitioners’ right to express their religious beliefs. But to be released from detention and enter Iceland, the movement argued, practitioners had no choice but to sign the declaration, which thus amounted to a limitation of their freedom of speech and demonstration.<sup>49</sup>

### III. FIRST DECISION OF THE ICELANDIC PARLIAMENTARY OMBUDSMAN (JANUARY 2004)

In January 2004 the Icelandic Parliamentary Ombudsman published its first response to the Falun Gong complaint.<sup>50</sup> After emphasizing that its task was limited by Icelandic law to “assessing the legality of administrative decisions and conduct that form the basis of complaints”,<sup>51</sup> the Ombudsman concluded that the behaviour of Icelandic authorities in June 2002 had essentially been appropriate and rejected virtually the entirety of the spiritual movement’s arguments. It did however acknowledge that additional investigations were needed in order to assess one specific aspect of the controversy. “Only the decisions to deny Falun Gong practitioners access to aircrafts en route to Iceland in airports in Europe and North America deserve to be considered in further detail”<sup>52</sup>, it wrote.

The Parliamentary Ombudsman began its legal assessment by quoting the normative provisions applicable to the June 2002 events, with special emphasis on the constitutional and statutory texts of Icelandic law. He mentioned, in particular, that while Article 73 of the Icelandic Constitution guarantees, in line with European and international law, the right to free-

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<sup>41</sup> Falun Gong-Iceland Dialogue Committee, cit, 4.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid., 8.

<sup>48</sup> Individual Declaration to the Icelandic Police, 11 June 2002, in Falun Gong–Iceland Dialogue Committee, cit, 26.

<sup>49</sup> Ibid.

<sup>50</sup> Icelandic Parliamentary Ombudsman, cit, § 2.

<sup>51</sup> Ibid., (‘Summary’).

<sup>52</sup> Ibid.

dom of expression, this liberty could be restricted “in the interests of public order or the security of the State, for the protection of health and morals, or for the protection of the rights or reputations of others, if such restrictions are deemed necessary and in conformity with democratic traditions”.<sup>53</sup> Likewise, the Ombudsman mentioned that the right to freedom of non-violent assembly guaranteed by Article 74 (3) of the Icelandic Constitution can be limited for reasons of public order and national security, while the Icelandic legislation on foreigners set similar restraints. “Article 10 (1) of Act 45/1965 states that authorities were under an obligation to deny a foreigner entry if some of the circumstances listed in the article applied to him or her”, the Ombudsman wrote, “[and] item 10 ... declares that a foreigner should be denied entry if this was considered necessary with a view to ensuring public order, national security or the international relations of Iceland or any other state taking part in the Schengen cooperation.”<sup>54</sup> Foreigners, the Ombudsman emphasized, do not have a general and unlimited right of entry into Iceland and the only question that needed to be asked was whether, in the specific circumstances of the case, ‘public order’ and ‘national security’ had legitimately been invoked to prohibit the practitioners’ entry into the country.

The Ombudsman answered that they had. By adopting a loose scrutiny, he noted that Icelandic law provides authorities with substantial flexibility when reasons of public order and national security are at stake. “[Article 10 (1)] granted Icelandic authorities considerable discretion in assessing whether to allow a certain foreigner to enter Icelandic territory”<sup>55</sup>, he commented, and the “police are [thus] vested with extensive authority to intervene in the conduct of citizens if, in their evaluation, the circumstances meet the conditions laid down in the aforementioned provisions.”<sup>56</sup> In the specific events of the case, it was also added, the Icelandic government did not seem to have erred in limiting the influx of Falun Gong practitioners because “the government arrived at its decision on the basis of reasons dealing with the protection of public order taking into account the relatively small nature of the Icelandic law enforcement community. [Consequently], there are [no] reasons for criticism on [my] part as regards the assessment of the government.”<sup>57</sup> The limitations to freedom of expression and assembly suffered by Falun Gong practitioners were thus, according to the Ombudsman, due to legitimate reasons of public order and it was not the intention of the government to diminish such freedoms—they were, in other words, collateral damage: “I reiterate that I cannot conclude from the evidence before me that these measures were *in themselves* intended to limit freedom of expression or prevent peaceful protests”, he wrote, “but to ensure full police control of the situation and thereby guarantee the safety of the foreign visitors as well as public order.”<sup>58</sup>

Yet it was not only the ban that the Ombudsman found justifiable: the detention and deportation of a number of Falun Gong practitioners and the declarations they were asked to sign were equally condoned. As regards the first point, he wrote that the ban had been subse-

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<sup>53</sup> Ibid., III (5).

<sup>54</sup> Ibid., III (1).

<sup>55</sup> Ibid.

<sup>56</sup> Ibid. III (5).

<sup>57</sup> Ibid. (‘Summary’).

<sup>58</sup> Ibid. III (5) (emphasis added).



quently relaxed and only a handful of practitioners had actually been deported out of Iceland—making the alleged violations of their right to defence somehow less ‘momentous’ than they appeared.<sup>59</sup> As for the question of whether their arrest was legitimate in the first place, the Ombudsman simply reiterated that public order was a sufficient justification for the limitation of these people’s freedom: “[H]aving examined the documentary evidence before [me]”, he concluded, “[I] found no evidence to support a conclusion that the treatment of individuals staying at Njardvik School was in violation of the principle of proportionality.”<sup>60</sup>

The same conclusion was also reached on the matter of the declarations: “[I]t was not unlawful for authorities to decide that a declaration on behalf of the practitioners ... should be a precondition for their admittance in light of the discretion afforded the authorities in these matters under Icelandic law,”<sup>61</sup> the Parliamentary Ombudsman wrote, because “[t]he practitioners to whom the proposition was made were free to decide whether to accept the terms of the agreement or to reject it. In my view, it cannot be inferred from the documents of this case that the practitioners were forced to accept the proposition and to sign the declaration.”<sup>62</sup> For these reasons, and while he acknowledged that the ‘wide range’ of such declarations was a matter of concern, the Ombudsman rejected the Falun Gong arguments and maintained that no violation of Icelandic law had actually occurred.<sup>63</sup> “[T]he government had ... a sufficient legal basis in Article 10, para 1, item 10 of Act no. 45/1965 for deciding to issue a ban on entry of individuals [belonging to the Falun Gong movement]”,<sup>64</sup> he concluded.

#### IV. SECOND DECISION OF THE ICELANDIC PARLIAMENTARY OMBUDSMAN (DECEMBER 2005)

In December 2005 the Parliamentary Ombudsman concluded his investigation on the last outstanding issue of the case: the government’s decision to order *Icelandair* to deny boarding to known or suspected Falun Gong members at foreign airports. The matter was significant, the Ombudsman wrote, because “the legality principle of administrative law entails that decisions made by government authorities must be in accordance with law and supported by appropriate legal grounds.”<sup>65</sup> As far as this specific circumstance was concerned, however, the Ombudsman wrote that this was not the case and that the Icelandic government’s legal justifications were shaky. “[The Ombudsman] cannot accept the position of the Ministry ... that Act 45/1965 represented satisfactory grounds for the Icelandic government to instruct an entity engaged in transport to refuse to transport specific individuals to the country in order to “avoid the trouble associated with denying them entry and sending them back”, as was stated in the Ministry’s 10 June 2002 letter to *Icelandair*, [because] the need to “avoid the trouble”

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<sup>59</sup> Ibid. III (3).

