National Margins of Discretion in the Court of Justice of the European Union's Adjudication of Fundamental Rights: Studies of Interconnectedness

Hanna Eklund

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, 25 May 2016.

European University Institute
Department of Law

National Margins of Discretion in the Court of Justice of the European Union's Adjudication of Fundamental Rights: Studies of Interconnectedness

Hanna Eklund

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Examining Board

Professor Claire Kilpatrick, EUI (Supervisor)
Professor J.H.H. Weiler, EUI
Professor Gráinne de Búrca, New York University
Professor Aida Torres Pérez, Universitat Pompeu Fabra

Researcher declaration to accompany the submission of written work
Department of Law – LL.M. and Ph.D. Programmes

I Hanna Eklund certify that I am the author of the work *National Margins of Discretion in the Court of Justice of the European Union's Adjudication of Fundamental Rights: Studies of Interconnectedness* I have presented for examination for the Ph.D. at the European University Institute. I also certify that this is solely my own original work, other than where I have clearly indicated, in this declaration and in the thesis, that it is the work of others.

I warrant that I have obtained all the permissions required for using any material from other copyrighted publications.

I certify that this work complies with the Code of Ethics in Academic Research issued by the European University Institute (IUE 332/2/10 (CA 297).

I declare that this work consists of 89 890 words.

Statement of language correction:

This thesis has been corrected for linguistic and stylistic errors.

I certify that I have checked and approved all language corrections, and that these have not affected the content of this work.

Florence, 8 March 2016.

SUMMARY

The aim of this thesis is to investigate the way in which the Court of Justice of the European Union (CJEU) uses the margin of discretion-technique to adjudicate cases involving fundamental rights, and importantly, what this use entails. This thesis will answer these questions by presenting the argument that the margin of discretion-technique opens up discretional spaces in specific instances of adjudication that enable participation of actors from both legal *loci,* along with their respective readings of legal sources. This creates an adjudicative process that blurs the boundaries between what is a *EUropean* and what is a nationally defined standard of fundamental rights protection. The margin of discretion-technique therefore promotes euro-national interconnectedness in the formulation of the applicable standard of fundamental rights protection in a given case, rather than separating subject matters and legal conflicts along jurisdictional lines. The presentation of this thesis proceeds as follows. Firstly, the origins of techniques of coordination of overlapping jurisdictions that share commitment to norms, such as margins of discretion, will be investigated and thereafter understood in the context of the European Union. Secondly, three dominant narratives pertaining to discourse on the CJEU's adjudication of fundamental rights will be reconstructed and their reliance on euro-national binary logics will be highlighted. These narratives then serve as points of contrast in what is the main body of the thesis, namely a presentation of three typologies of the CJEU's margins of discretion-use in its case law involving fundamental rights. In contrast to the dominant narratives, these typologies will illustrate the intricate sharing of interpretative authority that the margins of discretion represent, which creates the precondition for an interconnected elaboration of the standard of fundamental rights protection. Lastly, the legal pattern of interconnectedness will be picked apart and understood as a feature of the CJEU's adjudication of fundamental rights.

Till Olle Bäck.

CONTENTS

Acknowledgments

1. Introduction **1**

2. Margins of Discretion and the Adjudication of EU Fundamental Rights Law: Positioning Interconnectedness **5**

2.1 Origin: Overlapping Jurisdictions, yet Jurisdictional Divides 5

2.2 Context: The European Union 10
2.2.1 Hierarchy and the Question of Interpretative Authority 10
2.2.2 Margins of Discretion Do Not Define What Is Out of Scope of EU Law 13
2.2.3 Contrasting with the Understanding of the ECtHR's Margin of Appreciation as an Upholder of Jurisdictional Divides 14

2.3 Sources: The European Union's Fundamental Rights Material 21

3. Stories of a Separation: *Improvement*, *Intrusion* and *Diversity* in Discourse on the CJEU's Fundamental Rights Adjudication **25**

3.1 The Euro-National Binary 26

3.2 The Narrative of Improvement 32
3.2.1 The Example of Equal Treatment 35
3.2.2 The Method of Strategic Litigation 36

3.3 The Narrative of Intrusion 39
3.3.1 Intrusion Felt by National Constitutional Courts 41
3.3.2 *Social Protection Intruded Upon* 42

3.4 The Narrative of Diversity 45
3.4.1 Fundamental Rights as Values and Identity 47
3.4.2 Constitutional Pluralism 48
3.4.3 National Constitutional Identity 51

3.5 Concluding Remarks: Binary-Based Discourse 53

4. A Method for Studying the CJEU's Use of Margins of Discretion in Fundamental Rights Adjudication **55**

4.1. Finding the Margin of Discretion-Technique 55
4.1.1 Identifying the Research Object 55
4.1.2. Differentiating Proportionality Review 57
4.1.3 Selecting Case Law 59

4.2 Constructing Margin of Discretion-Typologies 62
4.2.1 Structure 62
4.2.2 Function: Capturing Interconnected Norm-Articulation Beyond the Euro-National Binary 66

5. The Deviation Margin of Discretion **69**

5.1 Legal Conflict: A Litigant Relies on a EU Fundamental Rights Source Against a National Measure 70

5.2 EU Law Geography: The Sex Equality Case Study 72

5.3 Technicality: Versions of Source-Sensitive Norm Departure 76

5.4 Examples of Deviation Margins of Discretion 80
5.4.1 Direct Sex Discrimination: The Women and Violence-Deviant 80
5.4.2 Direct Sex Discrimination: The Men and Babies-Deviant 84
5.4.3 Indirect Sex Discrimination: How To Objectively Justify Departing From Social Policy Aims 86
5.4.4 The Right to Maternity and Parental Leave: Margins of Discretion to Constrain Rights 93

5.5 Concluding Remarks: Sharing Deviance 97

6. The Balance Margin of Discretion **101**

6.1 Legal Conflict: An Internal Market Fundamental Freedom Clashes with a Fundamental Right 103

6.2 EU Law Geography: The Internal Market 106

6.3 Technicality: Imagined Balancing 107

6.4 Examples of Balance Margins of Discretion 110
6.4.1 National Margins Of Discretion to Balance Equal Weight 110
6.4.2 The National as Counterweight 117

6.5 Concluding Remarks: Signalling Balance 123

7. The Compliance Margin of Discretion 127

7.1 Legal Conflict: EU Secondary Law Challenged on Fundamental Rights Grounds 128

7.2 EU Law Geography: Fundamental Rights-Sensitive Secondary Law 129

7.3 Technicality: Unitary Application Interrupted 132

7.4 Examples of Compliance Margins of Discretion 135
7.4.1 Prelude: Stauder 135
7.4.2 Crying Over Spilt Milk: Re-reading Wachauf 136
7.4.3 The Parliament v Council Roadmap 146
7.4.4 The Lindqvist Imperative 150

7.5 Concluding Remarks: Entangling Compliance 153

8. Exploring Interconnectedness: Concluding Remarks 155

8.1 Components of Interconnectedness 156
8.1.1 Sharing Interpretative Authority 156
8.1.2 Elaborating the Standard of Fundamental Rights Protection: From Ex Ante Separability to Ex Post Interconnectedness 161

8.2 Representations of Interconnectedness 164
8.2.1 Countering the Value of Improvement, Non-Intrusion and Diversity 165
8.2.2 Moving Between Court-Centred and Non-Court-Centred Legal Realities: Notes on Jurisgenerativity and Iterations 170
8.2.3 Engaging With Interconnectedness 172

Bibliography 177

Table of Cases and Legislation 190

ACKNOWLEDGMENTS

I am glad to finally have the opportunity to thank Claire Kilpatrick for being the best supervisor a PhD researcher can have – committed, engaging, critical and funny. For inspiration, support and encouraging critique during these first years in academia I am especially grateful to Loïc Azoulai, Vittoria Barsotti, Judy Fudge, Sverker Gustavsson, Ruth Rubio Marin, Silvana Sciarra, Susan Sturm and Inger Österdahl. For making all of this great at all times I thank Aurélie. For support, friendship and unforgettable moments during these years I am especially grateful to Afroditi, Christelle, Einar, Emmanuel, Federica, Francesco, Frank, Iacopo, Isabel, James, Luísa, Johan, Mark, Rasha, Ríán, Robin, Rónán, Sara, Tommaso, Vincent and Veronica. Last, always and for everything I thank my family, Stina, Stefan and Ellen.

1. Introduction

This is a thesis about the Court of Justice of the European Union's use of the margin of discretion-technique to adjudicate cases involving fundamental rights, and importantly, what this use entails.[1] In this work, "margin of discretion" refers to a method of adjudication whereby the Court of Justice of the European Union (CJEU) identifies an instance where a decision-making body within a Member State has, or will have discretion to decide on a shared norm-commitment, such as the protection of fundamental rights.

This thesis therefore studies one method of adjudication within the CJEU's vast body of case law involving fundamental rights. This is not a thesis about whether the protection of fundamental rights is strong or weak, high or low, good or bad. It is a study about how the standard of fundamental rights protections is elaborated where margins of discretion are operationalized.

What happens when the CJEU uses a national margin of discretion? My thesis is that the margin of discretion-technique opens up discretional spaces in specific instances of adjudication that enable both the CJEU and actors from the national legal *locus* to participate with their respective reading of legal sources. This creates an adjudicative process that blurs the boundaries between a *EUropean* and a nationally defined standard of fundamental rights protection.[2]

The margin of discretion technique promotes euro-national interconnectedness in the formulation of the applicable standard of fundamental rights protection in a given case, rather than separating subject matters and legal conflicts along jurisdictional lines. Separating the *truly national* from the *truly EUropean* is therefore not, I argue, a representative description of the operation of the margin of discretion technique within the world of the CJEU's adjudication of cases involving fundamental rights.

This thesis will be developed by moving between narrow perspectives and case law studies of the interconnected micro-interactions that the margin of discretion enables, and much broader perspectives and theorizing on the better understanding of legal methods for coordination of overlapping jurisdictions. The margin of discretion, I argue, is an example of

[1] In this thesis I will refer to CJEU and EU law even when case law and legislation refer to the ECJ and EC periods.
[2] *EUropean* refers to what belongs to the EU-system, like comunitario in Italian or unionsrättslig in Swedish.

the latter. This thesis therefore engages with theories on transnational law but it does so while specifically exemplifying the detailed dynamics of transnationalism.

I will conduct this simultaneously narrow and wide analysis of the margin of discretion-technique in the context of the protection of fundamental rights, which is an area of law to which both the EU and the Member States have agreed to adhere, even though the precise shape of that adherence in specific cases is subject to interpretation. Importantly, I argue that where margins of discretions are used this interpretation is a shared exercise, which makes it increasingly difficult to make the case that fundamental rights simply have "fixed relationships to jurisdictional lines."[3]

In order to develop my thesis and present an analysis of the fundamental rights case law material containing margins of discretion, which emphasizes interconnectedness, I will proceed in the following way.

First, in ***chapter 2*** I will set the stage and explain the origins of methods of coordination of overlapping jurisdictions, such as the margin of discretion. I have been guided by literature that investigates the relationship between transnationalism and constitutionalism, federalism's less territorially categorical aspects, especially how techniques of adjudication and methods of decision-making may open up jurisdictional categories traditionally conceived as closed (such as federal states and states), as well as literature adhering to an understanding of legal pluralism as ultimately concerning coordination and collaboration, rather than separation of jurisdictions. With this guidance, I will illustrate the importance of not prematurely proclaiming interests to which margins of discretion cater, beyond the function of coordination.

Then I will move the margin of discretion to the context of the European Union and firmly locate it within the EU's structure of institutions and legal sources. I will also outline the difference between my reading of the CJEU's margin of discretion and mainstream commentary on the European Court of Human Rights' use of the margin of appreciation-technique. This exercise serves primarily to make my reading clearer and is not a thorough compare and contrast-exercise.

In ***chapter 3***, I will reconstruct dominant narratives in discourse on the CJEU's fundamental rights adjudication and I will argue that these narratives rely on a euro-national binary rationale that contrasts with the operation and affects of the margin of discretion.

[3] Resnik, J 2014, Federalism(s)'s Forms and Norms: Contesting Rights, De-Essentializing Jurisdictional Divides, and Temporizing Accommodations, in Fleming, JE and Levy, JT (eds.) *Federalism and Subsidiarity: Nomos Lv*, NYU Press, New York, p. 367.

These narratives will then be interwoven into the case law analysis conducted in chapter 5, 6 and 7 as points of contrast. Beyond crystalizing the case law analysis conducted in this work, this reconstructive discourse analysis serves to illustrate the contributions of my reading of the operation of the margins of discretion to the broader discourse on the CJEU's fundamental rights adjudication.

In ***chapter 4*** I will lay out a method for studying margins of discretion as they appear in the CJEU's adjudication of cases involving fundamental rights. I will start by providing a thorough definition of "margin of discretion" as a research object. Thereafter I will explain how I have constructed typologies of margins of discretion and outline the usefulness and novelty of this method.

In ***chapters 5, 6, and 7*** I present three typologies of margin of discretion-uses that the CJEU operationalize to adjudicate fundamental rights, namely *the deviation margin of discretion*, *the balance margin of discretion,* and *the compliance margin of discretion*. These three, although sharing the same core dynamic, have distinct shapes and originate in differently structured legal conflicts pertaining to the EU fundamental rights material.

The *deviation margin of discretion* is triggered in a setting where a litigant challenges a national measure on the grounds that it violates an EU-sourced fundamental right. The deviation margin of discretion then functions so as to accommodate a national deviation from the EU-sourced right.

The *balance margin of discretion* handles clashes between the EU internal market law fundamental freedoms and the protection of fundamental rights. The balance margin of discretion is attached to a national instance of decision-making understood to have achieved balance between these two competing interests.

The *compliance margin of discretion* is operationalized when secondary EU legislation is challenged on the grounds that it violates fundamental rights. The compliance margin of discretion is addressed to the competent national authority to make sure that the secondary EU source is applied in a fundamental rights compliant way.

The mere construction of these three typologies represents a novel contribution to the field of EU fundamental rights law. Taken together, they cut through several sectorial distinctions within EU law, such as internal market law, equal treatment, and several sets of secondary legislation. Furthermore, these typologies capture both the width of EU fundamental rights utilities and the myriad of sources that constitute the EU fundamental rights material: primary law, secondary law, the Charter, the ECHR and national constitutions.

Put together, this provides both an innovative and comprehensive basis upon which to

investigate the CJEU's use of the technique and detect legal patterns of interconnectedness. In particular, these typologies will amount to a critical consideration of the euro-national binary mode of analysis of EU fundamental rights law, which in contrast relies on the constant separability of the national and the *EUropean* qualities of the standard of protection.

Finally, in ***chapter 8*** I will explore the interconnectedness that I found in the operation of the typologies. Most importantly, I will summarize and develop the components of interconnectedness. By means of conclusion I will explain where I believe one finds important and interesting representations of interconnectedness within the world of the CJEU's fundamental rights adjudication, which could provide baselines for further investigation.

Ultimately it is hoped that the reader of this thesis will emerge with a clearer understanding of how the CJEU uses the margin of discretion-technique in cases involving fundamental rights, coupled with an appreciation for how the interconnectedness that this use entails should shape our understanding of the CJEU's fundamental rights adjudication.

2. Margins of Discretion and the Adjudication of EU Fundamental Rights Law: Positioning Interconnectedness

2.1 Origin: Overlapping Jurisdictions, yet Jurisdictional Divides

National margins of discretion are found where jurisdictions overlap and share commitment to norms, such as fundamental rights.[4] They address the need to coordinate and mediate the forms and methods of norm protection, and as such they are ultimately tools for ensuring that the jurisdictions concerned keep their promise to collaborate.

Within the European Union and elsewhere, the use of margins of discretion in adjudication is triggered by such jurisdictional overlaps and common commitments. This minimalist understanding of the origins of this technique, which runs through this work, serves to avoid moving directly to normative conclusions about the interests to which margins of discretion may cater. Margins of discretion originate in the need to ensure collaboration on shared commitments, but it is not immediately clear which particular interest this collaboration promotes.

Flowing from this understanding, there seems to be little demand for national margins of discretion in a legal setting with completely uncoordinated and absolutely independent units, such as a landscape populated with the stereotypical image of a sovereign and self-sufficient state.[5] In such a legal context the lack of shared commitment generates disassociation sooner than cooperation.[6]

---

[4] Resnik writes: "the effort to respect variations while adhering to certain specified legal obligations is increasingly familiar as a burgeoning number of multilevel and transnational institutions aim to mediate differences while developing shared commitments." Resnik 2014, supra note 3 at 364. Walker writes about "overlapping polities," see Walker, N 2010 *Constitutionalism as the Incompleteness of Democracy: An Iterative Relationship*, Edinburgh School of Law WP NO 2010/25, p. 28.

[5] On this point see Benhabib on the "outmoded Westphalian conception of unbridled sovereignty" where "states are free and equal; they enjoy ultimate authority of all objects and subjects within a circumcised territory; relations with other sovereigns are voluntary and contingent." States thus, (as quoted by Benhabib from Held, D 2002, Law of States, Law of Peoples, *Legal Theory* 8 (2), p. 4) "regard cross-border processes as a private matter concerning only those immediately affected." See Benhabib, S 2006, Another Cosmopolitanism, in Post, R (ed.), *Another Cosmopolitanism,* Oxford University Press, Oxford, p. 23 and 47.

On this point, Tuori for instance, reveals the fallacy of the way in which the "traditional legal mapping of our global universe gives expression to a state-sovereigntist view of modern law." See Tuori, K 2014, Transnational Law: On Legal Hybrids and Perspectivism, in Maduro, M, Tuori, K and Sankari, S (eds.) *Transnational Law: Rethinking European Law and Legal Thinking*, Cambridge University Press, Cambridge; New York.

[6] For an elaboration of the argument that true separation between entities in legal theory is fiction see West, R 1988, Jurisprudence and gender, *The University of Chicago Law Review* 55 (1), pp. 1-72.

National margins of discretion are instead commonly associated with a modern, globalised world with an ever-increasing number of international and regional forms of cooperation.[7] A post-sovereignty condition, often understood as taking shape in the after-war period and onwards.[8] Accordingly, national margins of discretion are more a contemporary legal reality than legal tradition.[9]

This condition is mirrored in the efforts of present-day democracies to navigate overlaps in decision-making authority, and the fact that an increasing number of issues are not only regulated within nation-state territories. Purely domestic affairs are in short supply, notwithstanding the insurgency of nationalist political parties determined to contain politics and potential progress within certain territorial borders.[10]

In other words, people live their lives in overlapping jurisdictions that come under the name of federations, supranational organizations and unions. They also live within the subunits of these structures, described as states, members, member states, contracting parties and so forth.

Within all of this we find the origins and the demand for legal methods of coordination. In the larger unit as well as *within* the smaller units, differences in ideas, decision-making,

---

[7] Delmas-Marty, M 2009, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World*, Bloomsbury Publishing, Oxford. For a different way of thinking and critique of the ease and benevolence with which the analytical move from state-sovereignist to globalisation has been performed and constructed by some, see Scheuerman, WE 2014, Cosmopolitanism and the World State, *Review of International Studies* 40 (3), pp. 426-427.

[8] MacCormick, N 1996, Liberalism, Nationalism and the Post-Sovereign State, *Political Studies* 44 (3), pp.553-567.

[9] Yet, looking specifically at Europe there is a long trajectory of coordinate and subordinate jurisdictions like cities, empires, churches and "complicated institutional structures." Aroney, N 2007, Subsidiarity, Federalism and the Best Constitution: Thomas Aquinas on City, Province and Empire, *Law and Philosophy* 26 (2), p. 195. And see further p. 172, where Aroney describes Aquinas' thinking on multiple legal sources and loci: "Thus, in the *Summa Theologiae*, he affirms that the goal of human law is 'the temporal tranquillity of the state,' which is to be achieved through punishment of external acts to the extent that they may disturb the peace of the state – whereas the purpose of divine law is to lead human beings to the end of external happiness and is thus concerned with both external and internal acts." Thus, overlapping jurisdiction and the need to mediate between them is not necessarily a condition dependent on contemporary forms of globalization and international cooperation. Rather, mediation between overlapping jurisdictions, the origin of national margins of discretions, could be understood as a recurring European theme, notwithstanding that every epoch comes with a different set of powers and institutions and that the shared commitments change character. For instance, from rules governing trade and religion to rules governing trade and human rights.