<sup>60</sup> Ibid. (‘Summary’).

<sup>61</sup> Ibid.

<sup>62</sup> Ibid. III (5).

<sup>63</sup> Ibid. (‘Summary’).

<sup>64</sup> Ibid.

<sup>65</sup> Icelandic Parliamentary Ombudsman (Umboðsmaður Alþingis), *Decision on Case 3820/2003: Part Two*, December 2005.

associated with following the rules set by the legislature cannot be considered an objective reason to deviate, at any given time, from currently valid legal provisions”.<sup>66</sup> The Ombudsman also hinted—without nevertheless taking a stance on the issue—that the government’s actions resulted in a limitation of these people’s rights of defence and their possibility of appealing the decision to a higher authority.<sup>67</sup> “[T]here were flaws in the decisions of the Icelandic authorities,” the Ombudsman concluded, “which decisions formed the foundation for *Icelandair*’s refusing to allow these individuals to board its Iceland-bound aircraft at foreign airports. [I]t must be the task of the courts to determine whether the Icelandic government had, with the said decisions, incurred liability for compensatory damages with respect to the individuals involved.”<sup>68</sup>

It should nevertheless be noted that the Ombudsman’s criticism was less stringent than it first appears, since his objections were narrowly limited to the lack of legitimate legal grounds brought by the Icelandic government to justify its order to deny practitioners’ boarding their flights to Iceland but did not involve an assessment of the legality of that order. “[T]he Ombudsman stresse[s] that he [has] not taken any position on whether and to what extent it was possible, pursuant to Icelandic law and appropriate pursuant to the international agreements to which Iceland is a party, to prevent known or suspected Falun Gong practitioners from boarding Iceland-bound aircraft.”<sup>69</sup> Displaying a high level of caution, therefore, the Ombudsman noted that while Icelandic authorities had in this specific case failed to provide sufficient legal grounds for their actions, these measures were not per se and necessarily illegal: “[A]s matters stand,” he concluded, “there is no reason for [me] to recommend to the Icelandic authorities ... that they reconsider the above decision. On the other hand, [I have] recommended to the Ministry to consider the viewpoints expressed in this opinion if Icelandic authorities should, in the future, be faced with a situation comparable to that related here.”<sup>70</sup>

#### D. LEGALITY, PROPORTIONALITY AND DISCRIMINATORY CHARACTER OF THE BAN AND BLACKLIST

Apart from Icelandic law, one of the obvious questions raised by the 2002 events concerns the legality and proportionality, from an international human rights perspective, of the measures taken by the Icelandic government to prevent Falun Gong practitioners from entering the country. While, as suggested elsewhere,<sup>71</sup> the authorities’ conduct reveals several areas of concern, any legal appraisal of the Icelandic events eventually comes down to the appropriateness of (i) introducing an anti-Falun Gong ban and (ii) assembling a secret blacklist of practitioners—so it is with these two issues that this section deals. Although they involve distinct

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<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> See my “Independent People?”, cit, 246–9.

sets of legal provisions (one related to freedom of religious expression, the other the right to privacy) and will thus be considered separately, both find, as we shall see, their point of convergence in the anti-discrimination provisions of European and international law. The third part of this section (iii) is therefore dedicated to this matter.

## I. THE ANTI-FALUN GONG BAN

The question of whether Falun Gong represents a religious group, a spiritual movement or simply an individual contemplative practice is highly debated.<sup>72</sup> A form of *qigong*, or ancient Chinese meditation exercise, that includes the better known variation of *tai-chi*, Falun Gong aims at cultivating both the body and mind via a combination of physical exercises and spiritual meditation.<sup>73</sup> For this reason, Erping Zhang, the movement's New York-based world spokesperson, told the author in an interview that Falun Gong is nothing more than "a traditional Chinese meditation practice",<sup>74</sup> while terms like 'religion', 'religious group', 'organization', 'association' and 'movement' are politely but firmly rejected by practitioners. Falun Gong is not a religion or a religious group, Mr Zhang argues, because "it has no churches, no rituals, no worshipping, no membership, no hierarchy of organization; it is like jogging, as anyone can do it or quit it at his or her pleasure".<sup>75</sup>

Yet the fact remains that Falun Gong has its very own leader, Li Hongzi, who founded the movement, is the author of all didactic materials and appears to be highly revered by practitioners. Because of this—and since religious and spiritual practices are covered, under European and international human rights law, by the broad formula "freedom of thought, conscience and religion"<sup>76</sup>—this article will refer to Falun Gong interchangeably as a spiritual and religious practice<sup>77</sup> and to 'religious expression' in its broadest possible meaning of both spiritual *and* religious. For our point of departure is precisely that the ban introduced by the Icelandic government targeted a well-defined group and negatively affected, in a variety of different ways, its freedom to manifest its beliefs.

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<sup>72</sup> For an interesting discussion see M.H. Chang: *Falun Gong: The End of Days* (New Haven: Yale UP 2004) 29; D. Schechter: *Falun Gong's Challenge to China: Spiritual Practice or Evil Cult?* (New York: Akashic Books 2001) 9; and M. Introvigne: "Falun Gong 101" in R. Lewis (ed.): *Odd Gods. New Religions and the Cult of Controversy* (London: Prometheus 2002).

<sup>73</sup> See e.g. H. Li: *Zhuan Falun* (New York: The Universe Publishing Company 2000) 7; and Falun Gong Human Rights Working Group: *The Falun Gong Report* (Buford: Golden Lotus Press 2002) IV.

<sup>74</sup> My interview with Erping Zhang, 29 September 2002.

<sup>75</sup> *Ibid.*

<sup>76</sup> See in this respect S. Bartole, B. Conforti, and F. Raimondi: *Commentario alla Convenzione Europea dei Diritti dell'Uomo e delle Libertà Fondamentali* (Padua: Cedam 2001) (especially the section on Article 9); V. Berger: *La Jurisprudence de la Court Européenne des Droits de l'Homme* (Paris: Sirey 1998) 12.

<sup>77</sup> The point is excellently treated in I. C. Ibán: *Nuovi Movimenti Religiosi: Problemi Giuridici*, in S. Ferrari (ed): *Diritti dell'Uomo e Libertà dei Gruppi Religiosi: Problemi Giuridici dei Nuovi Movimenti Religiosi* (Padua: Cedam 1989).

As is well known, religious expression is part of that fundamental space of autonomy recognized to individuals (citizens and aliens) as well as groups under both European and international law<sup>78</sup>. Article 9 of the European Convention on Human Rights (ECHR)<sup>79</sup> is, in this respect, the fundamental departure point: “Everyone has the right to freedom of thought, conscience and religion”, it reads. “This right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.”<sup>80</sup> Freedom of thought, conscience and religion, it should be noted, occupies an important position in European human rights law and has been recognized (albeit not always implemented<sup>81</sup>) by the European Court of Human Rights as “one of the vital elements that go to make up the identity of believers and their conception of life”<sup>82</sup> as well as “one of the foundations of a democratic society”,<sup>83</sup> while virtually identical guarantees to the ones provided by Article 9 (1) ECHR are to be found in Article 18 (1) of the International Covenant for Civil and Political Rights (ICCPR).<sup>84</sup> The jurisprudence of the European Court, in addition, has openly acknowledged that the expressions ‘religion’ and ‘religious beliefs’ must be considered in a non-restrictive sense and cannot be limited to the main religions<sup>85</sup> with the consequence that a spiritual movement like Falun Gong can indeed be regarded as a religion and benefits from the protection of the law.<sup>86</sup>

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<sup>78</sup> See e.g. R. Bermejo and C. Ramón: *Reflexiones Sobre la Libertad de Religión en el Ámbito Europeo*, *Ius Canonicum*, 1993, 31-46; and P. Boucaud: “La Liberté de Religion et de Conviction”, *Revue de l'Institut des Droits de l'Homme*, 1992, n.9, 22–37.

<sup>79</sup> Iceland signed the ECHR on 4 November 1950 and ratified it on 29 June 1953 (together with all optional protocols). While not an EU member, Iceland is also a party to the European Economic Area agreement (EEA) (see *EEA Enlargement Agreement* OJ L 130, 29.4.2004, p. 3 and *EEA Supplement* No 23, 29.4.2004, p. 1).

<sup>80</sup> European Convention on Human Rights, Article 9 (1).

<sup>81</sup> For a rather critical appraisal of the jurisprudence of the European Court of Human Rights on religious issues see C. Evans: *Freedom of Religion Under the European Convention on Human Rights* (Oxford: Oxford University Press 2001).

<sup>82</sup> ECtHR, *Otto-Preminger-Institut v Austria*, 20 September 1994, Series A, n.295-A. On the point, see also P. Wachsmann: “La Religion contre la Liberté d'Expression: Sur un Arrêt Regrettable de la Court Européenne des Droits de l'Homme”, *Revue Trimestrielle des Droits de l'Homme*, 1994, 441; and F. Rigaux: “La Liberté d'Expression et Ses Limites”, *Revue Trimestrielle des Droits de l'Homme*, 1995, 401. Although Iceland is not an EU member, EU jurisprudence is influential within the arctic nation and therefore reference to it will often be made in this article.

<sup>83</sup> ECtHR, *Kokkinakis v Greece*, 25 May 1993, Series A n. 160-A; ECtHR, *Metropolitan Church of Bessarabia and Others v Moldova*, 13 December 2001. See also N. Valticos: *Le Premier Arrêt de la Court Européenne des Droits de l'Homme en Matière de Liberté de Religion: L'Affaire Kokkinakis v Grèce*, Sakkoulas/Bruylant, 1995, 551-567; “La Liberté Religieuse Devant la Court Européenne des Droits de l'Homme”, *Revue Française de Droit Administratif*, 1995, 573–581.

<sup>84</sup> International Covenant for Civil and Political Rights, Article 18.

<sup>85</sup> ECtHR, *X v the United Kingdom*, 4 October 1997, 11 DR 55. See also G. Gonzales: *La Convention Européenne des Droits de l'Homme et la Liberté des Religions*, (Paris: Economica 1997), 53.

<sup>86</sup> On the point, see *supra* § I.

Important as freedom of religion is, however, its manifestation is subject to a number of limitations which are specified in Article 9 (2) ECHR<sup>87</sup>: “Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”<sup>88</sup> Article 18 (3) ICCPR similarly mentions as possible limits “public safety, order, health or morals or the fundamental rights or freedoms of others”.<sup>89</sup> On the one hand, therefore, European and international human rights law place significant importance on freedom of thought, conscience and religion and emphasize that such liberties cannot be limited to a person’s inner conscience but involve his or her freedom to manifest those beliefs; on the other, however, like for most human rights, religious freedom is conditional and state interference is possible under certain circumstances. Drawing a line between legitimate and illegitimate intervention is therefore crucial, and since the ECHR provides a more powerful supervisory mechanism—including a judicial one—than UN instruments, it is against the standards fixed by Article 9 (2) ECHR that the legality and proportionality of the Icelandic ban will be here assessed.

The first requirement provided by Article 9 (2)—“the intervention must be prescribed by law”<sup>90</sup>—is a formal as well as relatively uncontroversial one. European judges having interpreted the expression ‘law’ in the broadest possible sense (including regulations and administrative acts<sup>91</sup>), it is clear that the Icelandic ban, which was introduced by an administrative act and founded on both constitutional and legislative grounds, fulfils this obligation. In line with Article 9 (2) ECHR, Article 73 (2) of the Icelandic Constitution explicitly allows a number of limitations to freedom of expression (and religion), among which is also “public order or the security of the State”.<sup>92</sup>

The second condition is more complex and requires the restriction to pursue certain “legitimate aims”.<sup>93</sup> These are mentioned in Article 9 (2) as well as in other provisions of the ECHR

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<sup>87</sup> See in particular J. E. S. Fawcett: *The Application of the European Convention on Human Rights* (Oxford: Clarendon Press 1987) 35ss; R. Goy : ” La Garantie Européenne de la Liberté de Religion. L’Article 9 de la Convention de Rome ”, *Revue du Droit Public*, 1991, 5-60; F. Margiotta Broglio: *La Protezione Internazionale della Libertà Religiosa nella Convenzione Europea dei Diritti dell’Uomo* (Milan: Giuffrè 1967), vol. 35 (19); J. Martínez-Torrón: *La Doctrina Jurisprudencial de los Órganos de Estrasburgo sobre la Libertad Religiosa* (Madrid: Technos 1997) 1467; and J.-F. Flauss, *La Protection Internationale de la Liberté Religieuse* (Paris: Bruylant 2002).

<sup>88</sup> European Convention on Human Rights, Article 9 (2). The expression ‘democratic society’ is extensively discussed in P.T. Vegleris: ” Valeur et Signification de la Clause ‘Dans une Société Démocratique’ dans la Convention Européenne des Droits de l’Homme ”, 1(2) *HRJ* (1968) 219.

<sup>89</sup> International Covenant on Civil and Political Rights, Article 18 (3). Iceland signed the ICCPR on 30 December 1968 and ratified it on 22 August 1979.