[10] On this point see Nollkaemper, A and Nijman, JE 2007, Introduction, in Nollkaemper, A and Nijman, JE (eds.), *New Perspectives on the Divide Between National and International Law*, Oxford University Press, Oxford, p.12: "Individuals are no longer invisible, shielded by the domestic legal order; the subject matter of national and international law look more and more alike and sources are less and less controlling of any particular order. However, the reality is more complicated. We also face what can be called a 'new nationalism' that leads to fragmentation rather than a construction of a universal society." See also Walker 2010, supra note 4 at 21 and 22, he writes with the EU in mind: "as the political life of individuals and communities is increasingly dispersed across a variety of polities, the complex and obscure technology of coordination and co-articulation of these different regimes become key to life-chances."

needs, beliefs, methods and politics create clashes that call for mediation, by means of both legal and non-legal methods.

In this vein, the twentieth century analytical move from the imaginary of the self-sufficient sovereign state to a globalized world with "jurisdictional redundancies" that demand coordination, has fuelled interest in legal techniques of coordination beyond the state.[11]

Margins of discretion represent one such technique, and in the thinnest sense "margin of discretion" labels a method of adjudication whereby a superior court of a larger jurisdiction identifies an instance of decision-making within the smaller jurisdiction where the decision-making body has or will have discretion to decide on a shared commitment, such as the protection of fundamental rights, even though the superior court has jurisdiction.

Studying the technique thus means, in concrete, a micro focus on how margins of discretion are operationalized within the adjudicative process of a superior court belonging to the larger unit, which is ultimately responsible for the coordination of the shared commitment of the jurisdictions at play. Specifically, this refers to how and when that superior court indicates that some decision-making body within the sub-unit should be involved in decision-making and interpretation.

As such, the margin of discretion is a legal tool that serves to structure the myriad questions prompted by the condition of overlapping jurisdictions and shared commitment to norms, such as the fundamental rights of people.[12] In particular, it seeks to account for how and when the smaller unit in a supranational structure in principle is, and perhaps should be involved in decision-making, as well as how such allocation of decision-making is best understood and managed. Hence, structuring the question of how to organize what should be decided where.

In this capacity, margins of discretion (often under the label of "margin of appreciation") appear in different subsets of literatures determined to provide the best explanation for the

[11] On the point of the imaginary of the sovereign state and jurisdictional redundancy, Cover writes, primarily with the US in mind: "Many of the formal attributes of the sovereignty of the states have bowed before the onslaughts of necessity and convenience time and again throughout our history while the crazy patchwork of jurisdiction, if anything, has become more complex and apparently anachronistic." Cover, R 1981, The Use of Jurisdictional Redundancy: Interest, Ideology and Innovation, *William & Mary Law Review* 22, p. 642. On this shift see further: Benhabib 2006, supra note 5 at 24: "Sovereignty no longer means ultimate and arbitrary authority over a circumcised territory, states which treat their citizens in violation of certain norms, close their borders, prevent freedom of market, speech, and association and the like are thought not to belong within a specific society of states and alliances."

[12] Not excluding that other legal techniques, principles and normative positions are used with a similar purpose.

internal and not yet obvious logic of a legal world of overlapping jurisdictions and shared commitment to norms.[13]

When confronting these issues authors may, for instance, start from more experimental accounts of ***federalism*** and seek to understand how techniques of adjudication (for example the margin of discretion, among others) and methods of decision-making open up jurisdictional categories traditionally conceived as closed, such as federal states and states.[14] Writings on ***transnationalism*** and the question of what it does to constitutionalism are related to this strand of scholarship. The margin of discretion technique is regularly mentioned in such discourse.[15] Another plausible starting point is ***global legal pluralism***, possibly using margins of discretion as a way of thinking about coordination, but not necessarily separation of different components of legal pluralism.[16] Additionally, margins of discretion also feature in work that starts within ***international human rights law,*** and in that context the technique frequently functions as a tool that accommodates difference between jurisdictions by operationalizing the jurisdictional divide.[17] Indeed, this last mentioned instance is one of the more mainstream reconstructions of margins of discretion.[18]

These samples of different strands of legal thinking have divergent visions of the ultimate purpose of thinking about the margin of discretion-technique. Although there is agreement on the thin definition of its operation – a superior court of a larger jurisdiction gives a decision-making body within the smaller jurisdiction discretion to decide on a matter that is a shared commitment, even though the superior court has jurisdiction – there are different visions of what the margin of discretion has do to the system of overlapping jurisdictions in which it operates.

---

[13] I use ”margin of discretion” here to encompass all versions of margins not pertaining to any specific court, later in this work I will use “margin of discretion” to label the specific sub-category of the CJEU’s use of the technique. This is further explained in chapter 4.

[14] Here I think in particular of Cover’s elaboration of ”dialectic federalism” (no reference to margins of discretion) and Resnik's critique of categorical federalism in a similar vein (explicit reference to margin of appreciation). See Cover, R and Aleinikoff, AT 1977, Dialectical Federalism: Habeas Corpus and the Court, *Yale Law Journal* 86 (6), pp. 1035-1102 and Resnik 2014, supra note 3 and Resnik, J 2001, Categorical Federalism: Jurisdiction, Gender, and the Globe, *Yale Law Journal* 111 (3), pp. 619-680.

[15] Jackson, V 2010, *Constitutional Engagement in a Transnational Era*, Oxford University Press, Oxford, on page 57 she discusses ”the margin of appreciation” as a doctrinal position of convergence.

[16] In particular (with explicit reference to margin of appreciation) Berman Schiff, P 2006, Global Legal Pluralism, *Southern California Law Review* 80, p. 1195

[17] See for instance the following examples from international human right law: Carozza, PG 2003, Subsidiarity as a Structural Principle of International Human Rights Law, *American Journal of International Law* 97 (1), p. 40: “it is not surprising to find in the development of human rights law that other doctrines and ideas have arisen that function at least in part as analogues to subsidiarity in addressing the pervasive dialectic between universal human rights and legitimate claims to pluralism. The doctrine of the "margin of appreciation” first developed by the ECHR, is the most notable example.” And see Shany, Y 2005, Toward a General Margin of Appreciation Doctrine in International Law?, *European Journal of International Law* 16 (5), pp. 907-940.

[18] See chapter 2.2.3 on mainstream literature on the margin of appreciation in the European Convention system.

In other words, margins of discretions as they originate in overlapping jurisdictions and shared commitment to norms have triggered robust and dedicated inquiry into the ***maintenance of jurisdictional divides***. The dominance of this type of inquiry in turn prompts the question of whether the national margin of discretion-technique is truly a method best understood as an interaction between, or a separation of, overlapping jurisdictions?

It is clear from the interest in such questions, as in the samples of scholarship mentioned above, that jurisdictional divides are not analytically erased only because jurisdictions increasingly overlap. Rather the opposite. Such divides remain a central focus of the inquiry, and national margins of discretion may be used to navigate such investigation.

When margins of discretion feature in these discussions one may find two main analytical routes. Namely, on the one hand margins of discretion may be used by those interested in any residual guarantee that separates, along jurisdictional lines, subject matters that according to some criteria are better decided in one or the other original jurisdiction, thus emphasising difference between the larger and smaller units.[19] Which means describing why a subject matter ought to be, for instance, national rather than European and better dealt with in one or the other *locus*. The commentator would insist on this separation even though whatever is to be decided is a shared commitment rather than, for instance, an altogether internal concern of the smaller unit.

On the other hand, there are strong arguments in favour of using such techniques and theories of mediation to downgrade the importance of jurisdictional divides as the central organizational framework in a legal setting of interacting jurisdictions and find a "middle ground between strict territorialism (...) and universalism," thus downplaying the centrality of difference between the larger and smaller units and the importance of jurisdictional divides.[20] Or at the very least, to understand doctrines of deference such as the margin of discretion as based on the "recognition of the competence of the domestic legal order to contribute in determining the content to be given to some indeterminate international notions."[21]

The investigation carried out in this work is in part framed within this tension between separation and collaboration as the best understanding of what national margin of discretion, understood as a supranational adjudicative method that operationalizes national discretion,

[19] See scholarship that starts within international human rights law such as, Carozza 2003, supra note 17 and Shany 2005, supra note 17.
[20] See for instance Berman Schiff 2006, supra note 16 at 1195 and Resnik, 2001, supra note 14.
[21] Cannizzaro, E and Bonafè, B 2014, Beyond the Archetypes of Modern Legal Thought: Appraising New and Old Forms of Interaction Between Legal Orders, in Maduro, M, Tuori, K and Sankari, S (eds.) *Transnational Law: Rethinking European Law and Legal Thinking*, Cambridge University Press, Cambridge; New York, p. 89.

does to jurisdictional divides and shared commitments.[22]

I am interested in conducting this inquiry in the specific context of the European Union's fundamental rights protection. Therefore, as a preliminary remark I will firstly delineate the features of the EU contexts that condition national discretion in the process of adjudication. Secondly, I will present the characteristics of the EU's fundamental rights material.

I will, within the tension outlined above between emphasis and destabilization of jurisdictional divides in a legal setting of jurisdictional overlap, favour the position that within the EU judicial operationalization of national discretion works as a method for interaction between, rather than separation of, the EU and the different national jurisdictions. I will do so under the guidance of literature that investigates transnationalism, federalism's less-territory-categorical aspects, and understandings of legal pluralism as more about coordination and collaboration than separation.

In sum, I argue the act of separating the truly national from what is the EU, is not the best description of the operation of the margin of discretion technique within the EU-context.

2.2 Context: The European Union

2.2.1 Hierarchy and the Question of Interpretative Authority

The details and micro-interactions of national margins of discretion, just like any doctrine of deference, must be understood in the context in which they operate.[23] Apprehending the margin of discretion technique in the specific context of the European Union's fundamental rights protection is essentially an investigation that starts by *finding* the technique within the Court of Justice of the European Union's case law, *delineating* its operation(s) and ultimately *understanding* its function, effect and consequence.

[22] Along these lines, Walker states: "The regulatory circuits that develop within this complex set of movements affect the demarcation dimension of constitutionalism in two apparently opposite but connected ways, with various ramifications for other dimensions of constitutionalism. In some cases, globalisation engenders more and more heavily overlapping boundaries relevant to constitutionalism, while in others, by contrast, it dispenses with the logic of boundaries altogether." Walker 2010, supra note 4 at 22.

[23] In the same vein: "Finally, a pluralist framework suggests a research agenda that emphasizes the micro-interactions among different normative systems. Such a case study approach would serve as a contrast to rational choice and other forms of more abstract modelling, by focusing instead on thick description of the ways in which various procedural mechanisms, institutions, and practices actually operate as sites of contestation and creative innovation. Thus, applying pluralism to the international arena illuminates a broader field of inquiry and asks scholars to consider studying in more depth the processes whereby normative gaps among communities are negotiated." In Berman Schiff 2006, supra note 16 at 1168.

Inevitably then, such an investigation lives in a symbiotic relationship with the particularities of the European Union; its court system; its preliminary reference proceedings; its primary law; its secondary law; all the national law within the scope of EU law; the multitude of national decision-making bodies and so forth.[24]

National margins of discretion are techniques of adjudication, and appear in the immediate contexts of the superior court and the competent national authorities that are engaged in the superior court's process of decision-making.

Specifically in the context of the European Union, article 267 TFEU holds that the Court of Justice of the European Union "shall have jurisdiction to give preliminary rulings concerning the interpretation of the Treaties," and the CJEU is accordingly placed above the national courts and authorities in relation to the interpretation of the treaties' provisions.[25] Because of the hierarchical structure of this relationship, the CJEU may, during the process of adjudication of an EU law subject matter, decide to use a national margin of discretion and thus direct decision-making or incorporate decision-making from a national court or authority into its process of adjudication, even if the CJEU in principle has jurisdiction.

In sum, where the CJEU has jurisdiction, hence where a question concerns, as stated in article 267 TFEU, "the interpretation of the Treaties," the CJEU decides whether a margin of discretion is to be used in the process of interpreting EU law in cases that come before it.

[24] The European Union's Member States cooperate on a large number of issues, which are enumerated in the Lisbon Treaty. See articles 3-5 TEU and articles 3-6 in TFEU. The EU's institutions and the Member States, separately and when they interact within the scope of EU law, are committed to the protection of fundamental rights, as guaranteed in a series of sources both national and enacted on EU level, including the Charter of Fundamental Rights of the European Union. See article 6 TEU. Furthermore, in Opinion 2/13 delivered on 18 December 2014, paras., 158 and 166-167 the CJEU (Full Court) describes the EU legal order in the following way: "the EU has a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation, (…)." And frames EU law as "characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States (…), and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves (…). These essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a 'process of creating an ever closer union among the peoples of Europe.'"

[25] The competent judicial body within these Member State may initiate a process of adjudication by asking questions of interpretation through the preliminary reference procedure as regulated in article 267 TFEU. The Court of Justice of the European Union then answers. There are other forms of procedures too, see articles 258, 259, 265 and generally section 5 of the TFEU. See both article 19.3 TEU and article 267 TFEU that in terms of jurisdiction in full reads "a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union." The latter ground does not trigger national margins of discretion, however, but concerns the CJEU's power to review acts of the EU institutions.

Hence the CJEU owns the question of ***when*** to operationalize a national margin of discretion, or any other technique of adjudication, in the process of interpreting EU law.[26]

The fact that the CJEU decides to operationalize a national margin of discretion does not however automatically translate into ***singularity of interpretative authority*** for the CJEU. Here I draw a distinction between the *initiative* to operationalize a margin of discretion and the *effects* of a margin of discretion within the context of adjudication of cases involving EU fundamental rights. In other words, the CJEU has the prerogative to use margins of discretion in cases that come before it and solely possess the initiative to operationalize the technique in those processes of adjudication. This does not mean however, that the CJEU maintains interpretative authority in a process of adjudication where a margin of discretion is used. Instead, the initiative of the CJEU to use a margin of discretion opens up for sharing interpretative authority. This will be explained further in chapters 4, 5, 6, 7 and 8.1.

As stated at the outset, I seek the best understanding of the operation of margins of discretion in the tension between whether it upholds or destabilizes jurisdictional divides. One of the recurring lines of inquiry in this work is the extent to which jurisdictional divides become more porous and the nature of legal sources less characterizable as belonging to a specific *locus*, if interpretative authority is multiple rather than singular.

I will argue that within the EU's world of fundamental rights protection the choice of the CJEU to operationalize national discretion is ultimately a choice of a methodology for the sharing of interpretative authority. *Descriptively* then the CJEU's use of margins of discretion in cases involving fundamental rights is best framed as a method for destabilizing jurisdictional divides, thus creating a collaborative process of adjudication, which will be outlined in chapters 5, 6 and 7.

In the following section, with the purpose of placing the margin of discretion-technique on the CJEU's adjudicative stage, I will make two separate points aimed at clarifying the contours of the national margins of discretion as they appear in the CJEU's adjudication of cases involving fundamental rights; how they are best understood to relate to the outer limits of the EU's legal context (1) and how they are best understood to relate to what is commonly conceived as "its" sibling – the ECtHR's margin of appreciation (2). In other words, I will address two questions relating to the *external* dimensions of the use of the margin of

[26] The case law of the CJEU is the object of study in this work. It should however be pointed out that an interesting line of inquiry would be to investigate the use of margins of discretion or similarly structured techniques outside of the case law of the CJEU, potentially in the acts of a vast number of national courts and administrative authorities. Cases, in other words, that never come before the CJEU. Here, however, the research concerns specifically the CJEU's use of the technique in cases involving the EU fundamental rights material.

discretion-technique within the specific context of the CJEU's adjudication of fundamental rights before I turn to the *internal*.

2.2.2 Margins of Discretion Do Not Define What Is Out of Scope of EU Law

Do margins of discretion communicate what is in, and what is outside the scope of EU law when used by the CJEU? In abstract terms, this question is that of whether the technique possibly establishes the borders of the larger unit in a system of overlapping jurisdictions?

This question could be highlighted by contrasting this brand of discretion with the notion of discretion in a completely national setting, say one of criminal law in any given European country during the 1960's.[27] In such a setting discretion has been understood as existing "whenever the effective limits on power leave an official free to make a choice among possible courses" or "where law ends."[28] There are many possible nuances of such framings, and well-known debates about the inevitability of discretion.[29] The conceptual tension in such discourse lies however, in establishing the best understanding of where law ends and discretion begins.

In contrast, in a supranational setting where jurisdictions overlap, such as the EU, a national margin of discretion does not direct decision-making to "where law ends," hence functioning as a means of exiting the system. Rather, it coordinates who decides and under what circumstances on a shared legal commitment.

This means that in this work, understanding national margins of discretion within the EU does not mean understanding when a subject matter is inside or outside of EU law. In other words, national margins of discretion do not as such externalize decision-making, nor do they define the outer borders of the EU legal order.

This is not to say that the CJEU has never held, in the area of cases involving fundamental rights, that something is out of the scope of EU law because it is an absolutely national concern that the CJEU cannot, or better still, will not touch.

---

[27] To be contrasted with sub-national margins of discretion in national administrative law: marge d'appréciation, margine di discrezionalita', Ermessensspielraum and so forth, which have been used to indicate discretionary powers of administrative or political bodies.

[28] Davis writes that: "Where law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness." Davis, KC 1969, *Discretionary Justice: A Preliminary Inquiry*, Louisiana State University Press, Baton Rouge, p. 3 and 4.

[29] See for classic contributions: Hart, HLA 1961, *The Concept of Law*, Oxford University Press, Oxford, p. 124 ff; Dworkin, R 1963, Judicial Discretion, *Journal of Philosophy* 60 (21), pp. 624–638; Dworkin, R 1967, The Model of Rules, *The University of Chicago Law Review* 35 (1), pp. 14-46; Raz, J 1972, Legal Principles and the Limits of Law, *Yale Law Journal* 81 (5), p. 847 ff. See further Shapiro, SJ 2007, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed*, Public Law and Legal Theory Working Paper Series, WP No. 77, March 2007.

For instance, *Grogan* from 1991 (the right to life, i.e. abortion and the freedom of services)[30] and *Grant* from 1998 (equal protection and sexual orientation)[31] are both cases where, despite a clear EU law link, the CJEU deemed the question at issue in the case as being outside the scope of EU law altogether. These cases, though they might be described as the CJEU taking an *absolutely deferential position* and as having an interesting story to tell about adjudicating shared commitment, deviate from the patterns of the ordinary operation of the margin of discretion technique presented in chapter 5, 6 and 7. Indeed, as distinct from the methods applied in *Grogan* and *Grant,* national margins operate inside the scope of EU law.

Instead, national margins of discretion will be identified within the micro-interactions between the CJEU and the national decision-maker in cases relating to clashes between internal market law and fundamental rights protection, within secondary legislation that is challenged on fundamental rights grounds, and when formulating acceptable deviations to EU rights. Within these inherently EU-natured legal conflicts and judicial processes, straightforward answers on the 'in or out' of EU law are in short supply.[32]

2.2.3 Contrasting with the Understanding of the ECtHR's Margin of Appreciation as an Upholder of Jurisdictional Divides

In Strasbourg, the European Court of Human Rights (ECtHR) has created one of the prime examples of a doctrine of national discretion in the area of human rights law, namely the *margin of appreciation*. A technique that, as will be discussed in some detaile below, is commonly conceived as separating decision-making on certain issues along territorial lines, and as such upholds jurisdictional divides.

In this work the aim is not that of carefully analysing and reconstructing the margin of appreciation as used by the ECtHR. Indeed, my interest is not even in an in-depth compare-and-contrast exercise between the use of national discretion within the EU and the Council of Europe's Convention system respectively.[33] Instead my aim is to sharpen, by way of (generic) contrast between the two, the contours of the CJEU's use of national discretion.

The necessity of addressing this issue, albeit in a limited fashion, is highlighted by the connection made, by several authors and in various forms, between the use (or desired

[30] Case C-159/90, The Society for the Protection of Unborn Children Ireland Ltd. v Stephen Grogan and others ECR [1991] I-04685, for further comments on this case see Coppel, J and O'Neill, A 1992, The European Court of Justice: Taking Rights Seriously, *Common Market Law Review* 12 (2), p. 675 and Nic Shuibhne, N 2009, Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law, *European Law Review* 34 (2), p. 250.
[31] Case C-249/96, Lisa Jacqueline Grant v South-West Trains Ltd, ECR [1998] I-00621.
[32] Admissibility decisions are somewhat artificially excluded from this statement.
[33] That is not to say it would not be an interesting project.

increase in use) of some sort of doctrine of deference in the CJEU's fundamental rights case law and the ECtHR's margin of appreciation.[34] Drawing on the proximity between the European Union and the European Convention of Human Rights system, particularly when the EU acts in the area of fundamental rights,[35] these authors have sought to explicitly or implicitly elaborate on the proximity between the uses of national discretion within the respective bodies of case law.