<sup>90</sup> European Convention on Human Rights, Article 9 (2).

<sup>91</sup> ECtHR, *Kruslin v France*, 24 April 1990, Series A n.176-A, § 29.

<sup>92</sup> Icelandic Constitution, Article 73 (3).

<sup>93</sup> European Convention on Human Rights, Article 9 (2).

(particularly Articles 8<sup>94</sup> and 11<sup>95</sup>), and although limited in number—the list is regarded as exclusive—they include broad ideas such as “security, safety, public order, territorial integrity, prevention of disorder or crime, economic well-being of the country, protection of health or morals”.<sup>96</sup> As the language suggests, national states are thus left with considerable scope for manoeuvring<sup>97</sup> when it comes to these ‘aims’, and in this respect it is not a coincidence that public order and national security featured prominently among the reasons invoked by the Icelandic government to justify the Falun Gong ban and the necessity to keep all related documents secret. In the case of Iceland, the objective pursued by the prohibition seemed indeed aimed at the protection of public peace and of a foreign head of state—both legitimate aims as per Article 9 (2). The circumstances of the events also suggest that Icelandic authorities did not prohibit Falun Gong for the sake of it: they simply wished, in the remarkably honest (but meant to be confidential) words of the Ministry of Justice, “to avoid the trouble”<sup>98</sup> associated with managing the demonstrations against the Chinese President. While, as the IDPA wrote, this is not an acceptable legal justification, one can hardly claim that Icelandic authorities pursued an ‘illegitimate aim’ as per Article 9 (2).

It is however the third and last condition that seems most problematic with reference to the Icelandic ban. The fact that the “interference must be *necessary* in a democratic society”<sup>99</sup> to achieve the above-mentioned aims obviously implies an idea of proportionality because, as one author underlined, “the necessity of a measure restricting rights must be weighed in relation to its indispensability, which is not open to question, and its acceptability, which is obviously not sufficient”.<sup>100</sup> The jurisprudence arising from the ECHR seems to confirm this stance: “According to the Court’s established case law”, the Strasbourg judges wrote, “the notion of necessity implies that an interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued”.<sup>101</sup> Yet in the case of Iceland, it is far from obvious whether such proportionality was actually respected. While it is true that the Icelandic police force is limited in size, the number of Falun Gong practitioners who intended to visit the country was also modest (about 200 people) and had no previous record of violence, nor did they cause trouble during their stay either. It should equally be noted that while Iceland might be geographically isolated, it has in the past and continues to this day to proudly play host to a plethora of official state visits as well as social events: only one month before the Falun Gong ban, for example, Icelandic authorities had successfully hosted—and the police had perfectly managed—an imposing NATO meeting which saw the presence of 43 fore-

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<sup>94</sup> Article 8 ECHR (‘Right to Respect for Family and Private Life’).

<sup>95</sup> Article 11 ECHR (‘Freedom of Assembly and Association’).

<sup>96</sup> J.-F. Renucci: *Article 9 of the European Convention on Human Rights* (Strasbourg: Council of Europe 2005), cit, note 161.

<sup>97</sup> F. Sudre: *Droit International et Européen des Droits de l’Homme* (Paris: PUF 1999), 108.

<sup>98</sup> Icelandic Parliamentary Ombudsman (Umboðsmaður Alþingis), *Decision on Case 3820/2003*: Part Two, cit.

<sup>99</sup> European Convention on Human Rights, Article 9 (2) (Emphasis added).

<sup>100</sup> Renucci, cit, 47.

<sup>101</sup> ECtHR, *Olsson v Sweden*, Series A n. 130 § 67 (1988).

ign ministers and hundreds of foreign dignitaries, journalists and demonstrators,<sup>102</sup> while three months after the June events almost a thousand ‘lively’ supporters of the Scottish national team visited Reykjavík to assist to a football match.

While it is thus true that European law allows member states considerable discretion over possible restrictions of the right to religious expression—states are, after all, in the best position to decide whether restrictions ought to be applied since they are directly in touch with the reality on the ground—it is also accurate to say that such discretion is far from unlimited. Particularly with reference to public order, national security and public safety, the risk of abuse is especially high<sup>103</sup>—it is for example precisely on these grounds that Falun Gong and all other non-official religious movements are forbidden in China<sup>104</sup>—and consequently invites an especially rigorous examination of the state’s actions. As one author underlined, “[t]he restrictions imposed on the freedom to manifest religion call for very strict scrutiny by the Court”<sup>105</sup> and it should be noted that this situation is not limited to the European context: during the preparation of the Universal Declaration of Human Rights, for example, several delegates objected to the expression ‘public order’ on the ground that “arbitrary acts could be committed under the pretext of defending public order”.<sup>106</sup> They feared, in particular, that this might “open the door to abuses”,<sup>107</sup> “create uncertainty and might constitute a basis for far-reaching derogations from the rights guaranteed by the State”.<sup>108</sup>

It is interesting to notice that similar observations can be made with reference to Article 10 ECHR, which deals more generically with freedom of expression, and which is of interest to the Iceland events since it is possible to argue that the intention of Falun Gong practitioners in going to Iceland was not only to express their religion but also (if not mainly) to make a

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<sup>102</sup> NATO, *Statement by NATO Secretary General*, 14 May 2002.

<sup>103</sup> See e.g. E. Benvenisti: “Margin of Appreciation, Consensus and Universal Standards”, 31 (4) *New York University Journal of International Law and Politics* 843 (1999); M.R. Hutchinson: “The Margin of Appreciation Doctrine in the European Court of Human Rights”, 48 (3) *International and Comparative Law Quarterly* 638, July 1999; A.H. Català i Bas: *La (In)tolerancia en el Estado de Derecho: Un Análisis de la Jurisprudencia del Tribunal Europeo de Derechos Humanos y de la del Tribunal Constitucional* (Valencia: Ediciones Revista General de Derecho 2002) 44; G. Cohen-Johnathan: “Les Lignes de Force de l’Evolution du Droit de la Convention Européenne des Droits de l’Homme”, 13 (1) *Revue Québécoise de Droit International* 63 (2000).

<sup>104</sup> See for example Xinhua News Agency: *Responsible Persons of the Supreme People’s Court Answer Questions by Xinhua Reporter: Correctly Apply Laws to Crack Down on the Criminal Activities of Cult Organizations*, 10 June 2001; see also the leaflet *Fabricating Heretical Ideas and Practicing Mind Control* (Beijing: New Stars Publishers 2001) (materials provided by the Chinese Embassy in Iceland).

<sup>105</sup> Renucci, cit, 50.

<sup>106</sup> Uruguay, supported by Australia (E/CN.4/SR.74, 12-3).

<sup>107</sup> C.D. De Jong: *The Freedom of Thought, Conscience and Religion or Belief in the United Nations*, (Antwerp: Intersentia 2000) 98.

<sup>108</sup> *Ibid.*, 97. See also D.J. Sullivan: “Advancing the Freedom of Religion or Belief through the UN Declaration on the Elimination of Religious Intolerance”, *American Journal of International Law*, 82, 1988, 499.

symbolic act of protest against the Chinese government's ban of the movement in China. After stressing that "[e]veryone has the right to freedom of expression" and that "[t]his right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers",<sup>109</sup> Article 10 includes a series of limitations (national security, territorial integrity, public safety, disorder and crime, health and morals, reputation and rights of others, privacy, authority and impartiality of the judiciary) which are analogous to those mentioned by Article 9 and which must equally be "prescribed by law" and "necessary in a democratic society".<sup>110</sup> Since according to the European Court "freedom of expression constitutes one of the essential foundations of a [democratic] society"<sup>111</sup> and Article 10 seeks to create "pluralism, tolerance and broadmindedness",<sup>112</sup> the control of the Strasbourg judges must thus determine—as in the case of Article 9—whether the interference at issue is "proportionate" to the legitimate aim pursued and whether the reasons adduced by the authorities were "relevant and sufficient",<sup>113</sup> while the adjective 'necessary' implies the existence of a "pressing social need".<sup>114</sup>

It is thus precisely in order to prevent member states from overstepping the limits set by the ECHR and exploit their power of interference that the European Court of Human Rights provides, both with reference to Article 9 and 10, a number of checks.<sup>115</sup> Among them, one of the most relevant for our case is given by the nature of the rights involved. As the European Court wrote, if the right is of particular importance (as is often the case with expression and especially religious expression) "there must exist particularly serious reasons before interferences can be legitimate".<sup>116</sup> While such interference is possible, therefore, it must be narrowly restricted and in this sense it is interesting to note the rapid evolution of jurisprudence of the Court in this area.<sup>117</sup> From being merely procedural at first,<sup>118</sup> its control has now extended to the question of whether the member state had not only adequate reasons to interfere

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<sup>109</sup> Article 10 (i) ECHR.

<sup>110</sup> Article 10 (ii) ECHR.

<sup>111</sup> ECtHR, *Handiside v UK*, § 49.

<sup>112</sup> *Ibid.*

<sup>113</sup> ECtHR, *Lingens*, § 40.

<sup>114</sup> L. Garlezki: *Article 10 of the European Convention on Human Rights and Limitations of Freedom of Expression*, unpublished paper. See also Council of Europe: *Case Law concerning Article 10 ECHR* (Strasbourg: Council of Europe 2001) 11; and Minnesota Human Rights Library: *Manuel de Formation sur la Surveillance des Droits Humains: Chapitre 15, Le Monitoring des Manifestations et Réunions Publiques*, available at <<http://www1.umn.edu/humanrts/monitoring/Fchapter15.htm>> (last accessed 3 December 2006).

<sup>115</sup> See e.g. ECtHR, *Golder v United Kingdom*, 21 February 1975; ECtHR, *Sunday Times v United Kingdom*, 28 November 1991, Series A, n. 30, § 55; ECtHR, *Observer and Guardian v United Kingdom*, Series A, n.216, § 56.

<sup>116</sup> ECtHR, *Dudgeon v UK*, Series A n. 45 § 52 (1981). See also, in this respect, J.-P. Schouppe, *The Emergence of Freedom of Religion in the Case Law of the European Court of Human Rights* (Strasbourg: Council of Europe 2004), 16–18.

<sup>117</sup> ECtHR, *Kokkinakis v Greece*, 25 May 1993, Series A n. 160-A, § 47.

<sup>118</sup> See for example Application n. 514/59, Yearbook III, 196 in Renucci, cit, 49.



with the freedom of expression as well as thought, conscience and religion<sup>119</sup> but also whether such reasons “are relevant and sufficient whilst determining whether the interference is proportionate to the aim pursued.<sup>120</sup> State interference is therefore legitimate, but precautions must be taken in order to avoid any risk of arbitrary intervention [and] this is why interference is subject to conditions and strict supervision.”<sup>121</sup>

UN instruments seem to follow a similar path. In its general comments to Article 18 ICCPR, for example, the Human Rights Committee writes that “in interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds,”<sup>122</sup> adding that “[I]mitations . . . must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.”<sup>123</sup> As we shall see below, however, in the case of Iceland it is questionable whether the ban would pass this non-discrimination scrutiny because only Falun Gong practitioners were affected by the 2002 measures. As for proportionality, the question that a hypothetical European judge would need to answer is whether two hundred people engaging in non-violent demonstrations could, because of Falun Gong’s peaceful but at times confrontational habit of visiting foreign countries to protest the movement’s treatment in China, be more of a danger to public order and Iceland’s national security than a thousand over-excited (and mostly drunken) soccer fans.<sup>124</sup>

## II. THE ANTI-FALUN GONG BLACKLIST

From the moment it emerged in June 2002, the blacklist has been a controversial issue in Iceland, possibly even more so than the ban. As we have seen above, the Ministry of Justice has been extremely vague when it comes to the sources of this document—for reasons of “national security”,<sup>125</sup> it wrote, neither the contents nor the sources could be revealed<sup>126</sup>—yet it has consistently insisted that the information was not provided by China but compiled by the Icelandic police on the basis of both internal intelligence and information “coming from abroad”.<sup>127</sup> While, as we have suggested elsewhere,<sup>128</sup> a series of elements—including the quantity and accuracy of the data, the fact that it pertained to people residing in several countries,

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<sup>119</sup> ECtHR, *De Wilde, Ooms and Versyp v Belgium*, 18 June 1971, Series A, n.12, 93.

<sup>120</sup> Renucci, cit, 50. See in this respect ECtHR, *Silver and Others v United Kingdom*, Series A, n.61; v, *Olsson v Sweden*, 24 March 1988, Series A, n.250, § 68.

<sup>121</sup> Renucci, cit, 43.

<sup>122</sup> De Jong, cit, 82-83.

<sup>123</sup> *Ibid.*

<sup>124</sup> An interesting discussion of the public order issue is P. Rolland: “Ordre Public et Pratiques Religieuses”, in J.-F. Flauss: *La Protection Internationale de la Liberté Religieuse*, cit, 231-271.

<sup>125</sup> Icelandic Data Protection Authority, cit, “What Happened”, § 3.

<sup>126</sup> *Ibid.*

<sup>127</sup> Icelandic Ministry of Justice, Letter to Data Protection Authority, 10 September 2002.

<sup>128</sup> See my *Independent People?*, cit, 251–2.

the limitation of the Icelandic police forces and the record of the Chinese President's visits abroad<sup>129</sup>—cast a series of doubts about this stance,<sup>130</sup> the issue of the blacklist sources is not strictly relevant here—what matters is that the Icelandic government did use this document to prevent Falun Gong members from entering the country. Already because of this, the list raises serious legal issues involving the right to privacy and to be free from discriminatory treatment—and it is to these two issues that we shall now turn.