In this work, and in contrast to such an analytical move, one reason for choosing the term "margin of discretion" in the analysis of CJEU case law is that this difference in labelling serves to emphasise that I am not concerned with a project of legal transplantation of the ECtHR's "margin of appreciation" into the CJEU's jurisprudence.

In this vein, I will present a short summary of how mainstream commentary (1), and the ECtHR itself when it elaborates explicitly on the origins of the margin of appreciation technique (2), seem to favour an understanding of the margin of appreciation as an upholder, rather than a destabiliser, of jurisdictional divides. Herein, it is submitted, lies the essential contrast. In addition, I will point to the manner in which national discretion serves to mediate different types of legal conflicts and handle differently structured legal sources within the respective systems (3).

Again, clearly, by relying on secondary sources and a very limited number of primary sources this reconstruction only serves to cast in relief the contours of the CJEU's use of margins of discretion rather than capturing the internal logics and complexities of the

[34] Delmas-Marty, M 1992, The Richness of Underlying Legal Reasoning, in Delmas-Marty M (ed), *The European Convention for the Protection of Human Rights*, Nijhoff Publishing, Dordrecht; Boston, p. 335; Küling, J 2006, Fundamental Rights, in von Bogdandy, A and Bast, J (eds.), *Principles of European Constitutional Law*. Vol. 8. Hart Publishing, Oxford, p. 538; Shany 2006, supra note 17 at 927; Sweeney, J 2007, A 'Margin of Appreciation' in the Internal Market: Lessons from the European Court of Human Rights, *Legal Issues of Economic Integration* 34 (1), pp. 27-52; Nic Shuibhne 2009, supra note 30; Torres Pérez, A 2009, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication*, Oxford University Press, Oxford, p.168; Kumm, M 2010, Internationale Handelsgesellschaft, Nold and the New Human Rights Paradigm, in Maduro, M and Azoulai, L (eds), *The Past and Future of EU Law The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Hart Publishing, Oxford; Martinico, G 2010, Preliminary Refernce and Constitutional Courts. Are you in the Mood for Dialogue?*,* in Fontanelli, F, Martinico, G and Carrozza, P (eds.), *Shaping Rule of Law Through Dialogue : International and Supranational Experiences*, Europa Law Publishing, Groningen; Gerards, J 2011, Pluralism, Deference and the Margin of Appreciation Doctrine*, European Law Journal* 17 (1) p. 81; Fichera, M and Herlin-Karnell, E 2013, The Margin of Appreciation Test and Balancing in the Area of Freedom Security and Justice: A Proportionate Answer for a Europe of Rights? *European Public Law* 19 (4), pp. 759–788.

[35] "While the EU and the ECHR were in some ways quite different in origin and aspiration, they are now closely linked systems of transnational cooperation sharing an instantiation of a dynamic form of constitutionalism beyond the state." de Búrca, G and Gerstenberg, O 2006, The Denationalization of Constitutional Law, *Harvard International Law Journal* 47, p. 257. See further article 6(2) TEU read together with Opinion 2/13 of the Court of Justice of the European Union delivered on 18 December 2014, and article 53 of the Charter of Fundamental Rights of the European Union.

ECtHR's margin of appreciation. In other words, I will merely use the more popular conceptions of the latter to strengthen my reading of the former.

*

The European Court of Human Rights' margin of appreciation doctrine is often represented as an embodiment of a sovereignty rationale that allows for diversity of fundamental human rights formulation between the Contracting Parties.[36]

Shany argues that the essence of the margin of appreciation doctrine is judicial deference coupled with normative flexibility.[37] Mahoney is more pointed however: "in an international system, some interpretational tool is needed to draw the line between what is properly a matter for each community to decide on a local level and what is so fundamental that it entails the same requirement for all countries whatever the variations in traditions and culture."[38]

The mainstream lines of scholarly inquiry thus seem to presuppose that the overall aim of the technique is to "set the limits of state sovereignty in the sphere of human rights."[39]

In sum, the ECtHR, according to the mainstream commentary, uses the margin of appreciation to ***uphold jurisdictional divides*** in a system of overlapping jurisdictions and the debate is centred around, albeit not limited to, whether this function is desirable or not.[40]

---

[36] Sir Humphrey Waldock, President of the ECtHR, described the margin of appreciation as "one of the more important safeguards developed by the Commission and the Court to reconcile the effective operation of the Convention with the sovereign powers and responsibilities of governments in a democracy." Waldock, H 1980, The Effectiveness of the System set up by the European Convention on Human Rights, *Human Rights Law Journal* 1 (1), p. 9. See also Carozza 2003, supra note 17.

[37] Shany 2006, supra note 17 at 909.

[38] Mahoney, P 1998, Marvellous Richness of Diversity or Invidious Cultural Relativism, *Human Rights Law Review* (19), p. 1.

[39] For a recent summary of these arguments and an attempt to challenge them see: Legg, A 2012, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality*, Oxford University Press, Oxford, p.1. This has, throughout the history of the technique, exposed it to accusations of promoting relativism, see for instance: Itzcovich, G 2013, One, None and One Hundred Thousand Margins of Appreciations: The Lautsi Case, *Human Rights Law Review* 13 (2), pp. 287-308; Lester, A 1998, Universality versus Subsidiarity: A Reply, *European Human Rights Law Review* 73 (1), pp. 75-76; Macdonald, RSJ 1993, The Margin of Appreciation, in Macdonald, RSJ, Matscher, F and Petzold, H (eds.), *The European System for the Protection of Human Rights*, M. Nijhoff, Leiden; Boston, p. 85. Or the margin of appreciation, with a more nuanced framing, address the "functional differentiation of spheres of life" in a legal system where different states participate, see de Búrca and Gerstenberg 2006, supra note 35 at 252.

[40] For examples of critical analyses of how the margin of appreciation operates as a tool for absolute deference to the national level which create an inconsequential ECHR jurisprudence, see Benvenisti, E 1998, Margin of Appreciation, Consensus and Universal Standards, *NYU Journal of International Law and Politics* 31, pp. 843 - 854 and Itzcovich 2013, supra note 39.

Normatively then, debates about the desirability of the margin of appreciation technique mirror the lines of inquiry in the universalism versus particularism debate, which have focused on "the tension between (1) the universalistic claims of rights, and (2) the diversity of culture and moral views in the world." See Stone Sweet, A 2012, A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe, *Global Constitutionalism* 1 (1). p. 54. See further, Rorty, R 1993, Human Rights, Rationality, and Sentimentality, in Shute, S and Hurley, S (eds.), *On Human Rights,* Basic Books, New York, pp. 111-134; Ignatieff, M 2001, *Human Rights as Politics and Idolatry*, Princeton University Press, Princeton; Bell, L, Schaefer, AJN and Peleg,

*

The building blocks of the margin of appreciation have been ***elaborated in the case law*** of the ECtHR, most notably in *Handyside* from 1976; one of the very first times that the method was used.[41]

Handyside concerned a restriction of the freedom of expression with the aim of safeguarding public morals. The ECtHR held that "the machinery of protection established by the Convention is subsidiary to the national systems of safeguarding human rights," and went on to state that it is not possible to find a uniform conception of morals amongst the Contracting Parties. Furthermore, it held that: "the state authorities are in principle in a better position than the international judge" to give an opinion on "morals" as well as on the criteria for derogation from the right to freedom of expression.[42] For these reasons the Contracting Party was accorded a margin of appreciation.[43]

It should be noted that articles 1 and 35 of the ECHR embody the idea that it is first and foremost the Contracting Parties that should ensure effective rights protection and, as is stated in *Handyside*, the ***principle of subsidiarity*** is central to the ECHR system and the legitimacy of the margin of appreciation.[44] In this vein, the ECtHR has explained that it uses the margin of appreciation as an outflow of the principle of subsidiarity, reinforced specifically by the so-called ***better-placed argument***, namely that the national decision-maker is more suited to deciding certain issues.[45] This is especially so with such issues on which, according to the ECtHR's best understanding, there is no ***European consensus***.[46]

I (eds.) 2001, *Negotiating Culture and Human Rights*, Columbia University Press, New York; Donnelly, J 2007, The Relative Universality of Human Rights, *Human Rights Quarterly* 29(2). pp. 281-306.

[41] Handyside v United Kingdom, Judgement of 7 December 1976, application no 5493/72. For discussion of earlier use by the ECommHR see Hutchinson, MR 1999, The Margin of Appreciation Doctrine in the European Court of Human Rights, *International and Comparative Law Quarterly* 48 (3), p. 639.

[42] Found in article 10.2 ECHR.

[43] *Handyside*, para. 48: "Consequently, article 10 para. 2 leaves the Contracting States a margin of appreciation […] both to the domestic legislator […] and the bodies, judicial amongst others, […]. The domestic margin of appreciation thus goes hand in hand with a European supervision."

[44] As a consequence which should be noted, the EU's preliminary reference system (article 267 TFEU) and the principle of subsidiarity embodied in the exhaustion of domestic remedies (article 35 ECHR) causes national discretion to operate in different procedural settings. The former typically appears in the context of an ongoing case, "in the spirit of cooperation" between the national and the supranational as part of an answer to an EU law interpretational question, and the latter as an international last resort if the national level which is primarily responsible is suspected of not upholding minimum protection. For such terminology in relation to the preliminary reference system see, *Schmidberger*, para. 31; "in the context of that cooperation" and para. 32; "the spirit of cooperation" and *Viking*, para. 28; "in the context of cooperation."

[45] Drawing on these building blocks, in April 2013 the Parliamentary Assembly of the Council of Europe initiated a process of codifying the margin of appreciation-technique by adopting Protocol 15 amending the Convention. See the Explanatory report on Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, (CETS No. 213), Article 1 of the amending Protocol, para 9: "The

This should be contrasted with the CJEU's lack of any explicit elaboration of why it uses the margin of discretion-technique and its incoherent terminology when using the technique to adjudicate cases involving fundamental rights.[47] The principle of subsidiarity is guaranteed in EU primary law, yet the CJEU does not as a rule connect it with the use of deferential adjudicative methods in cases involving fundamental rights.[48] Moreover, as a rule the CJEU does not invoke the better placed-argument or lack of "European consensus" as determining concepts for the operation of national discretion in the process of judicial review in cases involving fundamental rights.[49] There is thus a clear difference in communication as between the two courts of the premises and reasons underpinning their operationalization of the margin of discretion-technique.

*

Beyond the ECtHR's moments of explicit elaboration and the recurring line of interpretations presented in dominant strands of commentary, it is important to highlight the forms of interaction enabled by the ordinary uses of the CJEU's margin of discretion and the ECtHR's margin of appreciation respectively. In other words, to delineate what typically happens between the ECtHR and the Contracting Parties and between the CJEU and its Member States when these techniques of national discretion are operationalized in the process of adjudication of cases involving fundamental rights.

The ECHR is designed to provide a minimum floor of protection of human rights in Europe. The Contracting Parties, amongst which all of the EU's Member States are included, are free to offer a higher standard of protection.[50] When a conflict arises in relation to one of

---

jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation."

[46] The caveat in formulation that modestly balances the deferential language of the ECtHR is that the margin of appreciation is coupled with "European supervision." See *Handyside,* para. 48: "The domestic margin of appreciation thus goes hand in hand with a European supervision."

[47] It is submitted that this compromises transparency and makes it harder for both commentary and the wider public to engage with the use of the technique within the EU. For a discussion on how such elaboration improves transparency see, Delmas-Marty 2009, supra note 7 at 57.

[48] See article 5 TEU. The preamble to the Charter reads in part: "This Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity (…)."

[49] In what appears to be an opposition to EU deference in the area of fundamental rights, the CJEU has defined its own role, especially as it relates to the ECHR-system, as contributing "to the implementation of the process of integration that is the *raison d'être* of the EU itself." See Opinion 2/13 of the Court of Justice of the European Union delivered on 18 December 2014, para. 172.

[50] See article 53 ECHR.

the rights enshrined in the Convention, the ECtHR may hold that the Contracting Party is not in violation of that right by reference to its margin of appreciation.

The quintessential Convention-conflict is thus between a state and an individual (or group of individuals) that claims that the state violated a Convention-right within its territory.[51] Therefore, the margin of appreciation enables an outcome where the ECtHR steps back and does not enforce the Convention right in the case at hand and leaves the state practice untouched.[52] In other words, the ECtHR's use of the margin of appreciation responds to a legal conflict in such a way as to enable the observer to conclude that it defines what is inside and outside the scope of the Convention rights.

As has already been explained, this contrasts with the CJEU's use of national margins of discretion, which will be identified within the micro-interactions between the CJEU and the national decision-maker in cases addressing clashes between internal market law and fundamental rights protection, within secondary legislation that is challenged on fundamental rights grounds and within the elaboration of acceptable deviations to EU rights.

Because of the fact that the EU is a legal system that integrates more subject matters than the Convention-system and encompasses a multitude of fundamental rights sources (including the ECHR), it also harbours more than one "typical" rights-conflict. Put differently, the CJEU's margin of discretion mediates and operates within a broader set of legal conflicts and within the text and application of more detailed and sophisticated legal sources, compared to the working environment of the ECtHR's margin of appreciation. To be clear, the distinction that I draw does not relate to the fact that the discretional space can vary, because the ECtHR's margin of appreciation appears to vary according to context.[53] Rather, it is the type of conflict-mediation requested, the difference between the legal sources that the technique handles, and the interaction triggered, that differ between the two systems.

[51] An addition to the rule in article 34 ECHR on individual application stating that the "Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto" is the rarely used possibility of inter-state applications in article 33 that states: "Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party." Between 1956 and 2014, 17 such inter-state applications were lodged.

[52] With the view that the smaller jurisdiction is better placed to decide the matter, which in turn is motivated, frequently but not solely, by a lack of European consensus. The genuineness and the coherence in the use of this motivation in relation to say, different Contracting Parties or different subject matters is outside the scope of this work but remains an important question. See Itzcovich 2013, supra note 39.

[53] The ECtHR has held that the "scope of this margin of appreciation is not identical in each case but will vary according to the context (…). Relevant factors include the nature of the Convention right in issue, its importance for the individual and the nature of the activities concerned." This quote is taken from Buckley v United Kingdom, Judgement of 26 September 1996, application no 20348/92, para. 74.

The CJEU operationalizes national discretion to elaborate on acceptable deviations from an EU fundamental right, to balance internal market law with fundamental rights, and to ensure compliance between a piece of EU secondary legislation and fundamental rights. The type of coordination required is thus broader in terms of the legal conflicts that the margin of discretion is supposed to handle, and simultaneously more detailed in terms of its source-sensitive mode of operation, compared to the margin of appreciation and the coordination required within the Convention-system.

Having said this, in the former case where an individual claims that a national measure violates a right guaranteed by the EU and the CJEU uses a national margin of discretion to deviate from an EU right, one finds the closest resemblance to the ECtHR's use of the margin of appreciation, since the type of legal claim, conflict and mediation requested is similar. This will be discussed further in chapter 5.

In sum, the language of the ECtHR, as well as of mainstream commentary and indeed the Parliamentary assembly on the Council of Europe,[54] takes the position that the margin of appreciation is a method of adjudication that separates decision-making along jurisdictional lines.[55] This separation, as noted above, occurs when an individual alleges that a national measure violates Convention-rights. Such separation, as will be carefully examined below, does not represent the best understanding of the CJEU's use of national discretion. In any event, studying the CJEU's use of national margins of discretion in cases involving fundamental rights goes far beyond cases where individuals rely on *E(U)ropean* rights against national measures.

[54] Drawing on these building blocks, in April 2013 the Parliamentary Assembly of the Council of Europe moreover initiated a process of codifying the margin of appreciation-technique by adopting Protocol 15 amending the Convention. See the Explanatory report on Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, (CETS No. 213), Article 1 of the amending Protocol, para 9.

[55] Whether or not this is indeed the best understanding of the margin of appreciation-technique or not is outside the scope of this work. See for instance, pointing in the direction of a more interconnected and less categorical understating: Spielmann, D 2014, Whither the Margin of Appreciation? *Current Legal Problems* 67 (1), p. 53, on the Handyside case, contrasting with mainstream commentary he writes: "subsidiary to what? Not, as some would have it, to State authorities in a broad or general way on traditional sovereignty grounds. Rather, the Convention mechanism is subsidiary to the national systems safeguarding human rights. The point is crucial to a correct understanding of the margin of appreciation, its nature and its purpose." See also, which Spielmann quotes as well; the joint dissenting opinion of Judges Sajó, Lazarova Trajkovska, and Vucinic in Mouvement Raëlien Suisse v Switzerland, Judgement of 26 September 1996 [GC], App no 16354/06: "The doctrine of margin of appreciation is a valuable tool for the interaction between national authorities and the Convention enforcement mechanism; it was never intended to be a vehicle of unprincipled deferentialism."

2.3 Sources: The European Union's Fundamental Rights Material

My interest is in the CJEU's operationalization of national margins of discretion and the question of what forms of interaction are produced by this method of adjudication. The legal sources involved in the process of adjudication are central to such an inquiry.

The sources primarily discussed in this work are those that contain the European Union's fundamental rights material. Put differently, the comprehensive set of sources for rights-access for people living in the EU.

At an early stage the CJEU stated that fundamental rights are "rights of fundamental nature."[56] This understanding of "fundamental" is neither limited or sparse, but rather far-reaching and rich. The European Union goes outside of the paradigm of "one legal order and one bill of rights," and the blinking lights that signal which norms are "fundamental" come from various institutions and geographical locations.[57]

This is not a recent development as much as it is an EU tradition. Throughout the history of the European Union as a fundamental human rights protecting organization the legal sources supporting such protection have been myriad. Moreover, the EU has traditionally adopted a comprehensive approach to the concept of fundamental rights, thus including not only classic civil and political rights, but also social rights.[58] Hence, in the European Union one finds that the genesis of the sources are multiple, the decision-making bodies entrusted with their enforcement are several, and that social, political and civil rights are all considered *fundamental*.

At the core of the source-multitude is the euro-national duality,[59] which in a narrow sense accounts for how fundamental rights are both progressively protected by the Union itself and

---

[56] Case 11/70, Internationale Handelsgesellschaft v Einfuhr-und Vorratsstelle für Getreide und Futtermittel, ECR [1970] Page 01125, para. 4.

[57] This could be compared to what Eskridge and Ferejohn, in a US federal setting, describe as a non-traditional way for thinking about constitutionalism, namely by understanding statutes as devices of "thin constitutionalism" which "have evolved from the early days of the republic to permit the protection of an extensive and flexible system of rights and liberties and other forms of security that exists outside of the traditional Constitutional frame." See Eskridge, WN and Ferejohn, JA 2010, *A Republic of Statutes: The New American Constitution*, Yale University Press, New Haven, p.1.

[58] Perhaps this is one of the reasons fundamental rights have been the term used within the EU rather than human rights. A choice that signals reaching beyond the core of human rights protecting bodily integrity and freedom of thought, to rights that promote minimum protection in the workplace and when creating a family.

[59] This notion of EU fundamental rights protection is, for example, to be found in the preamble of the Charter of Fundamental Rights of the European Union (CFREU): "The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values. […]
The Union contributes to the preservation and to the development of these common values while respecting the diversity of the culture and traditions of the people of Europe."

traditionally guaranteed by the Member States, now 28, in constitutions, ordinary legislation and common law.

Beyond this, the history of source-multiplicity within the EU framework could be reconstructed in summary in the following terms. In the late 1960s the CJEU identified "fundamental human rights" as being "enshrined in the general principle of Community law and protected by the Court."[60] In the 1970s the sources were interpreted as being derived from the "common constitutional traditions of the member states,"[61] the European Convention on Human Rights,[62] and provisions of the EU Treaties (such as the principle of non-discrimination based on nationality and the right to equal pay for equal work).[63]

Thus already at this stage the genesis of fundamental rights sources are varied; enacted by national constituencies, enacted by the Council of Europe, enacted by the EU, and guaranteed by both European and national judiciaries.[64] This, perhaps needless to say, creates formal overlaps. Which in the thinnest and most simplistic sense, means that within the EU the "same right" can be protected in various instruments with different origins.

Moving from this core of fundamental rights derived from primary law, national constitutional traditions and the ECtHR, the EU affirmed its own agency in the area of fundamental right in Europe in a series of important secondary law instruments. Prominently, in two waves in the 1970s and then the 1990s, the EU adopted secondary law in the social field designed to provide for minimum European work-rights protection.[65] Triggered by "the worker" as a key category of early European integration, social rights, both as primary and secondary law rights, are in the DNA of EU fundamental rights protection.