Religious beliefs, but also the simple fact of belonging to a spiritual movement, are part of that individual sphere of personal freedom and as such are highly valued by European and international law. As one author underlined, “apart from protecting the private life of individuals, [privacy law] is aimed at preventing every kind of discrimination on religious grounds.”<sup>131</sup> While several provisions of both European and international human rights law deal with this right to privacy,<sup>132</sup> it was specifically for the purpose of restricting the risk of discriminatory consequences caused by the collection and processing of personal data that the member states of the Council of Europe (Iceland included) signed, in 1981, the *Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data* (CPPD).<sup>133</sup> The rationale of this instrument, as stated by Article 1, is “to secure in the territory of each Party for every individual, whatever his nationality or residence, respect for...his right to privacy with regard to automatic processing of personal data relating to him”,<sup>134</sup> with Article 2 (c) specifying that “automatic processing includes ... storage of data [as well as] their alteration, erasure, retrieval or dissemination.”<sup>135</sup> Composing a blacklist of peaceful people from different countries who are affiliated to a certain religious movement and distributing such information to embassies and a private airline fall within the scope of these provisions.

The Convention grants an extensive series of rights to people whose personal data is stored or automatically treated, and these include the right to establish the existence of such data<sup>136</sup>; the right to ask its rectification or permanent erasure<sup>137</sup>; and a remedy in case of lack of compliance from the person or institution which is storing the data.<sup>138</sup> It should also be

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<sup>129</sup> Id. 258–60.

<sup>130</sup> Also in 2002, blacklists similar to the Icelandic one emerged in Hong Kong and Macau, while a number of subsequent events (including the revelations by a former Chinese diplomat who defected to Australia and by a member of the Chinese Security Bureau) seem to corroborate the ‘practice’. See on the matter my “Are the Icelandic Events Isolated?” in *Arctic Totalitarianism?* cit, 168–203.

<sup>131</sup> Messner, F., P.H. Prélôt, J.M. Woehrling and I. Riassetto: *Traité de Droit Français des Religions* (Paris: Juris-Classeur 2003), 487.

<sup>132</sup> See for example Universal Declaration of Human Rights, Preamble; International Covenant for Civil and Political Rights, Article 9; and European Convention on Human Rights, Article 8.

<sup>133</sup> Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, ETS 108, 28 January 1981.

<sup>134</sup> *Ibid.*, Article 1.

<sup>135</sup> *Ibid.*, Article 2 (c).

<sup>136</sup> *Ibid.*, Article 8 (a).

<sup>137</sup> *Ibid.*, Article 8 (c).

<sup>138</sup> *Ibid.*, Article 8 (d).

noted that the Convention applies to internal as well as trans-border data transferring<sup>139</sup> and that it draws an interesting distinction between generic ‘personal data’—which is defined as “any information relating to an identified or identifiable individual”<sup>140</sup>—and ‘sensitive data’, which, contrary to the former, cannot be automatically treated. “Personal data revealing racial origin, political opinions or religious or other beliefs”, Article 6 CPPD emphasizes, “may not be processed automatically unless domestic law provides appropriate safeguards.”<sup>141</sup> Similar to the provisions of Article 9 (2) ECHR, the CPPD also prescribes that exceptions to such rule “shall be allowed when such derogation is provided for by the law of the Party and constitutes a *necessary* measure in a democratic society in the interests of...protecting State security, public safety, the monetary interests of the State or the suppression of criminal offences.”<sup>142</sup> Contrary to Article 9 (2) ECHR, however, it should be noted that the less stringent expression of ‘public order’ is not mentioned among the possible exceptions—an indication of the intention to regard any automatic treatment of sensitive personal data as utterly exceptional. As one author observed, “[i]t is obvious that, considering the possible risks [of discrimination], the principle of general prohibition [of treating sensitive personal data] has the purpose of avoiding any processing that could directly or indirectly reveal the religious opinions of the people concerned, treatment that could lend itself to discriminations on the basis of such opinions.”<sup>143</sup> It is precisely in order to avoid these risks that Interpol—one of the organizations that was at first mentioned by the Icelandic Ministry of Justice as a source of information for the blacklist<sup>144</sup>—firmly denied possession or transmission of any data about religious beliefs: “It is strictly forbidden for the Organization to undertake any intervention or activities of a political, military, religious or racial character”,<sup>145</sup> Article 3 of the Interpol Constitution reads, because such information (in line with European and international law) is regarded as “particularly sensitive”.<sup>146</sup>

The above-mentioned Convention of the Council of Europe is not the only European instrument dealing with personal data privacy. Article 8 ECHR provides that “everyone has the right to respect for his private and family life, his home and his correspondence”<sup>147</sup> and that “there shall be no interference by a public authority with the exercise of this right”<sup>148</sup> except in cases of national security, public safety, the prevention of disorder or crime, health

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<sup>139</sup> See the Convention’s Explanatory Report, § 19, available at <http://conventions.coe.int/Treaty/EN/Reports/HTML/108.htm> (accessed 3 May 2006).

<sup>140</sup> Convention on the Automatic Processing of Personal Data, Article 2 (a).

<sup>141</sup> *Ibid.*, Article 6.

<sup>142</sup> *Ibid.*, Article 9 (2)(a)(emphasis added).

<sup>143</sup> Messner et al., *op.cit.*, 489.

<sup>144</sup> My interview with the Permanent Secretary of the Icelandic Ministry of Justice, 28 October 2002, § 7.

<sup>145</sup> Interpol Constitution, Article 3; see also *Rules on the Processing of Information for the Purposes of International Police Co-operation*, Article 1 (d).

<sup>146</sup> Interpol, *Rules*, *cit.*, Article 10 (2).

<sup>147</sup> Article 8 (1) ECHR.

<sup>148</sup> Article 8 (2) ECHR.

and morals, and the protection of rights and freedoms of others. In October 1995, in addition, the European Parliament approved a specific *Directive on the Protection of Personal Data* (DPPD)<sup>149</sup> which regulates the processing of personal information, regardless of whether this is automatic or not. Although Iceland is not formally bound by this document, the latter fixes the principle according to which personal data should not be processed at all, except when certain conditions are met. These include transparency (the data subject has a right to be informed when his or her personal information is being processed<sup>150</sup>), lawful purposes (which must be specified, explicit and legitimate<sup>151</sup>) and proportionality.<sup>152</sup> “Any person must be able to exercise the right of access to data relating to him which are being processed”, Item 41 of the Preamble adds, “in order to verify in particular the accuracy of the data and the lawfulness of the processing.”<sup>153</sup> Like the above-mentioned Convention and Interpol Constitution, the Directive provides a rigid protection mechanism for sensitive personal data: “Member states shall prohibit the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership and the processing of data concerning health or sex life”,<sup>154</sup> Article 8 reads, except in cases of explicit consent,<sup>155</sup> a specific interest of the person in the processing<sup>156</sup> or data manifestly made public.<sup>157</sup> Although Article 3 provides that “the Directive shall not apply to the processing of personal data . . . in any case to processing operations concerning public security, defence, State security . . . and the activities of the State in areas of criminal law,”<sup>158</sup> it does not mention ‘public order’ and it explicitly encourages state parties to adopt its provisions in the most extensive way possible: “Given the importance of the developments under way . . . of the techniques used to capture, transmit, manipulate, record, store or communicate [personal data]”, the document reads, “this Directive should be applicable [also] to processing involving such [State security] data.”<sup>159</sup>