---

[60] Case 29-69, Erich Stauder v City of Ulm – Sozialamt, ECR [1969] 00419, para. 7.

[61] Case 11/70, Internationale Handelsgesellschaft v Einfuhr-und Vorratsstelle für Getreide und Futtermittel, ECR [1970] 01125.

[62] Case 4/73, Nold, Kohlen- und Baustoffgrobhandlung v European Commission, ECR [1974] 00491, p. 12 and 13 states that the ECHR "can supply guidelines which should be followed within the framework of community law."

[63] The European Coal and Steal Community Treaty already prohibited discrimination based on nationality of migrating coal and steel workers, this later developed into a general provision. Equal pay between men and women see article 119 of the now replaced EEC Treaty. See on article 119 EEC Case 43/75, *Defrenne II,* ECR [1976] I-455, paras. 26-27: "The Court has repeatedly stated that respect for fundamental personal human rights is one of the general principles of Community law, the observance of which it has a duty to ensure. There can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights."

[64] In addition to non-legally binding declarations on human rights by the three European institutions see further Craig, P 2010, *The Lisbon Treaty: Law, Politics, and Treaty Reform*. Oxford University Press, Oxford, p. 195.

[65] For instance, Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies, [1975] OJ L 48; Council Directive 77/187/EEC of 14 February 1977 relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, [1977] OJ L 61; Council Directive 93/104/EC of 23 November 1993, concerning certain aspects of the organisation of working time, [1993] OJ L 307; Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, [1996] OJ L 145.

Social rights however, is only one example of a fundamental rights subject matter guaranteed in secondary legislation within the EU. Other examples are secondary legislation in the area of voting rights,[66] criminal law (especially procedural rights relating to the European arrest warrant),[67] data protection,[68] immigration law[69] and family reunification.[70]

Only in 2009 did the EU, by its own motion, make a wide-ranging fundamental rights document legally binding, namely the Charter of Fundamental Rights of the European Union (the Charter). This document, faithfully following EU tradition, includes both civil and political, and social rights. The chapters of the Charter are entitled; Dignity, Freedoms, Equality, Solidarity, Citizen's Rights, Justice, and General provisions. Its preamble set the tone of multitude by stating that it reaffirms the content of a series of legal sources and in particular, that it guarantees a level not inferior to ECHR-standard.[71] Even though it formally consolidates the different components of fundamental rights protection, the Charter applies, by contrast to primary and secondary law, to the EU institution and to the Member States only when they implement EU law.[72]

My interest is in the way margins of discretion are used in cases, which the CJEU itself qualifies as its fundamental rights material, namely national constitutions, Council of Europe instruments, and primary and secondary EU law. It is important to note that the choice to use the CJEU's own conception of fundamental rights allows me to test the use of the margin of

[66] For instance, Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, [1994] OJ L 368.

[67] For instance, Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, [2013] OJ L 294.

[68] For instance, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, [1995] OJ L 281.

[69] For instance, Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, [2005] OJ L 326 and Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, [2008] OJ L 348.

[70] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [2004] OJ L 158.

[71] See article 53, and the preamble which reads in part: "This Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights."

[72] For example, and schematically on the right to equal treatment, article 23 of the Charter will have a vertical impact and bind the Member States when they implement EU law whereas article 157 TFEU has both vertical and horizontal direct effect. The Explanation to the Charter states that article 23 is based on article 157(1) TFEU.

discretion-technique only in the case law that concerns fundamental rights according to the EU's own understanding. This is a non-critical approach, which can never develop into a meaningful critique of the European Unions *understanding* of fundamental human rights. I will return to this point when explaining the method of case selection in chapter 4.

In sum, in chapters 5, 6, and 7 I will show how the type of EU-law conflict and the type of fundamental rights source involved in the conflict affects the shape of the margin of discretion and the interaction between the CJEU and the competent national authority on the national level. Therefore, when thinking about fundamental rights within the EU, multiplicity is an important starting point, yet, and which should not be underestimated, a characteristic that adds complexity.[73]

The Member States and the EU, when they interact and when they act within EU law, share a commitment to engage in the enforcement of this multitude of fundamental rights sources. Before outlining how national discretion is operationalized in this process, I will say something on how the stories about these sources and the actors handling them have been retold.

[73]See further Besson, S 2014, European Human Rights Pluralism, in Maduro, M, Tuori, K and Sankari, S (eds.), *Transnational Law: Rethinking European Law and Legal Thinking*, Cambridge University Press, Cambridge; New York.

3. Stories of Separation – *Improvement*, *Intrusion* and *Diversity* in Discourse on the CJEU's Fundamental Rights Adjudication

*

My interest is in the way in which the Court of Justice of the European Union uses the margin of discretion-technique to adjudicate fundamental rights. In chapters 5, 6 and 7, I will present three ways in which the CJEU has used the margin of discretion-technique to engage decision-making bodies on the national level in an essentially interconnected form of elaboration of the applicable standard of fundamental rights protection.

In this chapter, I will delineate what I believe to be the dominant narratives in the discourse on the CJEU's fundamental rights adjudication: the *narrative of improvement,* according to which the CJEU improves the standard of fundamental rights protection, the *narrative of intrusion,* describing the CJEU's undue intrusion into the Member States' systems for the protection of fundamental rights, and the *narrative of diversity,* which holds that the CJEU does and should defer to the different national constitutional systems of rights protection.

I will argue that none of these dominant narratives accurately capture the shared decision-making that the margin of discretion-technique represents because these narratives, in different ways, rely on a binary analytical structure that separates the EU from the national. In contrast, the use of the margin of discretion-technique by the CJEU that I identify blurs these boundaries.

The aim of the following reconstruction of dominant narratives is the illustration of their analytical reliance on the EU and the Member States as two separate spheres. This is therefore not a chapter about every story ever told about EU fundamental rights protection, but an attempt to sketch the stories that rely on binary reasoning and to highlight their limits.

Ultimately, this will serve as a contrast to my reading of the meaning and effects of the CJEU's use of the margin of discretion-technique in cases involving fundamental rights.

3.1 The Euro-National Binary

The binary, I argue, with the EU as one sphere and the Member State as the other, is a central organizing frame in important strands of EU fundamental rights discourse. Generally, in the thinnest sense, it accounts for how fundamental rights are both progressively protected by the Union itself and traditionally guaranteed by the Member States, and it relies importantly on the boundary between these two legal spaces.

This binary could be constructed hierarchically, typically with the EU placed above the national.[74] However the binary can also be invoked in the analysis without relative ranking and thus reject the idea of a strict hierarchical relationship. This two-component analytical structure, notwithstanding how the two components are understood to relate to each other (who is described as the most powerful, competent, important etcetera), is central in important strands of fundamental rights discourse. As will be shown, with this binary as a starting point there are stories that celebrate the increasing involvement of the EU in the protection of fundamental rights, and stories that critique it.

I will thus explore this national and *EUropean* binary in the specific area of EU fundamental rights discourse where the CJEU features centrally.[75] The ultimate aim is one of constructing a platform from which to sharpen and distinguish my claim that the margin of discretion-technique *blurs the boundaries* that fundamental rights have been perceived as creating between the different national settings and the EU legal order. Instead, I argue that the decision-making process enabled by margins of discretions produces an interconnected, and thus shared elaboration of the applicable standard of protection.

In sum, the idea is thus to enhance the understanding of this *non-binary condition* by contrasting it with academic perception and storytelling about the separability and

[74] When studied together with the minimum floor of protection provided for by the European Convention of Human Rights (ECHR), to which all EU member states (and perhaps one day the EU itself) are contracting parties, it has been referred to as European-styled multi-layered or multi-dimensional rights protection. See further, Fabbrini, F 2014, *Fundamental Rights in Europe: Challenges and Transformations of a Multilevel System in Comparative Perspective*, Oxford University Press, Oxford and Morton, V 2014, *European Union Human Rights Law*, Edward Edgar Publishing, Cheltenham.

[75] Glancing at historical literature on European integration Milward express this duality as "an assumption, which underlines most of the theoretical and scholarly writing about the European Community, the assumption that it is in antithesis to the nation-state." A claim that points towards the centrality of a, at times, dichotomist euro-national binary. Milward, A 1992, *The European Rescue of the Nation State*, Routledge, London, p. 2. For an exposé of the "rooted character of binary logic in contemporary legal thought," see: Glenn, HP 2014, Transnational Legal Thought, Plato, Europe and Beyond, in Maduro, M, Tuori, K and Sankari, S (eds.) *Transnational Law: Rethinking European Law and Legal Thinking*, Cambridge University Press, Cambridge; New York, p. 63.

distinctiveness of the national and the European in the sphere of EU fundamental rights protection.

So, to paraphrase Resnik, in the following I will critically consider the mode of analysis of EU fundamental rights law for which *distinctly national* and *distinctly European* are touchstones.[76] Of particular significance from the point of view of the effects this analysis has on EU fundamental rights adjudication discourse is the question of which lines of inquiry it prompts and perhaps more importantly, hinders.

I will show how this binary reoccurs, to different degrees, in three of the central narratives in EU fundamental rights discourse.

Firstly, the narrative of *improvement*: the story that describes how the EU, and in particular its Court, can have the potential to improve the protection of fundamental rights in the various Member States. Secondly, the EU law *intrusion narrative*: the perennial assertion of an intrusive CJEU whose fundamental rights jurisprudence unduly expands into the national milieu. Thirdly, the EU law *diversity narrative*: the (celebratory) story that there is, or alternatively should be, an emerging body of constitutional diversity jurisprudence that defers to national constitutional traditions.

My interest is thus primarily in how the role of the CJEU is understood in relation to the national legal sphere – as an improver, as an intruder or as a guarantor of diversity. The CJEU tends to be a prominent figure in stories about EU fundamental rights protection. Indeed, a classic position in EU law scholarship describes the CJEU as a single-minded engine of European integration, prone to judicial activism in the area of fundamental rights.[77] Hence,

---

[76] Resnik 2001, supra note 14 at 620.

[77]When deconstructed, this story rests on two factors. At the time it started to adjudicate fundamental rights the CJEU did not have a written bill of rights. This dissonance borne of a positivistic preoccupation created the story of judicial activism. See Weiler, JHH 1986, Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities, *Washington Law Review* 61, p. 1105: "Briefly stated, in the absence of a written bill of rights in the Treaty and an apparent freedom for the Community legislature to disregard individual rights in Community legislation, the European Court of Justice, in an exercise of bold judicial activism, and a reversal of earlier case law, created a judge-made higher law of fundamental human rights, culled from the constitutional traditions of the Member States and international agreements such as the European Convention on Human Rights (ECHR)." For a colourful version see Cappelletti, M 1989, *The Judicial Process in Comparative Perspective*, Clarendon Press, Oxford, on page 174: "those thirteen little men unknown to most of the 320 million community citizens, devoid of political power, charisma and popular legitimization" who claim "for themselves the … capacity to do what the framers did not even think of doing, and what the political branches of the Community do not even try to undertake."
For two contributions to edited collections on this theme with a critical and tentatively historical perspective on this phenomena, see Arnull, A 2013, Judicial Activism and the European Court of Justice: How Should Academics Respond?, in De Witte, B, Dawson, M and Muir, E (eds.), *Judicial Activism at the European Court of Justice,* Edward Elgar Publishing, Cheltenham. Discussing and problematizing the notion of judicial activism in the area of citizenship see Dougan, M 2012, Judicial Activism or Constitutional Interaction? Policymaking by the ECJ in the Field of Union Citizenship*,* in Micklitz, H-W and De Witte, B (eds.), *The European Court of*

the CJEU is a strong presence in any investigation of dominant narratives in EU fundamental rights discourse.[78]

As regards the narratives of improvement, intrusion and diversity, taken together they rely on a vision where fundamental rights protection is either pertinent to the EU or pertinent to the national, albeit differently. This is so since these narratives presuppose, *inter alia*, that the European fundamental right *locus* can intrude into the national sphere, that improvement of that sphere is possible through EU involvement or that separation of the national and European is possible (and perhaps desirable). These are narratives with a two-separate-components structure and this is the aspect I would like to zoom in on.

The binary starting point implicit in these narratives triggers questions about how the two distinct entities relate to each other. Can one better the other?[79] Is one dominating the other?[80] Are they in conflict or cooperation?[81] Is there a tension?[82]

Justice and the Autonomy of the Member States, Intersentia, Cambrdige. See also Tridimas, T 1996, The Court of Justice and Judicial Activism, *European Law Review*. 21 (3). p. 199; Horsley, T 2013, Reflections on the Role of the Court of Justice as the "Motor" of European Integration: Legal Limits to Judicial Law-Making, *Common Market Law Review* 50 (4), pp. 931-964, who frames the debate as whether the CJEU properly or improperly oversteps its limits.

[78] For instance, the CJEU activity during these early days of adjudication of cases involving fundamental rights has been described as *fortunate*, *excessively interventionist or creative* (1), its actions qualify it as *the guardian of EU fundamental rights* (2*)* or as *a nation-builder* (3), perhaps soberly as an *adventurous enterprise* that is *not necessarily a good thing* (4) and in a classic and seemingly never out-dated critique as *not taking human rights seriously* but instead using them *as no more than a vehicle…to extend the scope and impact of European law* (5). See in this order: (1) Tizzano, A 2008, The Role of the ECJ in the Protection of Fundamental Rights, in Arnull, A, Eeckhout, P and Tridimas, T (eds.), *Continuity and Change in EU law: Essays in Honour of Sir Francis Jacobs*, Oxford University Press, Oxford, p. 138 where the author is characterising the evaluation of his opponents and his own opinion, the author himself describes the CJEU's fundamental rights adjudication as fortunate; (2) Muir, E 2013, The Court of Justice: A Fundmantal Rights Institution Among Others, in De Witte, B, Dawson, M and Muir, E (eds.), *Judicial Activism at the European Court of Justice*, Edward Elgar Publishing, Cheltenham, p. 100; (3) Tridimas, T 2010, Primacy, Fundamental Rights and the Search for Legitimacy, in Maduro, M and Azoulai, L (eds.), *The Past and Future of EU law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Hart Publishing, Oxford, p. 103; (4) Mancini, GF 1989, The Making of a Constitution for Europe, *Common Market Law Review* 26 (4), p. 612; (5) Coppel, J and O'Neill, supra note 30 at 692.

[79] For inquiry along these lines see for instance, Lenaerts, K and De Smijter, E 2001, A "Bill of Rights" for the European Union, *Common Market Law Review* 38 (2), pp. 273-300; Cichowski, RA 2004, Women's Rights, the European Court, and Supranational Constitutionalism, *Law & Society Review* 38 (3), pp. 489-512; Pernice, I, Griller, S and Ziller, J 2008, The Treaty of Lisbon and Fundamental Rights, in Griller, S and Ziller, J (eds.), *The Lisbon Treaty, EU Constitutionalism Without a Constitutional Treaty,* Springer, New York, pp. 235-256.

[80] For inquiry along these lines see for instance, Dubout, E 2014, The Protection of Fundamental Rights and the Allocation of Competences in the EU: A Clash of Constitutional Logics, in Azoulai, L (ed.), *The Question of Competence in the European Union*, Oxford University Press, Oxford; de Vries, S, Bernitz, U and Weatherill, S 2013, Introduction, in de Vries, S, Bernitz, U and Weatherill, S (eds.), *The Protection of Fundamental Rights in the EU After Lisbon*, Hart Publishing, Oxford; Portland, p. 4; with a Member State specific analysis see Grabenwarter, C 2010, National Constitutional Law Relating to the European Union, in von Bogdandy, A and Bast, J (eds.), *Principles of European Constitutional Law*, 2nd ed., Hart Publishing, Oxford; Portland, p. 84 ff; Aziz, M 2004, *The Impact of European Rights on National Legal Cultures*, Hart Publishing, Oxford; Portland.

[81] For inquiry along these lines see, Alter, K 1998, Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration, in Slaughter, AM, Stone Sweet, A and Weiler, JHH (eds.), *The European Court and National Courts- Doctrine and Jurisprudence: Legal Change in its Social Context*, Hart Publishing, Oxford; Torres Pérez, A 2012, *The Dual System of Rights Protection in the*

All these questions, while sometimes aiming at investigating closer interaction, rarely depart from the two-component structure. Indeed, the binary construction relies on the identity and origin of *actors* and *sources*. It follows along the lines of what Resnik observes on the other side of the Atlantic: "many discussions of federations presume a singularity of entities and rights, and that the power over a given domain or kind of right belongs either to subunits or to the federal government; a few arenas are defined as concurrent; and the jurisdictional entities are posited to be unilateral actors. To borrow from critical theory, this approach relies on *essentializing* rights, roles, and jurisdictional allocations."[83]

The genesis of ***the actors***, as either national or European, is unchallengeable – the German constitutional court comes from Germany and the Court of Justice of the European Union is a European creation and so on. It is rather the explanations of their interactions, the ideas about their roles that set the stage for the construction of dominant narratives, such as the ones of *intrusion, improvement* and *diversity*. For instance, an instantiation would follow something like the following form: How is the Court of Justice of European Union acting and how is the Italian constitutional court responding to its actions?[84]

More challenging then is the way in which the distinctiveness and separability of European and national ***sources*** are central analytical assertions in the construction of these narratives. Take for instance the idea of the national constitution as an outflow of truly national values, or the debate about whether the EU should promote a maximalist or minimalist standard of protection.[85] Such ideas and debates represent a view of fundamental rights sources involved and referred to in the EU project as categorizable along euro-national lines.

European Union, in Cloots, E, De Baere, G and Sottiaux, S (eds.), *Federalism in the European Union*, Hart Publishing, Oxford; Portland; Mayer, F 2010, Multilevel Constitutional Jurisdiction, in von Bogdandy, A and Bast, J (eds.), *Principles of European constitutional law*, 2nd ed., Hart Publishing, Oxford; Portland, p. 400; with a Central and Eastern European perspective see Albi, A 2007, Supremacy of EC Law in the New Member States, *European Constitutional Law Review* 3 (1), pp. 25-67.

[82] For inquiry along these lines see, Spaventa, E 2009, Federalisation Versus Centralisation: Tensions in Fundamental Rights Discourse in the EU, in Dougan, M and Currie, S (eds.), *50 Years of the European Treaties: Looking Back and Thinking Forward*, Hart Publishing Oxford; Portland; arguing that fundamental rights operates both as reducers and vectors of the autonomy of the Member States. see Azoulai, L 2012, The Case of Fundamental Rights: a State of Ambivalence, in Micklitz, H-W and De Witte, B (eds.), *The European Court of Justice and the Autonomy of the Member States*, Intersentia, Cambridge; in relation to the Charter see Eeckhout, P 2002, The EU Charter of Fundamental Rights and the Federal Question, *Common Market Law Review* 39 (5), pp. 945-994.

[83] Resnik 2014, supra note 3 at 366.

[84] See for instance, Cartabia, M 1995, *Principi inviolabili e integrazione europea*, Giuffrè, Milano, pp. 97-102, Donnarumma, MA 2010, Il processo di "costituzionalizzazione" dell'Unione Europea e la tensione dialettica tra la giurisprudenza della corte di giustizia e le giurisprudenze delle corti costituzionali, *Rivista Italiana di Diritto Pubblico Comunitario*, fasc.2, p. 407.

[85] In essence, the idea that the CJEU should choose the highest standard of fundamental rights protection offered by either the national or the European level, see Besselink, LFM 1998, Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union, *Common Market Law Review* 35(3), p.

These binary-based questions and observations, notwithstanding their merit and importance, tend to lead away from investigations that seek to establish more complex patterns of interconnected existence and decision-making between the national and European.[86] The logic of this type of analysis is thus that within the EU's fundamental rights protection the national/European binary is ***a categorization that exists both ex ante and ex post a European fundamental rights conflict***.

Therefore, the binary starting point for the analysis of a particular problem tends to turn into a conclusion based on the binary. Is the EU dominating the Member States in the area of fundamental rights protection? Yes. Is there a conflict between the EU and the national concerning the level of protection? Yes. And so on. The investigation has been carried out, but the binary remains the same.

In contrast, I will later argue that *even if* the European and the national exists *ex ante,* my concern is the manner in which the distinctiveness of ***the national and the European identity of the standard of protection in numerous cases involving fundamental rights is considerably blurred ex post the process of adjudication***. This is the point that most distinctively separates the actual operation of the margin of discretion technique in cases involving fundamental rights from the legal perception expressed in the narratives of intrusion, improvement and diversity. Thus, an evolution where a binary *before* becomes a non-binary *after*...