As the above-mentioned provisions indicate, therefore, the processing of personal data is the object of increasing protection under European law—a consequence, perhaps, of the vertiginous diffusion of the Internet and other technological means of data transfer. This protection is particularly stringent when the information at issue is ‘sensitive’ (i.e. possesses a religious, political or racial connotation), in which case only very exceptional circumstances (involving State security, public security and national defence, but not public order) can allow

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<sup>149</sup> Directive 95/46/EC on the Protection of Individuals with Regard to the Processing of Personal Data, Official Journal of the European Communities, 23 November 1995, n. L. 281, 31.

<sup>150</sup> Ibid. Articles 10 and 11.

<sup>151</sup> Ibid., Article 6 (b).

<sup>152</sup> Ibid., Article 6.

<sup>153</sup> Ibid., Preamble, Item 41.

<sup>154</sup> Ibid., Article 8.

<sup>155</sup> Ibid., Article 8 (2) (a).

<sup>156</sup> Ibid., Article 8 (2) (c).

<sup>157</sup> Ibid., Article 8 (2) (e).

<sup>158</sup> Ibid.

<sup>159</sup> Preamble, Item 14.

for an exception. In the case of Iceland, however, it is debatable whether public security—and all the more so the safety of the state—was in any danger in June 2002 due to Falun Gong practitioners, particularly since authorities themselves eventually acknowledged that the movement created no disturbance at all. “It is necessary to point out,” the Ministry of Justice wrote after the visit, “that the police authorities did not detect anyone taking part in any kind of illegal behaviour during the public visit of the Chinese president so that not a single police file was made or name nor names of people [retained].”<sup>160</sup>

### III. DISCRIMINATORY CHARACTER OF BAN AND BLACKLIST

In addition to the issues of religious expression and privacy, another problem raised by the ban and blacklist lies with the matter of discrimination and differential treatment. It is a fundamental principle of European and international law that people of different religious beliefs shall not be treated differently<sup>161</sup>—as one author observed, “the right of non-discrimination is generally perceived as one of the most essential human rights [and], when based on grounds such as race, sex, religion or belief, it has the status of *jus cogens*.”<sup>162</sup> In this respect, Article 14 of the ECHR provides that “the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”<sup>163</sup> While Article 14 does not have independent existence and can only be applied if the facts at issue fall within the ambit of at least one of the other provisions in the Convention, the association of Articles 9 and 14 provides a powerful non-discrimination tool that can profitably be applied to the Icelandic events, for the European Court has suggested that each case of suspected discrimination undergo the following questions<sup>164</sup>: Is the complainant a member of a definable group? Is there a difference of treatment between the plaintiff and those not members of the group? Are the comparators in an analogous position? Is there an objective justification for the difference in treatment? And, finally, is the difference in treatment proportional to the legitimate aim?

Europe, it should be noted, is not alone in worrying about the effects of discrimination. Indeed, so important is the non-discrimination principle that a specific UN instrument, the *Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief* (DEDRB) proclaimed by the United Nations General Assembly in 1981, came

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<sup>160</sup> Icelandic Ministry of Justice, Letter to Data Protection Authority, 10 September 2002.

<sup>161</sup> See for example Article 7 UDHR, Article 26 ICCPR, Article 1 ICERD, Article 1 CEDOW and Article 2 DE Discrimination on Religious Beliefs.

<sup>162</sup> De Jong, cit, 211.

<sup>163</sup> Article 14 ECHR.

<sup>164</sup> See International Committee for Human Rights, *Discrimination*, available at <http://www.ichr-law.org/english/expertise/areas/discrimination.htm> (last accessed 3 December 2006); S. Fredman, *Discrimination Law* (Oxford: Oxford UP 2002) 7; O.M. Arnardóttir, *Equality and Non-Discrimination under the European Convention on Human Rights* (Hague: Kluwer Law 2003) 17.

to reinforce the already numerous legal provisions on the matter.<sup>165</sup> According to Article 2 DEDRB, “the expression ‘intolerance and discrimination based on religious belief’ means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose *or as it effect* nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.”<sup>166</sup> This means that, like for the ECHR, states must ensure and protect the Declaration rights not only by refraining from discriminatory acts themselves but also by preventing such acts when committed by others, because, as the DEDRB reminds us, “[d]iscrimination between human beings on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations”.<sup>167</sup>

In the case of Iceland, there was never any doubt that the measures adopted by the government affected exclusively practitioners of the Falun Gong spiritual movement. Only Falun Gong names appeared, as far as it is possible to know, on the blacklist of banned people; only Falun Gong practitioners were arrested and detained at the airport; only Falun Gong practitioners were deported out of Iceland; only Falun Gong practitioners were denied boarding at foreign airports; and it was only in order to identify Falun Gong practitioners that incoming passengers were questioned about their religious beliefs at Keflavík airport.<sup>168</sup> The formal ban set up by the June 10 and 11 letters, after all, leaves little doubt about the target of the prohibition: “Falun Gong members intending to travel to Iceland during the period 11<sup>th</sup> to 16<sup>th</sup> of June will be refused entry and might face deportation if they have entered the country”,<sup>169</sup> the Ministry wrote. It was thus merely for ‘cosmetic’ reasons that at a certain point Icelandic authorities argued that the measures were not aimed at Falun Gong but at anyone wishing to protest against the Chinese president during the presidential visit.<sup>170</sup> The facts just do not support this assertion: the ban was always a ‘Falun Gong ban’, not one against protests in general, since only Falun Gong followers were put on the blacklist, arrested and deported. They were stopped by immigration officials for the very fact of belonging to that spiritual movement, whilst hypothetical non-Falun Gong (and, especially, non Asian-looking Falun Gong<sup>171</sup>) people wishing to visit Iceland in order to peacefully protest would have found very few—if any—obstacles in their way.

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<sup>165</sup> See United Nations General Assembly Resolution n. 36/55 of 25 November 1981. It should nevertheless be noted that the DEDRB is not legally binding on the states party. For an interesting discussion see E.O. Benito: *Elimination of All Forms of Intolerance and Discrimination Based on Religion and Belief* (Geneva: UN 1989); and M.J. Bossuyt: *L’Interdiction de la Discrimination dans le Droit International des Droits de l’Homme* (Brussels: Bruylant 1976).