Yet, the relationship between the binary, the narratives of *improvement*, *intrusion,* and *diversity,* and the interconnected decision-making which the margin of discretion-technique

---

671. This agenda has however received thorough critique and must nowadays be described as a minority position. This is especially so since the weakness of the maximalist approach can be summarized as follows: how can it be determined what the highest (maximal) level of protection is? Classic examples of high/low protection as a problematic paradigm are the right to abortion and clash of rights-situation, for instance between freedom of speech and freedom of religion. See further; Olsen, F 1984, Statutory Rape: A Feminist Critique of Rights Analysis, *Texas Law Review* 63, pp. 387-432; on the high-low conundrum see Weiler, JHH 1999, Fundamental rights and fundamental boundaries: on the conflict of standards and values in the protection of Human Rights in the European Legal Space, in Weiler, JHH (ed.), *The Constitution of Europe: "do the clothes have an emperor?" and Other Essays on European Integration*, Cambridge University Press, Cambridge.

[86] Not to say that such has never been made, see for instance: Payandeh, M 2011, Constitutional Review of EU Law after Honeywell: Contextualizing the Relationship Between the German Constitutional Court and the EU Court of Justice, *Common Market Law Review* 48 (1), pp. 9-38; On the difference between 'outcome', 'guidance', and 'deference' cases see Tridimas, T 2011, Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction, *International Journal of Constitutional Law* 9 (3–4), p. 737; Komárek, J 2014, National Constitutional Courts in the European Constitutional Democracy, *International Journal of Constitutional Law* 12 (3), pp. 525-544, stating that his argument offers something "that should be welcomed by orthodox EU lawyers as much as national constitutionalists." More generally, on inquires that centre on "various forms of 'paraconsistent,' 'inconsistency tolerant' or 'dialectic logic." See Glenn 2014, supra note 75 at 67. Further, Jackson describes the classic constitutional conflict of constitutional authority treasured by intrusion narrators as sign of "engagement." Jackson 2010, supra note 15 at 93.

produces is not to be reduced to claims of what is right and wrong – a truly correct or truly incorrect description of the nature of EU fundamental rights protection.

Hence, it is important to note how these doctrinal narratives could, for instance, be triggered by the interpretation of certain cases handed down by the CJEU,[87] by pieces of legislation or treaty provisions that are considered to have a certain meaning and potential[88] or by normative arguments.[89]

Consequently, I do not seek to argue that the binary and the narratives of intrusion, improvement and diversity have no merit, logic or empirical traction. I argue that these narratives do not adequately capture the interconnected nature of important strands of the fundamental rights adjudication enabled by the operationalization of national discretion through the margin of discretion technique. In other words, that these narratives do not account for the way in which important strands of the CJEU's fundamental rights adjudication erases the solidity of the binary analysis.

There is an important point to be made about how deconstructing narratives and constructing new ones is not simply about establishing a right and wrong dichotomy.[90] Instead it is about investigating what lines of inquiry certain narratives produce, and which they frustrate. In doing this, the significance of alternative ways of reading the CJEU's fundamental rights jurisprudence can exist in relation to other stories.

Thus, this reconstruction is a first step towards an elaboration of the *disparity* between, on the one hand, the binary rationales of the narratives, and on the other hand, the legal realities of the use of national margins of discretion to adjudicate fundamental rights. This disparity then provides the basis for a structured critique of the dominance of these narratives, which in turn opens up *space* for different readings of the EU's fundamental rights material.

With this critical agenda in mind I will reconstruct the three dominant narratives in the discourse of the CJEU's fundamental rights adjudication; the narrative of improvement, intrusion, and diversity.

---

[87] For instance, the importance of *Laval* for certain version of the narrative of intrusion.
[88] For instance, the importance of article 4.2 TEU for certain strands of the narrative of diversity.
[89] For instance, the position that the horrors of WW2 should never happen again which is frequently elaborated within certain strands of the narrative of improvement.
[90] For a classic work on, *inter alia*, the relationship between dominant narratives and alternative narratives see Lyotard, J-F 1984, *The Postmodern Condition: A Report on Knowledge*, Manchester University Press, Manchester, where Lyotard writes about the way in which postmodernism represented the end to "grand narratives of legitimation." By which he meant the generalizability of certain ideas and values, uncritical trust of certain truths.

3.2 The Narrative of Improvement

The narrative of improvement has been around for the entirety of the EU's human rights protecting career. It celebrates the EU's activity in the area of fundamental rights and considers it to represent progress. It is an account of the benefits of European integration, and more broadly, a narrative of appreciation of the transnational and supranational elements in contemporary legal systems.

The EU, in this account, has the potential to raise the quality of the fundamental rights' protection compared to that the Member State can, or is willing to offer, either in general terms or as exemplified in relation to a specific issue such as workplace discrimination.[91]

The narrative of improvement is a searchlight. It identifies and reacts to what it holds to be insufficiencies and violation within the Member State's legal order, or at the very least, a situation where "the 'costs of non-Europe' would have been higher in many countries (…) than the 'costs of Europe.'"[92]

In concrete then, the EU fundamental rights sources and the CJEU add a separate dimension to the fundamental rights architecture of the Member State. Specifically, the narrative of improvement understands the CJEU's power to interpret EU law and strike down non-complying national provisions as offering the possibility of constructive reformation of the national system. The improvement narrative embraces the hierarchical relationship between the EU and the Member States.

To broaden the perspective, the narrative of improvement builds on the idea that more supranational fundamental rights protection, not less, enhances the solidity of the individual's protections and promotes European development.

This assumption about the need for more supranational European rights protection could be traced to what Arendt once qualified as the roots of 20th century European totalitarianism: "the constitutional inability of European nation-states to guarantee human rights to those who had lost nationally guaranteed rights, made it possible for the persecuting governments to

[91] For a general example see: Bryde, BO 2010, The ECJ's Fundamental Rights Jurisprudence - a Milestone In Transnational Constitutionalism, in Maduro, M and Azoulai, L (eds.), *The Past and Future of EU law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Hart Publishing, Oxford; Portland, p. 119:"With this jurisprudence the Court developed a system of human rights protection that could (and should) become an example for other international systems of government."

[92] Kilpatrick, C 2002, Emancipation Through Law or the Emasculation of Law: The Nation-State, the EU, and Gender Equality at Work, in Conaghan, J, Fischl, RM and Klare, K (eds.), *Labour Law in an Era of Globalization,* Oxford University Press, Oxford, p.493.

impose their standard of values even upon their opponents."[93] Therefore, Arendt underlines how "millions of people lived outside normal legal protection and needed an additional guarantee of their elementary rights from an outside body."[94]

The experience of the insufficiency of the nation state in protecting fundamental rights under the Nazi and fascist era informed the *raison d'être* of European cooperation in a broad sense. Arendt's call for an *outside body* was taken seriously, as it were.

The appeal of the improvement narrative lies, I believe, in the fact that it connects to the origins of post World War Two European cooperation and emphasises its humanistic potential, namely destabilising nationalism by constructing national cooperation, and as a consequence making sure that fascism and Nazism will not reappear as powerful and violent systems of government.[95]

In fact, the rise of European nationalist and xenophobic parties during the 2000s might revitalize these "classic" ideas of how European cooperation relates to the momentum of such political parties and their visions of government.[96] Especially since the improvement narrative tends to draw extensively on EU anti-discrimination law, thus pushing back on nationalistic and xenophobic ideals of differentiation between people. In contrast however, an important strand of European fundamental rights commentary is busy asserting the uniquely national in the constitutional, which must be considered an analytical move in the opposite direction.[97] This constitutes a tension that will be explored further below.

De Búrca has shown that the idea of including human rights in the architecture of cooperation was already present in pre-Coal and Steel Community deliberations, but was finally rejected.[98] Instead, the issue of the protection of fundamental rights emerged with the CJEU's case law, mostly concerning right to property in Germany of the late 1960s and early 1970s.

This line of case law was characterised by several commentators as being in sync with the EU's anti-totalitarian and peacekeeping function. Take for instance Cappelletti's argumentation in favour of the Court of Justice's work towards the creation of a "*law of*

[93] Arendt, H 1958, *The Origins of Totalitarianism*, Meridian Books, New York, p. 269.
[94] Ibidem at 275.
[95] See further: de Búrca, G 2013, Europe's Raison D'être, NYU Public Law & Legal Theory Research Paper Series, WP NO. 13-19.
[96] For a diverging opinion see, Weiler, JHH 2011, 60 Years Since the First European Community: Reflections on Messianism, *European Journal of International Law* 22 (2), p. 303.
[97] Particularly the work that is being done on the concept of "national constitutional identity," which will be discussed in the section on the narrative of diversity.
[98] de Búrca, G 2011, The Road Not Taken: The European Union as a Global Human Rights Actor, *American Journal of international law* 105 (4), pp. 649-693.

Europe" in the area of human rights: "by universalizing fundamental values, peoples will grow closer, the risks of conflicts and wars will diminish, and new enriching syntheses will emerge from divergent customs, cultures, races, and traditions."[99]

De Búrca soberly frames similar accounts, which I would refer to as early improvement narratives, as: "The European Court of Justice (ECJ) is placed at the center of this narrative, as a heroic and solitary actor that, through its pioneering case law, has encouraged and cajoled the main political actors into accepting human rights as a key element of the EU constitutional framework."[100] The improvement narrators thus believe that *the EU and its Court* should construct its function in fundamental rights terms, just like the ECtHR and its Convention, the UN, the national constitutions and constitutional courts and so forth.[101]

This idea of improvement, despite the fact that it has been rejected in large part by the intrusion and diversity narrative, has never been completely eradicated.[102]

For the purpose of presenting the improvement narrative I will give two examples of strands of scholarship where its presence is very strong. They also illustrate two different, albeit closely related, generations of improvement narratives.

Firstly, the legislative and case law-driven advancement of equal treatment between men and women and the celebratory description of this as an important development of EU fundamental rights protection.

Secondly, and connected to EU anti-discrimination law, the idea that the EU provides a forum for transnational cause-lawyering and strategic litigation with the capacity to improve the standard of rights protection in the Member States.

---

[99] Cappelletti, M 1979, The "Mighty Problem" of Judicial Review and the Contribution of Comparative Analysis, The *Southern California Law Review,* 53, p. 440. Cappelletti is however not necessarily celebrative of all the early decisions in the field.

[100] de Búrca 2011, supra note 98 at 652. For the sake of clarity I will give one example of how a first hand account can be framed: "Thus the focus in the human rights studies is not so much on fundamental rights as such, but on how their protection though central devices can not only help, in many cases, guarantee a better standard of protection but also lead to an increased cohesion of the "union."" To be found in Cappelletti, M, Seccombe, M and Weiler, JHH 1986, General Introduction, in Cappelletti, M, Seccombe, M and Weiler, JHH (eds.), *Integration Through Law: Europe and the American Federal Experience*. Vol. 1. Walter de Gruyter, Berlin, p. 233.

[101] Around the first years of the millennium fundamental rights was studied in the capacity of a potential next epicentre of European integration See, for example, Lenaerts, K 2000, Fundamental Rights in the European Union, *European Law Review* 25 (6), pp. 575-600; Beaumont, P 2002, Human Rights: Some Recent Developments and Their Impact on Convergence and Divergence of Law in Europe, in Beaumont, P, Lyons C and Walker, N (eds.), *Convergence and Divergence in European Public Law*, Hart Publishing, Oxford, p. 151; Alston, P and de Schutter O 2005, Introduction: Addressing the Challenges Confronting the EU Fundamental Rights Agency, in Alston, P and de Schutter, O (eds.), *Monitoring Fundamental Rights in the EU, The Contribution of the Fundamental Rights Agency*, Hart Publishing, Oxford, p. 1; Besson, S 2006, The European Union and Human Rights: Towards A Post-National Human Rights Institution? *Human Rights Law Review* 6 (2), pp. 323-360.

[102] Apart from the two examples that will be discussed, some of the commentary on the enactment of the Lisbon Treaty pointed in this direction, see for instance Pernice, Griller and Ziller 2008, supra note 79.

3.2.1 The Example of Equal Treatment

The core of this version of the improvement narrative is that European law and the CJEU has helped to promote the right to equal treatment between men and women.[103] The EU itself is the source-maker and not an organisation that internalizes the protection standards of its Member States.

It is a powerful story fuelled by pieces of secondary legislation deemed successful at achieving their aims,[104] and landmark cases by the CJEU that pushed national actors coming before the courts, mostly employers, to better their treatment of women. This is especially emphasised in relation to the stopping of work-place discrimination such as differences in pay between men and women for carrying out the same work.

Thus, this is a straightforward story about the supranational promotion of a right by both the legislature and the court.[105]

In particular, the concept of discrimination was gradually refined to encompass both direct and indirect discrimination. This represented a conceptual novelty for several Member States and was thus a clear sign of the EU adding a new and (possibly) progressive dimension to the national rights-protection regime.[106]

In particular the 1976 case *Defrenne II* was a pivotal catalyst for this narrative; a case about an airhostess winning against her employer by successfully arguing that it discriminated

---

[103] Burrows, N 1980, The Promotion of Women's Rights by the European Economic Community, *Common Market Law Review* 17 (2), pp. 191-209; Mazey, S 1998, The European Union and Women's Rights: From the Europeanization of National Agendas to the Nationalization of a European agenda?, *Journal of European Public Policy* 5 (1), pp. 131-152; Heide, I 1999, Supranational Action Against Sex Discrimination: Equal Pay and Equal Treatment in the European Union, *International Labour Review* 138 (4), pp. 381-410; Anagnostou, D and Millns, S 2013, Gender Equality, Legal Mobilization, and Feminism in a Multilevel European System, *Canadian Journal of Law and Society/Revue Canadienne Droit et Société* 28 (2), pp. 115-131.

[104] Three sources stand out: Article 119 on equal pay in the EEC Treaty, Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, and Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

[105] One reason, albeit not the only one, for the legislative and case law driven momentum was of the logic that the common market was used to restructure the workplace power balance between men and women. See *Defrenne II*, para 8. "The aim of Article 119 is to avoid a situation in which undertakings established in States which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-Community competition as compared with undertakings established in States which have not yet eliminated discrimination against women workers as regards pay." See further, More, G 1999, The principle of equal treatment: From market unifier to fundamental right?, in Craig, P and de Búrca, G (eds.), *The Evolution of EU Law*, Oxford University Press, Oxford, pp. 517–553.
Furthermore, discrimination on grounds of nationality has historically been the main tool of market integration, a trajectory that also assisted in paving the way for launching the principle of equal treatment between men and women. See; Prechal, S 2004, Equality of Treatment, Non-Discrimination and Social Policy: Achievements in Three Themes, *Common Market Law Review* 41 (2), p. 548.

[106] Prechal 2004, supra note 105 at 535.

against women employees by giving "cabin stewards' higher pay for the same work.[107] In *Defrenne II* the Court relates the principle of equal treatment between men and women to the community objective of "ensuring social progress."[108]

Thus, it is a case that is emblematic of the equal treatment story. It simultaneously pushes a quintessentially European right forward and relates it to a broader notion of social progress.

The momentum of this success story peaked somewhere around the mid 1990s. The retelling of the story about EU and gender equality became more affected by nuanced and contextual framings.[109] It was also critiqued outright using feminist scholarship[110] and by commentators who detected neoliberal biases.[111]

There is in other words, a clear move towards questioning the success story and nuancing the effects of the CJEU's activity in this area. A sign of fragility perhaps of any straightforward claim that the EU improves national rights protection, it does not take many counter-indicative CJEU cases or critical framings to arrive at more pessimistic conclusions. However the EU changed shape as well. After the Maastricht Treaty's expansion of the reach of the EU, well beyond the common market, improvement narratives perhaps needed more fuel than "simply" gender equality in employment and occupation. In other words, the statement: "the EU improves" has to be made in the context of, and is highly dependent on what the EU project *de facto* covers.

Yet many have interpreted this moment as an enduring, and most likely an evolving achievement of EU fundamental rights protection.[112] This helped pave the way for the version of the improvement narrative described below, one more focused on method but still closely linked to the success story of equal treatment between men and women.

3.2.2 The Method of Strategic Litigation

The strategic litigation wave of the improvement narrative belongs to the new millennium.[113] It belongs to a post-Maastricht Europe with both citizens and third country-nationals

[107] Case 43/75, *Defrenne II,* ECR [1976] Page I-455, para 10.
[108] *Defrenne II*, para 10.
[109] Kilpatrick 2002, supra note 92. and de Búrca, G 2012, The Trajectories of European and American Antidiscrimination Law, *American Journal of Comparative Law* 60 (1), pp. 1-22.
[110] Especially the way in which equality was conceived and reproduced by the court, see: Fredman, S 1992, European Community Discrimination Law: A Critique, *Industrial Law Journal,* 21 (2), pp. 119-134 and see further MacKinnon, CA 1991, Reflections on Sex Equality Under Law, *Yale Law Journal*, pp. 1281-1328.
[111] Somek, A 2011, *Engineering Equality: An Essay on European Anti-Discrimination law*, Oxford University Press, Oxford.
[112] Prechal 2004, supra note 105; Cichowski 2004, supra note 79; Anagnostou and Millns 2013, supra note 103.
[113] Despite there being a sense of novelty within the field, the idea of raising awareness in Europe on the potential of strategic litigation strategies and public interest law is traceable to earlier generations of European

populating the territory, and to a post-Lisbon Europe with its own Charter of Fundamental Rights.

It is a story about cause lawyering and how the two European courts (I will focus on the CJEU in this section) can act as catalysts of social change by improving the standard of protection in the different Member States.[114] This is especially the case where they act as a tool for eliminating discrimination based on race, ethnicity, religious belief, sex, disability, age or sexual orientation in the different Member States.[115] In other words, transnational public interest law (rather than lawyering concerned merely with one of the parties to the case) that addresses the failures of the state to uphold fundamental rights, remedying a specific instance of discrimination or some other fundamental rights violation.[116]

This scholarship looks at the CJEU and the EU fundamental rights sources and describes how these are being used, or how they could be used to advance the interests of specific groups that are being mistreated in some way in the Member State where they reside, work, travel and so forth.[117] For instance, litigation to advance LGBT-rights[118] and litigation to combat discrimination of people with Roma origin[119] has received extensive scholarly attention.

---

scholarship on access to justice. See Cappelletti, M and Garth, BG 1978, *Access to Justice: The Worldwide Movement to Make Rights Effective: A General Report*, AW Sijthoff, Leiden. Yet the ultimate source of inspiration is arguably US legal thinking on public interest law. See Cummings, SL and Trubek LG 2008, Globalizing Public Interest Law, *UCLA Journal of International Law & Foreign Affairs* 13, pp. 1-53.

[114] Scott, J and Sturm, S 2006, Courts as Catalysts: Re-Thinking the Judicial Role in New Governance, *Columbia Journal of European Law* 13, pp. 565-594.

[115] Hilson, C 2002, New Social Movements: The Role of Legal Opportunity, *Journal of European Public Policy* 9 (2), pp. 238-255; de Waele, H and van der Vleuten, A 2010, Judicial Activism in the European Court of Justice-The Case of LGBT Rights, *Michigan State University College of Law Journal of International Law* 19, pp. 639 -652.

[116] Jacquot, S and Vitale, T 2014, Law as a Weapon of the weak? A Comparative Analysis of Legal Mobilization by Roma and Women's Groups at the European Level, *Journal of European Public Policy,* 21 (4), pp. 587-604.

[117] See for instance the following commentary on the Race Directive: Toggenburg, GN 2005, Who is Managing Ethnic and Cultural Diversity in the European Condominium? The Moments of Entry, Integration and Preservation, *JCMS: Journal of Common Market Studies* 43 (4) p. 729: "the Race Directive (…) is innovative and quite radical in a number of respects which may lead it to become the most efficient minority protection tool in the EU for the years to come." And Busstra, MJ 2011,*The Implications of the Racial Equality Directive for Minority Protection Within the European Union*, Eleven International Publishing, The Hague, p. 3: "potentially enhance the level of minority protection."

[118] Weiss, A 2007, Federalism and the Gay Family: Free Movement of Same-Sex Couples in the United States and the European Union, *Columbia Journal of law and Social Problems,* 81, pp. 81 -122; de Waele and van der Vleuten 2010, supra note 115, Helfer, LR and Voeten, E 2014, International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe, *International Organization* 68 (1), pp. 77-110.

[119] Goodwin, M 2006, DH and Others v. Czech Republic: A Major Set-Back for the Development of Non-Discrimination Norms in Europe, *German Law Journal,* 7 (4), pp. 421-432; Goldston, JA 2010, The Struggle for Roma Rights: Arguments That Have Worked, *Human Rights Quarterly* 32 (2), pp. 311-325; Dawson, M and Muir, E 2011, Individual, Institutional and Collective Vigilance in Protecting Fundamental Rights in the EU: Lessons from the Roma, *Common Market Law Review* 48 (3), pp. 751-755.

This version of the improvement narrative is essentially transnational, connecting different people of different states around a common cause, and supranational in its use of institutions. In this story the EU's legal sphere is placed above the national legal sphere, with the capacity to change it and possibly improve it, thus relying on a hierarchical relationship between the national and European.

Ultimately, this emerging trend of building on the improvement narrative by thinking about the possibilities of cause lawyering and strategic litigation is arguably part of a broader tendency to think about the creation of social justice and progress without necessarily thinking about the state, in particular the welfare state.[120]

This legal development could thus be understood as linked, albeit not causally, to the decline of the redistributive European welfare state model, which in turn opens up spaces for other forms of social justice projects. In sum, methods for achieving social change that are less dependent on the legislator and the welfare state and more reliant on civil society and courts.

Fraser has written about the move from a politics of redistribution to a politics of recognition. How "the 'struggle for recognition' is fast becoming the paradigmatic form of political conflict in the late twentieth century. Demands for 'recognition of difference' fuel struggles of groups mobilized under the banners of nationality, ethnicity, 'race', gender, and sexuality."[121]

In this way Fraser deepens the understanding of a broader move towards more identity-based and court-centred notions of achieving justice by filling the gap left by, or maybe at the expense of,[122] a politics of redistribution typically administered by the welfare state. Following her inquiry helps us think critically about the turn to lawyering, rather than voting, for social change.[123]

Still, read as a part of a broader societal trend, the interest in cause lawyering and public interest law can also be understood as being prompted by virtue of necessity. In the improvement narrators' own words, *the outside body* is the best hope for improvement when Member States fail to maintain an adequate standard of protection.

---

[120] Hemerijck, A 2012, *Changing Welfare States*, Oxford University Press, Oxford.
[121] Fraser, N 1995, From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age, *New Left Review* 212, p. 68.
[122] Fudge, J 2015, Constitutionalizing Labour Rights in Canada and Europe: Freedom of Association, Collective Bargaining, and Strikes, *Current Legal Problems*, first published online June 23, 2015.
[123] For critical reflections on the strategic litigation apparatus by academics sympathetic to the cause in question see: Stoodard, TB 1997, Bleeding Heart: Reflections on Using the Law to Make Social Change, *NYU Law Review,* 72 (5), pp. 967-983 and Spade, D 2011, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law,* South End Press, Brooklyn New York.

3.3 The Narrative of Intrusion

The narrative of intrusion tells the story of how the EU's fundamental rights protection apparatus, and particularly the CJEU's adjudication, intrude into the national milieu. The central theme is that the EU's production of fundamental rights protection deliberately places it in a national situation where it is unwelcome or uninvited, and a worst-case scenario, where it poses a direct threat to the proper functioning of the national system. Unwarranted, unwanted, harmful, risky and so forth are thus the leitmotivs that mark the moral of this story.

The binary starting point is at the epicentre of this account since *the act of intrusion* presupposes two separate spheres of control over the formulation and interpretation of fundamental rights; one that belongs to the European Union and one that is national. The idea of a Union that intrudes into the national – one into the other – is made possible by keeping the two entities analytically separable and distinct. This distinctiveness evolves into an inquiry along the lines of *what will happen if the EU and its Court intrude?*

In this story told by legal scholars, as has been hinted above, the CJEU tends to be the engineer of intrusion. The Court is an institution with absolute interpretative authority – a protagonist that decides its own fate. Thus the narrative of intrusion, even though it can be preoccupied with the quality of EU fundamental rights' legislative sources, is largely focused on the Court and its adjudication.

Yet it is worth pointing out that some versions of the narrative of intrusion could be constructed around the CJEU's unwillingness to act. For instance, when it refuses to constrain or even review acts on fundamental rights grounds enacted by European Union institutions, which can be described as intruding into national systems of rights protection.[124]

The core theme of the storytelling could be the *motives* behind the intrusion as well as its *risks*. When critical attention is directed towards the *motives* behind the EU's expansiveness, the questions are, for instance: is the EU, and particularly the CJEU, really interested in the protection of fundamental rights? Or is it merely (and *disingenuously)* interested in pursuing other aims such as market integration and the efficacy of EU law?

[124] The recent post-financial crisis expansion of EU involvement in policy areas such as fiscal discipline and national budgetary design, and the CJEU's seeming unwillingness to constrain or even review these measures on fundamental rights grounds might give new life to an other version of the narrative of intrusion, with different features, most prominently the question of the application of the Charter. However, categorising this emerging literature as an example of the narrative of intrusion is premature.

When the narrative of intrusion is instead centred on the *risks* that intrusion poses, the inquiry is along the lines of: what will happen when the national no longer has the last word on fundamental rights issues triggered by European cooperation? The narrator can thus advance a normative posture by means of an EU legal framework that allows the CJEU to expand into areas of fundamental rights protection traditionally conceived as national, by adjudication measures that fall within the scope of EU law, hypothetically lowering or eliminating national standards.

The narrative of intrusion, when deconstructed, poses a destabilizing critical challenge to *European integration*. Which in the thinnest sense represent the idea of "a whole spectrum of activity ranging from mere cooperation to ultimate complete unification."[125]

This is not to say that it undermines the existence of integration. The point is rather that it disturbs the assumption of progress and development upon which integration is so often constructed, both outside and inside legal scholarship.

Another way of putting the same point is that the intrusion narrative might be said to cohere with a more traditional and limited vision of the EU's *raison d'être* – to bring peace and prosperity by means of *economic cooperation*.[126]

Fundamental rights then, in the intrusion narrative, fit badly, or at least the compatibility is too opaque, in relation to European economic integration. The intrusion narrative adheres to a vision where the EU and its *modus operandi* are separable from the protection of fundamental rights, a function that is and should be national, and *ultima ratio,* a task of the ECtHR. The contrast with the narrative of improvement is sharp.

With this in mind I will try to decode some of the specifics of the narrative of intrusion by giving two examples of its possible forms.

The first of these is the classic version of the intrusion narrative that focuses on the risk of letting the CJEU be the final arbiter on the constitutionality of legislation within the scope of EU law.

Second, and related to the above-noted preoccupation, I will focus on the version of intrusion that centres on the EU and CJEU intruding into national social protection as expressed in, or constructed as, social rights.

---

[125] Cappelletti, Seccombe and Weiler 1986, supra note 100 at 12.

[126] For a reconstruction of this view and suggestions for new ways of thinking about the EU's *raison d'être,* see de Búrca, G 2013, Europe's Raison D'être, in Kochenov, D and Amtenbrink, F (eds.), *The European Union's Shaping of the International Legal Order,* Cambridge University Press, Cambridge, and see also for a classic contribution, Mancini 1989, supra note 78 at 609.

3.3.1 Intrusion Felt by National Constitutional Courts

This small section could be a doctoral thesis.[127] Here however, a very brief summary of this version of intrusion will be given. The ultimate question underlying this story is *who decides* whether measures taken within the scope of EU law are compliant with fundamental rights – the CJEU, or the national constitutional courts based on the standards offered by their constitutions?

The situation in the 1970s European legal landscape, the epoch in which this narrative originates, is well known. In broad brush strokes: the EU's preoccupation was disintegration – hypothetically happening when an EU law is struck down on fundamental rights grounds in some of its Member States – and the Member States' preoccupation was intrusion, in the shape of a CJEU that lower or alters the standard of protection otherwise offered by the national system.[128]

This constituted a transparent accusation of the manner in which the EU and its Court overreach in the area of fundamental rights to the point of causing harm to the national system and depriving national citizens of the protection they expect from their constitution.

The example *par excellence* of this form of intrusion into national constitutional concerns comes from Germany, in the tension between the German constitutional court and the CJEU, a dynamic that has developed over the course of the history of European integration.[129] This

[127]See for examples of published versions of PhD theses on this topic: Claes, M 2005, *The National Courts' Mandate in the European Constitution,* Hart Publishing, Portland; Tatham, AF 2013, *Central European Constitutional Courts in the Face of EU Membership: The Influence of the German Model in Hungary and Poland*, Martinus Nijhoff Publishers, Leiden.

[128] See for instance, Frowein, JA, Schulhofer, S and Shapiro, M 1986, The Protection of Fundamental Human Rights as a Vehicle of Integratio*n*, in Cappelletti, M, Seccombe, M and Weiler, JHH (eds.), *Integration Through Law: Europe and the American Federal Experience*. Vol. 1. Walter de Gruyter, Berlin, 1986, p. 233: "it should be recognized that fundamental human rights may be protected in a manner which produces clearly disintegrative effects. With respect to the EC, this would be the case were a Member State's Bill of Rights to be applied to strike down Community legislation or other acts."

[129] For different generations of the same conflict see: Davies, B 2012, *Resisting the European Court of Justice: West Germany's Confrontation with European Law, 1949- 1979*, Cambridge University Press, Cambridge; Lanier, ER 1988, Solange, Farewell: The Federal German Constitutional Court and the Recognition of the Court of Justice of the European Communities as Lawful Judge, *Boston College International and Comparative Law Review* 11 (1), pp. 1-28; Reich, N 1996, Judge-made Europe a la carte: Some Remarks on Recent Conflicts between European and German Constitutional Law Provoked by the Banana Litigation, *European Journal of International Law* 7 (1), pp. 103-111; Halberstam, D and Mollers, C 2009, German Constitutional Court says Ja Zu Deutschland, *German Law Journal* 10 (8), pp. 1241- 1258; Payandeh 2009, supra note 86.

clash of titans, as it were, symbolizes the relationship between the CJEU and (what is often referred to as) *the national constitutional courts*.[130]

This has been constructed as the emblematic conflict of EU fundamental rights law notwithstanding the fact that not all Member States have constitutional courts or a tradition of guaranteeing rights in constitutional documents, rather effecting such guarantees through ordinary legislation.[131]

In fact, this version of intrusion – a hard-fought battle of legal reasoning between Courts, eventually won (or consistently being almost-won) by the CJEU – is conceived for a legal setting with a national constitutional court. Without this the game is hard to play, or at least considerably less exciting.

Yet this version of intrusion remains a central point of reference in current debates on EU fundamental rights law.[132] The enactment of the Charter has not changed this. Indeed, some have construed case law relating to the Charter as an uneventful continuation of the same clash, and the same risk of intrusion.[133]

3.3.2 Social Protection Intruded Upon

The idea that there is a tension between EU economic integration and national systems of social protection has been thoroughly researched.[134]

---

[130] Kumm, M 1999, Who Is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice, *Common Market Law Review* 36 (2), pp. 351-386.

[131] That the 'problem' of the protection of fundamental rights was actually a German, and to a lesser extent, an Italian concern as opposed to a Belgian, French, Luxembourgish or Dutch one, was sustained by Pescatore. Pescatore, P 1970, Fundamental Rights and Freedoms in the System of the European Communities, *American Journal of Comparative Law* 18, pp. 343-351.

[132] See for instance in relation to newer Member States: Sadurski, W 2008, 'Solange, chapter 3': Constitutional Courts in Central Europe—Democracy—European Union, *European Law Journal* 14 (1), pp. 1-35.

[133] Fontanelli, F 2013, Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog: Court of Justice of the European Union: Judgment of 26 February 2013, Case C-617/10 Åklagaren v. Hans Åkerberg Fransson., *European Constitutional Law Review* 9 (2), pp. 315-334. Though there are counter-arguments to this fear of intrusion, see Sarmiento, D 2013, Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe, *Common Market Law Review* 50 (5), pp. 1267-1304.

[134] Ball, CA 1996, The Making of a Transnational Capitalist Society: The Court of Justice, Social Policy, and Individual Rights under the European Community's Legal Order, *Harvard International law Journal* 37, pp. 307-388; Maduro, M 1999, Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU, in *The EU and Human Rights*, Alston, P, Bustelo M and Heenan J (eds.) Oxford University Press, Oxford; Sciarra, S 2002, Market Freedoms and Fundamental Social Rights, in Hepple, BA (ed.), *Social and Labour Rights in a Global Context: International and Comparative Perspectives*, Cambridge University Press, Cambridge; Syrpis, P and Novitz, T 2008, Economic and Social Rights in Conflict: Political and Judicial Approaches to their Reconsiliation, *European Law Journal* 33 (3), pp. 411-427; Giubboni, S 2010, Social Rights and Market Freedom in the European Constitution: A Re-Appraisal, *European Labor Law Journal*, 1 (2), pp. 161-184; Nielson, R 2010, Free Movement and Fundamental Rights, *European Labour Law Journal* 1 (1), pp. 19-32.

This strand of thinking is a story about *the European as the economic* and *the national as the social.* And it has been reconstructed multiple times and perhaps needless to say, not only by lawyers.[135]

To take one, very on-point example of how this has been framed: "The ordo-liberal European polity consists of a twofold structure: at supranational level, it is committed to economic rationality and a system of undistorted competition, while, at national level, redistributive (social) policies may be pursued and developed further."[136]

From a legal perspective, although the "highly problematic extension of jurisdiction into areas of social regulation" has been a recurring observation,[137] no set of case law is as emblematic of this debate as the sister cases *Viking* (Finland) and *Laval* (Sweden).[138]

In *Viking* and *Laval* the CJEU answers the question whether a collective action (framed by the CJEU as the fundamental right to strike), aimed at protecting the interests of workers can constitute a justified restriction on the right to freedom of establishment (*Viking*), and freedom of movement of services (*Laval*). The answer is no.[139]

The *no* proffered by the CJEU in this instance becomes the epicentre of this version of the intrusion narrative. The perennial identification of a tension between *the European as the economic* and *the national as the social* is gifted a pedagogic example, and the narrative of intrusion understandably gains momentum at this moment in time.[140]

Looking closer at the telling of this story, this version of the narrative, centring on how

[135] See for instance Höpner, M and Schäfer, A 2010, *Polanyi in Brussels? Embeddedness and the Three Dimensions of European Economic Integration*, No. 10/8 MPIfG Discussion Paper; Scharpf, FW 2010, The Asymmetry of European Integration, Or Why the EU Cannot be a 'Social Market Economy', *Socio-economic Review* 8 (2), pp. 211-250; Algotsson, K-G 2011, De svenska partierna och Lavaldomen, *Statsvetenskaplig tidskrift* 113 (4), pp. 403-422.

[136] Joerges, C and Rödl, F 2009, Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections After the Judgments of the ECJ in Viking and Laval, *European Law Journal* 15 (1), p. 4.

[137] Weiler 1999, supra note 85 at 102. See also Ball 1996, supra note 138, who argues that economic integration has happened at the expense of social policy.

[138] Case C-438/05, International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eest ECR [2007] I-10779, Case C-341/05, Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, ECR [2007] I-11767.

[139] For other commentators who discussed the logical gap between the different treatment of *Schmidberger,* containing a margin of discretion, and *Viking/Laval* see; Kilpatrick, C 2009, British Jobs for British Workers? UK Industrial Action and Free Movement of Services in EU Law, LSE Law, Society and Economy Working Papers 16/2009, London School of Economics and Political Science, Law Department, p. 19; Spaventa 2009, supra note 82 at 357; Nic Shuibhne 2009, supra note 30 at 234.

[140] For examples from Scandinavian scholarship see: Malmberg J and Sigeman T 2008, Industrial Actions and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice, *Common Market Law Review* 45 (4), pp. 1115-1146; Dølvik, JE and Visser J 2009, Free Movement, Equal Treatment and Workers' Rights: Can the European Union Solve its Trilemma of Fundamental Principles?, *Industrial Relations Journal* 40 (6), p. 506; Woolfson, C, Thörnqvist, C and Sommers, J 2010, The Swedish Model and the Future of Labour Standards after Laval, *Industrial Relations Journal* 41 (4), pp. 333-350. And see further: Davies, ACL 2008, One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ, *Industrial Law Journal* 37 (2), pp. 146-148.

national social protection is intruded upon, arguably benefits both from broader framings and from not being a limited rights clash-perspective. For example, perhaps as an encounter between the "social democratic welfare state regime"[141] and the EU's internal market, or being framed in a broader discourse on the EU's eastward enlargement and stubborn Scandinavian protectionism.

In contrast, framing it as a strict conflict between fundamental social rights and fundamental freedoms might provide strong support for the argument that the CJEU adjudicates cases involving social rights in an intrusive way, at the possible risk however of important nuances being lost.[142]

Notwithstanding the merit of criticism of these cases and overwhelming agreement that the cases were wrongly decided, the question is whether this narrative of intrusion overshadows other readings of how fundamental social rights are adjudicated by the CJEU. Without challenging the critical observation in this line of commentary, one could ask whether it represents the rule or the exception. Is this version of the intrusion narrative constructed on an extreme case or an emblematic case?

Writing in 2015 it is difficult not to try to frame the manner in which EU crisis management, heavily dominated by austerity doctrine, fits into the well-established narrative of European intrusion in the area of social rights protection shown above.

The economic crisis and subsequent EU crisis management has shown that when the EU expands its involvement into new areas of law and policy, such as fiscal discipline and the design of national budgets,[143] the CJEU's refusal to engage in reviewing these measures on fundamental rights grounds risks altering the standards of both EU and national fundamental

[141] Esping-Andersen, G 1990, *The Three Worlds of Welfare Capitalism*, Princeton University Press, Princeton, p. 27. It is worth noting that amongst the people who voted yes to Swedish membership in the European Communities back in 1994, a majority was convinced that whilst the EU would have a positive impact on the economy it would have a negative impact on social protection. The people who voted no, on the other hand, were convinced it would be bad for both. Oskarson, M 1996, Väljarnas vågskålar, in Gilljam, M and Holmberg, S (eds.) *Ett knappt ja till EU: Väljarna och folkomröstningen 1994*, Nordsteds Juridik, Stockholm, p. 132. This shows that sentiments held by swedes at the time of accession is a succinct illustration of this version of the intrusion narrative and forms the cultural setting for what were to become an important discourse in, but not limited to, Scandinavian legal scholarship. See further Hansen, L and Wæver, O 2003, *European Integration and National Identity: The Challenge of the Nordic States*, Routledge, London; New York.

[142] In Tuori's words the "functional primacy of the economic constitution is manifested by the manner in which these clashes are framed as legal issues." Tuori, K 2010, The Many Constitutions of Europe, in Tuori, K and Sankari, S (eds.) *The Many Constitutions of Europe,* Ashgate, Burlington, p. 8. See for such framings Reich, N 2008, Free Movement v. Social Rights in an Enlarged Union: The Laval and Viking Cases Before the European Court of Justice, *German Law Journal* 9, pp. 125-143; Hinarejos, A 2008, Laval and Viking: The Right to Collective Action Versus EU Fundamental Freedoms, *Human Rights Law Review* 8 (4), pp. 714-729; Syrpis and Novitz 2008, supra note 134; Lo Faro, A 2008, Social Rights and Economic Freedom in the Internal Market: Some Brief Notes on" Laval" and" Viking," *Lavoro e diritto* 22 (1), pp. 63-96; Giubboni 2010, supra note 134.

[143] See further Dawson, M and De Witte, F 2013, Constitutional Balance in the EU after the Euro-Crisis, *The Modern Law Review* 76, pp. 817–844.

rights protection.[144] Whether this can possibly be described as yet another representation of the EU as *the intrusively economic* and the national as *the intruded upon social,* or whether these events will alter and change the *Viking and Laval*-based version of the intrusion narrative, is a question that is open for debate.

3.4 The Narrative of Diversity

Judge Koen Lenaerts, President of the Court of Justice of the European Union (at the time of writing), has stated that the Court's case law embodies the idea of *unity in diversity*.[145]

What is *unity in diversity*? Sticking to a surface-understanding of its meaning, it is a phrase that has been coined and used as a *positive* description of the European Union – the rationale being that all its members are different but still united and that this is the way it should be.[146] And it has been utilized as a way of succinctly assuring whoever needs to be assured, that nation-state Europe is not gone – it is just organized in constructive unity. Here, *diversity* is very much a product of the idea of difference between states and their peoples and cultures, a notion closely linked to the idea of the nation-state.[147]

I reflect on the unity in diversity slogan and the way in which it has been used because it fits nicely with the core of *the diversity narrative*, which is a story that aims to account for how the CJEU's fundamental rights adjudication respects, but more importantly, should respect, whatever diversity is to be found in national modes of protecting fundamental rights.