<sup>166</sup> Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, Article 2 (emphasis added).

<sup>167</sup> *Ibid.*, Article 3.

<sup>168</sup> See my *Independent People?* cit, 254.

<sup>169</sup> *Ibid.*

<sup>170</sup> Icelandic Ministry of Justice, Letter to Data Protection Authority, 10 September 2002.

<sup>171</sup> See my *Independent People?* cit, 254.

It is certainly true that, according to both the Declaration and Article 14 ECHR, not all forms of differential treatment based on religious beliefs are illegal – since a 1968 case the European Court of Human Rights has for example acknowledged that “distinctions are reasonable if they pursue a legitimate aim and have an objective justification, and a reasonable relationship of proportionality exists between the aim sought to be realized and the means employed.”<sup>172</sup> Yet as an author wrote, “in the public domain distinctions made on religion or belief are generally hard to justify”<sup>173</sup> because the arbitrary treatment coincides with the absence of a balance between the denial of certain rights to some and the realization of those rights of others. Furthermore, the European Court of Human Rights has at times adopted a more comprehensive principle of comparability (discrimination occurs when equal cases are dealt with differently) rather than the stricter one of proportionality,<sup>174</sup> with the consequence that, as one author explains, “[a]cts [should be regarded] of an arbitrary nature, and thus constitute discrimination, when the end result is one of *de facto* inequality, irrespective of the (legitimate) aim which constitutes the basis for such acts.”<sup>175</sup> Apart from cases of affirmative action, therefore, distinctions based on religious belief are extremely uncommon as well as hard to justify—especially if they affect, as in Iceland, only the members of a particular group.

Why the Icelandic measures proved so unpopular both in Iceland and overseas was precisely because they targeted a particular group of people who practiced a non-violent belief and who wanted to travel to Iceland to peacefully protest against the movement’s harsh treatment in China. This fact alone was enough to ensure, beyond legal considerations, that the ban and blacklist turned into a public relations embarrassment for the Icelandic government.<sup>176</sup> Yet the unusual character of the ban and the difficulty of distinguishing ‘known or suspected’ practitioners of a spiritual movement that does not possess a formal membership system meant that government and airline officials had to turn to more ‘visible’—and even more arbitrary—selection criteria than enquiring about people’s spiritual beliefs: “I was wondering whether you have people with oriental or Chinese looking origins,”<sup>177</sup> a policeman reportedly asked the owner of a guesthouse in Reykjavík. This was not an isolated incident: several other hotel managers reported the same thing—“[t]hey went everywhere”, one of them said. Similar episodes of racial profiling, it should be noted, were also witnessed at Keflavík airport. “An Icelandic officer handled all Asian-looking passengers taking my flight a piece of printed document that clearly stated a control of Schengen Visa entry and Icelandic Visa control to Chinese and Taiwanese passport holders during these days,”<sup>178</sup> one Falun Gong practitioner wrote

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<sup>172</sup> ECtHR, *Belgian Linguistic Case*, Series A n. 6 (1968). See also ECtHR, *Hoffman v Austria*, Series A n.255-C (1933). On the point, see also W. McKean: *Equality and Discrimination under International Law* (Oxford: Blackwell 1985) 287.

<sup>173</sup> De Jong, cit, 223.

<sup>174</sup> See for example ECtHR, *Van der Musselle Case*, Series A n. 70, 1983, 22-3; ECtHR, *Johnston Case*, Series A, n. 112, 1987, 26-7. See also on the point P. Van Dijk-G.J.H. Van Hoof: *Theory and Practice of the European Convention on Human Rights* (Boston 1990) 539.

<sup>175</sup> In De Jong, cit, 704.

<sup>176</sup> See my *Artic Totalitarianism?* cit, esp. 92ss.

<sup>177</sup> My Interview with Hotel Owner Mr H., 7 December 2002 (§ 1).

<sup>178</sup> My interview with Y. L., 4 November 2002.

to the author. “All Asian-looking passengers before me who were waiting at the customs were stopped and questioned and brought to another special area aside the exits for later detailed questioning.”<sup>179</sup> Again, this does not appear an isolated episode.<sup>180</sup>

## E. CONCLUSION

Because of its unusual character, broad scope and controversial implementation, the ban introduced by the Icelandic government in June 2002 could not but raise a number of legal issues, the first of which concerns religious freedom and the limitation of Falun Gong practitioners’ right to manifest their beliefs. While it is certainly true, as the Parliamentary Ombudsman wrote, that neither Icelandic nor international law provides foreigners with an automatic right of entry into the country, simply claiming ‘public order’ and ‘national security’ reasons is not, according to European and international human rights law and practice, enough to deny a person—and least of all a group of non-violent members of the same spiritual belief—entry into Iceland. As we have seen above, national governments are expected to justify their exclusions on the basis of well-established principles of necessity and proportionality, something the Icelandic Ministry of Justice seemed unwilling to do from the outset. Its insistence on keeping all documents secret on grounds of ‘national security’ and its repeated clashes with the Data Protection Authority are perhaps emblematic of the difficulty to justify a ban against ‘known or suspected’ members of a worldwide spiritual movement which is individual in character and does not keep lists of practitioners.

The second problem is obviously given by the blacklist. While it must be possible for national states, in exceptional cases, to derogate to the very strict regime covering the automatic processing of personal data, the circumstances and implementation of the intelligence work self-admittedly carried out by Icelandic authorities in order to collect such information and pass it on to a private company while requiring it to prevent Falun Gong from boarding its planes raise a number of difficult questions. Indeed, such intelligence work goes against the very reason supra-national data protection rules are considered necessary in the first instance: to secure for every individual, national or alien, the right to privacy when it comes to sensitive information such as affiliation to a spiritual movement—particularly *vis-à-vis* national governments and especially when such affiliation is not publicly known but is the result of undercover intelligence work.

This brings us to the third and final area of concern, the discriminatory effects of the Icelandic measures. While European and international human rights law allows member states a certain degree of latitude when interests of public order and national security are at stake, it also provides increasingly stringent limitations in order to prevent abuses<sup>181</sup>—especially

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<sup>179</sup> Ibid.

<sup>180</sup> See my *Independent People?* cit, 248 and 254.

<sup>181</sup> A theoretical but insightful discussion of rights and discrimination is in R. Dworkin: *Taking Rights Seriously* (London: Duckworth, 1978).



when the intervention has the effect, as it did in Iceland, of directly discriminating against a well-defined religious movement.

By vetoing a group of people merely on the basis of their spiritual beliefs; by assembling a document with sensitive information that was then used to adversely impact their rights; and by distributing this document in order to prevent them from entering the country, the Icelandic government seems to have underestimated the gravity of its own actions. The blacklist and the veil of secrecy surrounding it ultimately stand as lucid examples of the serious consequences that a nonchalant possession and exchange of sensitive data can have in limiting the fundamental freedoms of religious liberty, privacy and non-discrimination.