---

[144] See Kilpatrick, C and De Witte, B (eds.) 2014, *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges,* EUI Working Paper LAW 2014/05; Groppi T, Spigno I and Vizioli N 2013, The Constitutional Consequences of the Financial Crisis in Italy, in Contiades, X (ed.), *Constitutions in the Global Financial Crisis. A Comparative Analysis*, Ashgate, Burlington, pp. 89-113; Kilpatrick, C 2015, *Constitutions, social rights and sovereign debt states in Europe: a challenging new area of constitutional inquiry*, EUI WP LAW 2015/34.

[145] During the keynote speech at the Columbia Journal of European Law's 20th Anniversary Gala in April 2014. It was entitled "To say what the law of the EU is: Methods of interpretation and the European Court of Justice."

[146] In 2004, the motto was written into the failed European Constitution Article I-8 about the EU's symbols and read "*The motto of the Union shall be: 'United in diversity.'"* According to the EU website (http://europa.eu/about-eu/basic-information/symbols/motto/index_en.htm, accessed on 4 May 2015) it is the motto of the European Union since 2000 and: "It signifies how Europeans have come together, in the form of the EU, to work for peace and prosperity, while at the same time being enriched by the continent's many different cultures, traditions and languages." Key operatives of the European institutions often use it as a way of showing that they believe in separation between the Member States and the EU. For instance, the speech by Barroso: "A new narrative for Europe" where he said: "Europe has a soul, and that soul is its civilisation in all its rich creativity, its unity in diversity and, even, its contradictions." EC SPEECH/13/357, 23/04/2013. Appearing before MEPs as the candidate nominated by the Member States at the European Council in late June 2014, Jean-Claude Juncker gave a speech listing "unity in diversity" as one of the 10 guidelines for EU.

[147] Habermas, J 1996, The European Nation State. Its Achievements and Its Limitations. On the Past and Future of Sovereignty and Citizenship, *Ratio Juris* 9, pp. 125–137.

In other words, the idea underpinning the diversity narrative is that the national modes of protecting fundamental rights, most notably but not exclusively found in written constitutions, are different and that such difference should be treasured. At the heart one finds the conviction that the Union should not eliminate the diversity of its members. [148]

Almost needless to say then, the diversity narrative rests firmly on the distinction between what is European and what is national. In the diversity narrative's account, the national is the non-European. The distinctiveness of the diversified is very much extracted from its contrast with *the European* and so the separability is the starting-point, the method for avoiding a clash and in the outcome.[149]

The narrative of diversity is younger than the narrative of intrusion, though they are related insofar as their bias tilts towards the sanctuary of *the national*. While the narrative of intrusion always poses a direct challenge to the assumption of progress in the process of integrating fundamental rights protection, the diversity narratives seeks to formulate a solution or an alternative to the tensions posed by that integration. Therefore, the diversity narrative implicitly or explicitly answers some of the questions posed by the intrusion narrative.[150] Still, the diversity narrative maintains the same recurrent identification of a euro-national dichotomy.

The EU law *diversity narrative*, especially when it tells the fundamental rights story, ranges from the celebratory and descriptive to the normative and has, it is submitted, three main moments.

First, the initial moment is the original sin, as it were, on which the other two exemplifying moments are based. Namely, the construction of a direct link between the Member States, their values and their identities on the one hand, and their systems of fundamental rights protection on the other.

The second moment is represented in the constitutional pluralism discourse that has

[148] There is a resemblance with the arguments put forward in international law debates by particularistic or relativist commentators who reject the idea and desirability of one universal human rights standard and promote the notion of diversity in the way in which human rights are, and ought to be utilized around the globe. For classic contributions see Rachels, J 1993, *The Challenge of Cultural Relativism, The Elements of Moral Philosophy,* McGraw-Hill, New York, p. 15-29; Renteln, AD 1988, Relativism and the Search for Human Rights, *American Anthropologist* 90 (1), pp. 56-72.

[149] Maduro, M 2012, Three Claims of Constitutional Pluralism, in Avbelj, M and Komárek, J (eds.) *Constitutional Pluralism in the European Union and Beyond*, Hart Publishing, Oxford, p. 69: "constitutional pluralism emerges as a theory of European constitutionalism and not simply as a theory of constitutional conflicts."

[150] For instance, the intrusion narrative, as has been described above, highlights situations where the CJEU's fundamental rights jurisprudence threatens to damage the national constitutional milieu. The diversity narrative holds either that, nowadays, this risk of damage is decreasing due to an emerging body of CJEU case law that respects national values, or that it should drastically decrease with the help of deference to the national constitutional system.

worked as a mobilising and organising framework for the establishment of the dominance of the diversity narrative, and which is based on the idea of the plausibility of uniqueness in the Member States modes of protecting fundamental rights.

The third moment, based on the first move and closely related to the constitutional pluralism discourse, takes the form of interest in the idea of *national constitutional identity*. This is rooted and focused on article 4.2 TEU and the CJEU's fundamental rights jurisprudence.

3.4.1 Fundamental Rights as Values and Identity

The idea that the difference between states is reflected in the difference between what these states value, which in turn is expressed in their systems of fundamental rights protection, is a crucial logic underpinning the diversity narrative.

It is this rationale that supports the diversity narrative's claim that the national modes of protecting fundamental rights, most notably written constitutions, is or should be respected because they are the expression of something unique. Hence the member state's distinctness is reassuringly protected by virtue of respect for its legalistic expression.

In the context of post World War Two Europe the connection between values and rights appears forcefully in the work of Cappelletti, a legal academic prone to improvement narrative. He understood constitutions as expressing the "positivization" of higher values and judicial review as the method for rendering these values effective, inside and outside of the state.[151] Yet Cappelletti did not emphasize the national uniqueness of these values, rather the opposite. He identified "converging trends" in the proliferation of fundamental rights and judicial review throughout the European countries.[152] Cappelletti thus makes the first move - rights are an expression of values. However the next step – rights are an expression of values unique to their national context, is taken by Weiler.

In classic and eloquent expression of the seemingly linear connection between states, their difference, their values, their identity, and their fundamental rights, Weiler presents the analytical pairing of "fundamental rights and fundamental boundaries." The basic claim guiding this framing is that:

[151] Cappelletti, M 1971, *Judicial review in the contemporary world*, Bobbs-Merrill, Indianapolis, p. x (preface).
[152] Cappelletti frequently used the term "converging trend" to highlight the similarity or emerging tendencies of similarities between different legal systems. See for instance Cappelletti 1979, supra note 99 and Cappelletti, Seccombe and Weiler 1986, supra note 100.

> " (…) beyond a certain core, reflected in Europe by the European Convention of Human Rights (ECHR), the definition of fundamental human rights often differs from polity to polity. These differences, I shall argue, reflect fundamental societal choices and form an important part in the different identities of polities and societies. They are often part of social identity about which people care a great deal. What menu and flavour of human rights are chosen in the Community context matters and can become a source of tension even absent direct conflict of norms. The choice of human rights is about the choice of fundamental values so the stakes are rather high." [153]

This piece was published in 1999, just before Advocate Generals[154] and commentators writing about *constitutional pluralism* and *national constitutional identities* started to operationalize this assumption of a foundational connection between Member States' difference, their identities, their values and their fundamental rights more vigorously.[155]

3.4.2 Constitutional Pluralism

The notion of diversity, or better still, a community of distinct national diversities is interlinked with the rich literature on constitutional pluralism – an unavoidable point of reference for diversity narrators.

The core meaning of constitutional pluralism seems to be that more that one constitution should be able to exist at the same time in a given legal context. As such it rejects, in sharp contrast to the improvement narrators, hierarchy between these coexisting constitutions. I will, somewhat artificially, describe the three main routes by which constitutional pluralism may be arrived at as a conclusion.

First the solution to conflict-route:[156] constitutional pluralism is a response to the fear of intrusion in connection with a constitutional conflict between the CJEU and a national constitutional order.

The second route is the epistemic-route: constitutional pluralism is what best describes the EU's constitutional order both as it is,[157] and to varying extents as it should be.[158] Maduro is

---

[153] Weiler 1986, supra note 77 at 102.

[154] In more general terms see Opinion of AG Jacobs in C-112/00, Schmidberger, delivered on 11 July 2002: "divergencies between the fundamental rights catalogue of the Member States, which often reflects the history and particular political culture of a Member State;" More on point see Opinion of AG Maduro in Case C-213/07, *Michaniki,* delivered on 8 October 2008, p.31.

[155] It is noteworthy that Weiler in his later work develops a critique of constitutional pluralism. See Weiler, JHH 2011, Prologue: Global and Pluralist Constitutionalism—Some Doubts, in de Búrca, G and Weiler, JHH (eds.), *The Worlds of European Constitutionalism*, Cambridge University Press, Cambridge.

[156] Kumm, M 2005, The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty, *European Law Journal* 11 (3), pp. 262-307; Baquero Cruz, J 2008, The Legacy of the Maastricht-Urteil and the Pluralist Movement, *European Law Journal* 14 (4), pp. 389-422. See also Maduro 2012, supra note 149 at 72;"It must be recognized, however, that it has been the risks of constitutional conflicts highlighted by the Maastricht judgment that have fed the interest in constitutional pluralism."

the most prominent supporter of an understanding of constitutional pluralism as both epistemic and normative at the same time. In other words, as a framework that both *embraces* and *regulates* the nature of the European Union.

A third route, adopted most prominently by Walker in his earlier writing, is the necessity-route:[159] constitutional pluralism as the only possible option in a world that is not what it used to be when national constitutions were created. In other words, state-centred constitutionalism is gone and this new constitutional era demands a vision less focused on hierarchy to accommodate a multi-level, fragmented world.

These three routes, albeit distinct, are interlinked. Separating them is useful however because it illustrates the far-reaching ambitions of this version of the diversity narrative. Indeed, the attractive feature of this line of scholarship is that it seems to at the same time solve a classic EU law conflict, describe the European Union as it is, describe the European Union as it should be, and respond to a world that is changing. The ultimate means of achieving all of this is the operationalization of the value of diversity, turning it into a determinate criterion for the organization of constitutions, and favouring it over hierarchy.[160]

Following MacCormick, as many of these diversity narrators did, constitutional pluralism discourse evolved out of a two-options-paradigm of either choosing the way back to sovereign nation states, or the way forward to a massively centralised EU.[161]

---

[157] For a good example of what it might look like to embrace constitutional pluralism as a description of the EU but doubting whether it is "normatively attractive" see, Komárek, J 2012 Institutional Dimensions of Constitutional Pluralism, in Avbelj, M and Komárek, J (eds.) *Constitutional Pluralism in the European Union and Beyond*, Hart Publishing, Oxford, p. 232.

[158] This position is argued for first and foremost by Maduro. See Maduro, M 2003, Contrapunctual Law: Europe's Constitutional Pluralism in Action, in Walker, N (ed.), *Sovreignity in Transistion*, Hart Publishing, Oxford; Maduro, M 2009, Courts and Pluralism. Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism, in Dunoff, JL and Trachtman, JP (eds.) *Ruling the world?: Constitutionalism, International Law, and Global Governance*, Cambridge University Press, Cambridge; Maduro 2012, supra note 149 at 68: "Some understand it, in fact, simply as theory regulating conflicts of constitutional authority. In other words, constitutional pluralism would not define the identity of European constitutionalism itself but the nature of its relationship with other constitutional orders (national and, possibly, international). In this piece, I want to discuss the real potential of constitutional pluralism as a constitutional theory. I conceive constitutional pluralism not only as remedy for constitutional conflicts of authority but as the theory that can best embrace and regulate the nature of the European Union polity."

[159] Walker, N 2002, The Idea of Constitutional Pluralism *The Modern Law Review* 65 (3), pp. 317-359.

[160] See for further discussion on the feasibility of constitutional pluralism's rejection of hierarchy Walker, N 2012, Constitutionalism and Pluralism in Global Context, in Avbelj, M and Komárek, J, *Constitutional Pluralism in the European Union and Beyond*, Hart Publishing, Oxford; Weiler 2011, supra note 155.

[161] MacCormick, N 1993, Beyond the Sovereign State, *The Modern Law Review* 56 (1), p. 17: "we can only either go forward or go back – lateral thinking or movement will be out of the question. Either we are fated to go forward to a situation in which there is a massively centralised European Community which takes over the dominant place in legal imagination. (…) That we may call the way forward. The other way would be the way back. No doubt many are tempted by it. The siren voices urge us to go back to the good old world in which we did not face the loss of sovereignty through its being granted somewhere else. "In the same paper on page 5 he also writes: "One thing which it is necessary for jurisprudence or the philosophy of law to do in the present state of affairs is to guard against taking a narrow one-state or Community-only perspective, a monocular view of

Yet the condition of existing in more than one part or form, the essence of pluralism, is constrained by the insistence on the nation-state as the essential unit of the pluralist structure.[162] In contrast one could think about other forms of diversity, for instance based on ethnicity or class, in people living within the same state. This is a view akin to that adopted by the strategic litigation-focused improvement narrators in their understanding of the nation-state as disabling rather than enabling diverse societies.

Resnik writes of US federalism: ”Appreciation of federalism's pluralism ought not, however, be translated into complacency that federalism is a mechanism that will result in the production of other norms central to liberalism, such as equality, dignity, and fair treatment of all persons. The consequences of federalism's toleration—and sometimes its celebration—of differences through the endowment of authority to various political sectors (be they states, provinces, länders, cities, indigenous nations, or linguistic or other minorities) does not, intrinsically, produce liberal commitments or preclude illiberal outcomes.” [163]

In constitutional pluralism discourse such preoccupations are not raised, the focus is on the importance of existing jurisdictional divides and difference between states.[164] All of this stains the *prima facie* potential for unconditioned, non-territorial human diversity.

In other words, the diversity-value is so closely connected to the state entity that all other possible ways of expressing diversity (or unity for that matter) are effectively suffocated. This move towards celebrating the national constitution as a guarantee of pluralistic diversity paves the way for the more outright nationalistic rhetoric in the line of scholarship that elaborates the concept of national constitutional identity.

In sum, I argue that scholarly investigation on sovereignty's evolving role in modern transnational constitutionalism (following MacCormick) has as of late become a source of inspiration for commentary that is interested in pursuing an analysis that draws on the logics of nationalism.

---

things.” He develops these ideas further in MacCormick, N 1995, The Maastricht-Urteil: Sovereignty Now, *European Law Journal* 1 (3), pp. 259-266; MacCormick, N 1995, Sovereignty: Myth and Reality, *Scottish Affairs* 11, pp. 1-13.

[162] On this point, especially on the drift to particularity and how nationalism is one of its main expressions, see: Vincent, A 2002, *Nationalism and Particularity*, Cambridge University Press, Cambridge.

[163] Resnik 2014, supra note 3 at 364.

[164] Bengoetxea, in more general and mild terms, suggests that: ”Constitutional pluralism has heretofore shown little interest in those other important sources of plurality, distinct from the constitutional forms, namely cultural, social, economic and political normative systems. Perhaps this can be seen as a suggestion for future research rather than a criticism of its focus.” see Bengoetxea, J 2014, Rethinking EU Law in the Light of Pluralism and Practical Reason, in Maduro, M, Tuori, K and Sankari, S (eds.) *Transnational Law: Rethinking European Law and Legal Thinking*, Cambridge University Press, Cambridge, p. 150.

3.4.3 National Constitutional Identity

Perhaps the most straightforward version of the diversity narrative is the claim rooted in primary law and case law that lately (i.e. the last 10 years or so), the CJEU has begun to couch some of its case law involving fundamental rights in a way that respects national constitutional identities (and that this is mostly a good thing).[165]

The progenitors of this position have been traced back to provisions in the early treaties, but primarily to article 4.2 TEU, which reads in part: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government."

On the face of it, this provision manifests the core of the assumption outlined above: that the uniquely national is expressed, *inter alia*, through constitutional rights protection. It is interesting however, to note that the Maastricht Treaty, enacted in 1993, held in article F.1 that "The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy." Thus, the concept has been around for some time without being a cause for commentary, and more importantly perhaps, the desire on the part of scholars and advocate generals to operationalize it is definitively a later preoccupation.

So, what is the legal argument pursued on the basis of article 4.2 and the CJEU's case law? For instance, von Bogdandy and Schill write:

> By focusing national identity on the fundamental political and constitutional structures of Member States, Article 4(2) TEU, we argue, provides a perspective for overcoming the idea of absolute primacy of EU law and the underlying assumption of a hierarchical model for understanding the relationship between EU law and domestic constitutional law, because this provision endorses a pluralistic vision of the relationship between EU law and domestic constitutional law.[166]

[165] Millet, XF 2014, The Respect for National Constitutional Identity in the European Legal Space: An Approach to Federalism as Constitutionalism, in Azoulai, L (ed.) *The Question of Competence in the European Union*, Oxford University Press, Oxford; van der Schyff, G 2012, The Constitutional Relationship Between the European Union and its Member States: The Role of National Identity in Article 4 (2) TEU, *European Law Review* 37 (5), pp. 563-583; von Bogdandy, A and Schill, S 2011, Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty, *Common Market Law Review* 48 (5), pp. 1417-1453 and the contributions to the edited collection National Constitutional Identity and European Integration, see Saiz Amaiz, A and Alcoberro Llivina, C 2013, Introduction, in Saiz Amaiz, A and Alcoberro Llivina, C (eds.), *National Constitutional Identity and European Integration*, Intersentia, Cambridge. And for two more sober, not necessarily celebratory contributions; Guastaferro, B 2012, Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause, *Yearbook of European Law* 31 (1), pp. 263–318 and Konstadinidies, T 2010, Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement, *Cambridge Yearbook of European Legal Studies*, 13.

[166] Von Bogdandy and Schill 2011, supra note 165.

This quote highlights the main ingredients in this line of scholarship (and its affinity with constitutional pluralism). Firstly, there is an affirmation that national identity is an *essentially coherent* concept, or at least that it is not considered necessary to contest it in order to conduct fruitful analysis. Secondly, article 4.2 and the emerging body of case law referring to that article[167] are thought to give the concept the gravitas necessary to unsettle,[168] or at least modify[169] the principle of the primacy of EU law, and as a consequence destabilize the strict hierarchical relationship between EU and the Member States.[170]

Such inquiry is significantly less concerned with what this insistence on the national constitution as the carrier of something uniquely national does to the living condition of the *Union*.[171]

The turn to the concept of *national constitutional identities*, disguised further and to various degrees in the language of non-primacy and pluralism, introduces the logics of nationalism into EU fundamental rights discourse.

National constitutional identity discourse, just like nationalism, tends to view national identity as a coherent concept or, at the very least, as a tangible and understandable

[167] The most recurrent references being, Case C-208/09 Sayn-Wittgenstein v. Landeshauptmann von Wien, ECR [2010] I-13693and C-391/09, Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others, ECR [2011] I-03787. See further chapter 6.4.2.

[168] Von Bogdandy and Schill 2011, supra note 165; Relating to another treaty but on the same point, Kumm, M and Ferreres Comella, V 2005, The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union, *International Journal of Constitutional Law* 3, pp. 473-492.

[169] Millet 2014, supra note 165; Claes, M 2013, National Identity: Trump Card or Up for Negotiation?, in Saiz Amaiz, A and Alcoberro Llivina, C (eds.), *National Constitutional Identity and European Integration*, Intersentia, Cambridge. The status quo like situation where in fact primacy remains although national constitutional identity is referred to is illustrated in this pre-Lisbon opinion of AG Maduro in Case C-53/04 *Marrosu and Sardino*, delivered on 20 September 2005, p. 40: "Doubtless the national authorities, in particular the constitutional courts, should be given the responsibility to define (…) the constitutional identity of the Member States which the European Union has undertaken to respect. The fact remains, however, that it is the duty of the Court of Justice to ensure that that assessment is made in accordance with the fundamental rights and objectives with which it must ensure compliance within the Community context."

[170] In the introduction to Saiz Amaiz and Alcoberro Llivina 2013, supra note 165 the editors state that national constitutional identity caters to "the Member States' need to limit the EU's claim for original authority on one hand without falling back into the traditional sovereignty narrative or impeding further integration on the other."

[171] Advocate General Cruz Villalón express such concerns in his opinion in Case C-62/14, *Gauweiler and others v Deutscher Bundestag*, delivered on 14 January 2015, paras. 59 - 60: "The first is that it seems to me an all but impossible task to preserve *this* Union, as we know it today, if it is to be made subject to an absolute reservation, ill-defined and virtually at the discretion of each of the Member States, which takes the form of a category described as 'constitutional identity'. That is particularly the case if that 'constitutional identity' is stated to be different from the 'national identity' referred to in Article 4(2) TEU.
Such a 'reservation of identity', independently formed and interpreted by the competent — often judicial — bodies of the Member States (of which, it need hardly be recalled, there are currently 28) would very probably leave the EU legal order in a subordinate position, at least in qualitative terms. Without going into details, and without seeking to pass judgment, I think that the characteristics of the case before us may provide a good illustration of the scenario I have just outlined."

concept.[172] Nationalism mainly extracts national identity from people with the "right" nationality – discerning similarities in their behavioural characteristics, their language, and their traditions. *National identity constitutionalism* in contrast, extracts national identity from the constitutions.

Both of these "extractions" represent the tightening of a problematic relationship between the values of nationalism and *the state*.[173] It is important to observe how this version of the diversity narrative reconnects to the classic nationalistic *modus operandi* – equating what is foundational for a state, such as its "citizen" or its constitution, with "national identity."[174]

While this latest generation of the diversity narrative could be understood to reintroduce the "rampant red line of nationalism" into EU fundamental rights law discourse, the narrators themselves tend to refer to their interest in the concepts of national constitutional pluralism as a "pluralistic vision" of the EU.[175] There is a disguised resurgence of the idea of the *uniquely national* that, as we know, has been used time and again to define and condition the life of Europe and now, apparently, fundamental rights protection in the European Union. Against this background, it should be observed that in terms of timing, the turn to national constitutional identity discourse (around the 2000's) parallels the intensified interest in nationalism in the European parliament as well as national parliaments.

3.5 Concluding Remarks: Binary-Based Discourse

The most important reason for this reconstruction of dominant narratives in discourse on the CJEU's adjudication of fundamental rights is the necessity of formulating how and why they contrast with the operation of the margin of discretion-technique.

---

[172] Not to say that its exact definition is not up for debate within the sub-field, see the introduction in Saiz Amaiz and Alcoberro Llivina 2013, supra note 165 where the editors write that: "Scholars, judges and advocates general have rendered the concept currently so fashionable and yet so ambivalent that an in-depth analysis putting some order into the intense debate over constitutional identity is warranted."

[173] Guibernau, M 2007, *The Identity of Nations*, Polity, Cambridge, p.23: "Most literature on national identity tends to define it as a property shared by citizens of a nation-state. I argue that this is an incorrect assumption based upon the common error of conflating nation and state." See also Besselink, LFM 2010, National and Constitutional Identity Before and After Lisbon, *Utrecht Law Review*, 44 (6), pp. 42. This article was published in a special issue on Euroscepticism and Multiculturalism.

[174] Needless to say, it is at odds with the ideas of the EU as an opportunity for "dissociation between the juridical order of the political community and the cultural, historical and geographical order of national identities." See Lacroix, J 2002, For a European Constitutional Patriotism, *Political Studies* 50 (5), p. 946. See further Habermas 1996, supra note 147.

[175] Smith, AD 1998, Nationalism and Modernism: A Critical Survey of Recent Theories of Nation and Nationalism, Routledge, New York; London, p.2 and von Bogdandy and Schill 2011, supra note 165.

The first main contrast is the reliance on the euro-national binary, expressed as an understanding of the European and the national as two separate spheres. This is a current that runs through all three narratives. In sum, in the area of fundamental rights protection, either the EU sphere improves, or it unduly intrudes into, the national legal sphere. Alternatively, the two spheres remain or should remain separate altogether. The logic supporting this type of analysis is that within EU fundamental rights protection the euro-national binary is a categorization that exists both *ex ante* and *ex post* a European fundamental rights conflict.

In the improvement narrative the CJEU's adjudication of EU fundamental rights sources improves the national standard of protection by modifying or replacing them with a common European standard. The CJEU's superiority is a possibility for constructive societal change.

In the intrusion narrative, the CJEU's adjudication of cases involving fundamental rights negatively affects the national system of fundamental rights protection. Here, the hierarchical relationship between the CJEU and national courts is accepted but heavily criticised.

In the diversity narrative, the CJEU's adjudication ought to respect the integrity of the national sources. In contrast to the other two narratives, the existence of hierarchy is rejected.

Set against the logics of these three narratives then, the CJEU's use of the margin of discretion-technique destabilizes the binary by engaging, to various degrees, the competent national authority in the elaboration of the applicable standard of fundamental rights protection. I argue that *even if* the European and the national exists *ex ante,* my concern is the way in which the distinctiveness of the national and European identities of the sources constituting the standard of protection are considerably blurred *ex post* the process of adjudication.

4. A Method for Studying the CJEU's Use of Margins of Discretion in Fundamental Rights Adjudication

4.1 Finding the Margin of Discretion-Technique

4.1.1 Identifying the Research Object

Within the European Union and elsewhere, the use of margins of discretion in adjudication is triggered by jurisdictional overlaps and shared commitment to norms. This minimalist understanding of the origins of this technique, which I presented at the outset, serves to avoid defining the technique in direct relation to any specific function or objective *a priori*. The reconstruction of the narratives of improvement, intrusion and diversity, in turn serve to destabilize the dominance, of the euro-national binary as a necessary function of the CJEU's adjudication of fundamental rights.

I thus maintain that there is no *prima facie* structure of the margin of discretion-technique that conditions it to operate as a separator of subject matters along jurisdictional lines, despite the fact that techniques of supranational adjudication that address national decision-makers are regularly conceived as upholding jurisdictional boundaries. For instance, and as discussed earlier, mainstream commentary on the rationales underpinning the ECtHR's margin of appreciation-technique represents a view by which subject matters are "bounderied" within strict jurisdictional frameworks.

All of these considerations are important when providing a definition of "margin of discretion," which ultimately means freeing the analysis from the recurring assumption of separation along jurisdictional lines. Specifically, to free it from such assumptions that pertain to techniques of supranational adjudication that operationalize national discretion and also to free the analysis from assumptions stemming from discourse on the CJEU's fundamental rights adjudication as embodied in the narratives of intrusion, improvement and diversity. In turn, this approach facilitates the introduction of the reading I would like to propose, namely one which centres on the interconnected decision-making enabled by the margin of discretion-technique.

Accordingly, prior to any analysis of the ultimate function of separation, interconnection or otherwise, in this work the "margin of discretion" labels a method of adjudication whereby

a superior court of a larger jurisdiction (such as the CJEU), identifies an instance of decision-making within a smaller jurisdiction (such as a Member State), where the decision-making body has or will have discretion to decide on a shared commitment (such as the protection of fundamental rights), despite the fact that the CJEU has jurisdiction.

In other words, when I look for a "margin of discretion," I look for a method that the CJEU uses to identify instances where a decision-making body within a Member State is authorized to decide on a fundamental rights based subject matter within the CJEU's jurisdiction, which is then incorporated into the CJEU's process of adjudication. In other words, national decision-making on an EU fundamental rights law subject matter. I use subject matter rather than legal conflict to underline that the national decision-maker to which a margin of discretion is analytically attached might be undertaking part of the ordinary work of a national administrative body or in a broadly defined policy area, rather than a complex case pending before a national constitutional court. Indeed, with the help of a margin of discretion the CJEU could identify and incorporate into its adjudicative process a national piece of legislation, an administrative decision, or a policy area.

A margin of discretion could thus be attached to an instance of decision-making that has already taken place, or to an instance of decision-making that will take place in the future. Given the topic of this work, these instances of national decision-making have in different ways triggered a fundamental rights question. This does not mean that the CJEU's use of the technique is triggered only by questions concerning the protection of fundamental rights, but rather that it is the focus of this research project.

In sum, this is the thinnest definition of the research object: the margin of discretion is an identifier of moments of national decision-making to which the CJEU analytically attaches discretion to decide on a shared commitment which is incorporated as such into the CJEU's adjudicative process, despite the CJEU having jurisdiction.

As stated at the outset, identifying the research object is only the first step. Subsequently, once the core definition is constructed and has served to detect the technique within the CJEU's massive body of case law involving fundamental rights, the question becomes what this method produces and what it enables. What is its ultimate function?

In this chapter, having provided a core definition of the research object "margin of discretion," I will start by explaining how proportionality review, which is omnipresent in the CJEU's case law, is distinguishable from the margin of discretion-technique, although they operate side by side. I will then describe which criteria I have used to select the case law discussed in this work. Thereafter, I will introduce the three typologies of margins of

discretion that I have constructed, and explain their function. Ultimately, I will illustrate how the typologies of uses of margins of discretion points towards an understanding of the technique as enabling interconnected decision-making, which blurs the euro-national jurisdictional boundaries in the elaboration of the applicable standard of fundamental rights protection.

4.1.2 Differentiating Proportionality Review

The proportionality principle is both a general principle of EU law and a much-studied method of adjudication.[176] The proportionality principle could be understood as, to various extents, discretion-giving in its capacity as a tool of judicial review operationalized by a supranational court to review national measures in order to establish whether these are proportionate to the aim which they pursue.[177] Therefore it is important to draw a distinction between the margin of discretion-technique and proportionality review, since both operate in similar zones and indeed, as I will show, operate side by side to address the same contested measures in many of the cases discussed in this work.

On this point of distinguishing between "proportionality and the margin of appreciation," Barak writes, with a generic international setting in mind, that the "rules of proportionality leave the legislator an area of discretion encompassing such matters as the need for legislation, its purposes, the means adopted for attaining those purposes, and the limits that might be imposed on constitutional rights. The legislator may set the relationship among those items as long as the rules of proportionality are satisfied; within the zone of proportionality, the legislator has freedom of manoeuvre."[178] Whereas the margin of appreciation by contrast "affords discretion to national bodies."

Along these lines and still schematically phrased but understood in the EU context, I maintain that the margin of discretion identifies a Member State's measure – a piece of legislation, an administrative decision or a broader policy area – as being within a discretional space. Thus *the national measure is analytically situated* within a margin of discretion. In contrast, the proportionality principle does not identify an action, such as a piece of

[176] de Búrca, G 1993, The Principle of Proportionality and its Application in EC Law, *Yearbook of European Law* 13 (1), pp. 105-150; Ellis, E 1999 (ed.), *The Principle of Proportionality in the Laws of Europe*, Hart Publishing, Oxford.
[177] Barak, A 2012, Proportionality (2), in Rosenfeld, M and Sajó, A (eds.) *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, Oxford, p. 748. And with a more pointed framing of the proportionality principle as a deliberation-inducing form of constitutional review, Eskridge and Ferejohn 2010, supra note 57 at 462.
[178] Barak 2012, supra note 177 at 748.

legislation, an administrative decision or a broader policy. Instead it is a technique of assessment, which reviews national measures. Here lies the fundamental contrast.

Proportionality review as performed by the CJEU can be more or less deferential to the national decision-maker. The proportionality review of the national measure can even be outsourced to the referring national court.[179] Yet however loosely the proportionality test is constructed, or if the CJEU leaves the national court the possibility of ascertaining proportionality of the contested measure, the contested measure itself is being reviewed according to certain criteria and it is not constructed as situated within a margin of discretion.

Taking a broader view, Barak frames the essential distinction as though the proportionality principle "reflects the constitutionality of a limitation on a right from a national point of view" while the margin of appreciation "reflects the constitutionality from an international perspective."[180]

Paraphrasing Barak's distinction, I maintain that the margin of discretion-technique coordinates overlapping jurisdictions within a given system of shared commitment by identifying moments of national decision-making to be incorporated into the CJEU's process of adjudicating the applicable standard of fundamental rights protection. Proportionality review however, will serve to enlighten the national decision-maker on what is to be considered a proportionate and therefore permissible action.

Yet, as stated above, the margin of discretion-technique and proportionality review interact. In such circumstances the proportionality principle is used to review a decision taken within a margin of discretion. For instance, when a margin of discretion encompasses a national decision understood to balance fundamental freedoms and fundamental rights the CJEU can ultimately perform a proportionality review of that decision. Furthermore, when the margin of discretion is used to accommodate a national measure deviating from an EU-sourced fundamental right, the CJEU may ultimately perform a proportionality review of that measure. In this way the two techniques meet and the proportionality review can be constructed so as to determine the effective discretional zone of the margin of discretion. Indeed, the proportionality principle may limit the national discretional space of the margin of discretion. This intertwined use of margins of discretions and proportionality review by the CJEU, as I will argue below, is yet another indicator pointing towards the interconnected

[179] See for examples of this Case 302/86, Commission of the European Communities v Kingdom of Denmark, ECR [1988] 04607 and Case C-368/95, Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag ECR [1997] I-03689.
[180] Barak 2012, supra note 177 at 748.

elaboration of the applicable standard of fundamental rights protection, which the margin of discretion entails.

The details of the Court of Justice of the European Union's simultaneous use of the margins of discretion and proportionality principle will be explained in the following chapters.

4.1.3 Selecting Case Law

It is important to note that the CJEU has never comprehensively elaborated on the criteria governing the use of the margin of discretion-technique in fundamental rights cases even when the Court has referred to, for instance, a "margin of discretion" or a "margin of appreciation." Accordingly, one must go beyond explicit references to any specific term in order to get the best possible picture of when and how the Court uses this technique. This is an important clarification in terms of methodological starting point.

In other words, it is argued that emphasis should be placed on the substance of the Court's judgment rather than the precise terminology used by the Court in each case. This approach is motivated primarily by the CJEU's lack of elaboration of the terminology it will use to indicate that a national instance of decision-making will be within a margin of discretion and as such incorporated into the CJEU's process of adjudication.

However, since the subject matter is within the CJEU's jurisdiction and the CJEU is asked to interpret the EU law triggered by the case, any deviation from full interpretative authority of the CJEU needs to be signalled by the CJEU. Thus the Court needs to communicate that it understands an instance of national decision-making to be incorporated into its own process of adjudication of the applicable standard of fundamental rights protection.

With this background, three criteria have guided the selection of the case law to be analysed in the following chapters: the case must involve a fundamental right as qualified by the CJEU (1), the case must reference directly or indirectly, through other cases, margin of discretion-language as opposed to a specific term (2), and the case must *de facto* identify an instance of national decision-making, which it will incorporate into its adjudicative process (3).

The first two criteria are instrumental in the work of searching for case law in Curia and Eur-Lex. Which means that they provide the key-words necessary to perform the activity of searching for case law.

The first criterion (1) concerns the definition of "a case involving fundamental rights." I do, as I have outlined in chapter 2.3, use the CJEU's own categorization of what is to be

considered a fundamental right. In other words, I do not criticise the CJEU's own labelling or include cases in my analysis which by way of argumentation beyond the CJEU's own language might be constructed as containing a fundamental right. This means that the criterion encompasses the CJEU's adjudication of cases involving fundamental rights in the operative parts of the judgements (not merely linguistic references) between 1969, when the CJEU first referred to fundamental rights, and 2015.

This represents a broad group of cases, which means that the second criterion significantly reduces the vastness of the material produced by the first. These two criteria furthermore represent two different methods, which are used in parallel. While only analysing case law which the CJEU itself has qualified as concerning fundamental rights (non-critical approach), I simultaneously use a critical approach vis-à-vis the CJEU's own labelling of the operation of a margin of discretion.

This means that in the following chapters I critically evaluate the CJEU's margin of discretion-granting language, yet I rely on the CJEU's own qualifications in terms of what constitutes a fundamental right. Therefore this analysis of the margin of discretion-technique lives within the premises of what the CJEU itself understands as its world of fundamental rights adjudication.

The second criterion of case selection is thus decisively more dynamic than the first because it challenges the CJEU's own language. The second criterion therefore address straightforwardly the imperfection of the CJEU's own labelling and confronts the lack of any visible commitment to a comprehensive elaboration of the use of margins of discretion and the terminology which would indicate that use.

In concrete, criterion number two means that in the following three chapters I only include cases with a reference directly or indirectly through other cases to margin of discretion-language as opposed to a specific term.[181] By margin of discretion-language I mean the following terms: *margin of direction*; *reasonable margin of discretion*; *wide margin of discretion*; *margin of appreciation*; *certain degree of discretion*; *discretion to decide*; *certain degree of latitude*; *wide freedom of action*; *the discretion enjoyed by the national authorities in determining*; *measure of discretion; discretion when determining*.[182] This is an exhaustive

[181] *Lindquist,* discussed in the chapter on compliance margins of discretions, is the only case that deviates from this rule.

[182] It is important to note that the French language version is much more streamlined, the following are the translations in the same order: marge d'appréciation; marge d'appréciation raisonnable; large pouvoir d'appréciation; marge d'appréciation; certaine marge d'appréciation; aucun pouvoir discrétionnaire; certaine marge d'appréciation; large marge de manœuvre; le pouvoir d'appréciation dont disposent les autorités compétentes; marge d'appréciation; marge d'appréciation.

list of the labels that appear in this work and which I interpret to plausibly indicate the presence of an operational margin of discretion. These are thus the key words used on EUR-LEX and Curia within the body of case law that handles fundamental rights in their operative parts, as categorized by the CJEU itself.

In a few clearly highlighted instances I do study cases without any explicit reference to margin of discretion-language, where the case thoroughly refers to other cases with specific and precise reference to margins of discretion-language. Or alternatively, where the case in question has thoroughly served as a point of reference for future margin of discretion-cases with explicit references to margin of discretion-language. This is conceptualized as indirect reference to margin of discretion-language.

In this vein, the notion of a "line of cases" is recurrent in this work. These cases do tend to reference each other and form a line of case law involving fundamental rights with similarly organized uses of margins of discretion.

To summarize, while the use of the second criterion is based on a critical approach to the CJEU's own language, the criterion is simultaneously based on the assumption that deviation from the CJEU's absolute interpretative authority will be signalled by the Court itself. Therefore I have adopted the approach of identifying margin of discretion-language and also expanded to cases that reference such language indirectly.

Criterion (3) may be described as a safety check. It is in line with the critical approach embedded in the second criterion, and it ensures that the margin of discretion-language, directly or indirectly referred to, indeed signals the presence of an operational margin of discretion. In other words, in each case of direct or indirect reference to margin of discretion-language, I verify the presence of an actual identification of an instance of national decision-making, which is to be included as such into the CJEU's process of adjudication.

I illustrate the importance of criteria (2) and (3) by using a quote of the CJEU regarding institutional deference. In this quote the CJEU is describing the General Court's language compared to its actual performance of judicial review of the Commission's actions: "It must be noted in that regard that although the General Court repeatedly referred to the 'discretion,' the 'substantial margin of discretion' or the 'wide discretion' of the Commission, (…), such references did not prevent the General Court from carrying out the full and unrestricted review, in law and in fact, required of it."[183]

[183]Case C-389/10P, KME Germany AG, KME France SAS and KME Italy SpA v European Commission ECR [2011] I-13125, para. 136.

This point summarizes the importance of critically assessing whether language and action match. Furthermore, this quote also demonstrates the variability in terminology used, in this case by the General Court, to describe the granting of discretion to a specific addressee. Thus the CJEU identifies the potential for variation within the margin of discretion-language.

In sum, the research object of this work has been traced in the massive body of CJEU case law using three criteria: the case must involve a fundamental right as qualified by the CJEU (1), the case must reference directly or indirectly, through other cases, to margin of discretion-language as opposed to any specific term (2), and the case must *de facto* identify an instance of national decision-making, which is to be incorporated as such into the Court's adjudicative process (3).

The cases produced by conducting research according to these guidelines have been organized in typologies. The following section introduces these typologies and sets out their functions and purposes.

4.2 Constructing Margin of Discretion-Typologies

4.2.1 Structure

The typologies constitute a framework for understanding the richness of the technique. In particular, they show how the technique is adaptable and how it enables a set of detailed and variegated micro-interactions involving different decision-makers and types of decisions. Inevitably, by constructing typologies one implicitly argues that the CJEU's operationalization of the margin of discretion-technique is not best understood as an absolute where one formula would satisfyingly capture all the dimensions of its operationalization. Instead, constructing typologies means that even though a core definition is identifiable, there is variability in the use of the technique, which ought to be singled out.

Constructing typologies therefore helps to carve out distinct forms and patterns within the core definition, which is, to repeat, *a method of adjudication whereby the CJEU identifies an instance of decision-making within a Member State and where the decision-making body has or will have discretion to decide on a shared commitment, such as the protection of fundamental rights, even though the CJEU has jurisdiction*.

Of course typologies are not ends in themselves, but they do help to answer other questions. Specifically, the typologies will answer questions about how certain variables affect the shape of the margin of discretion. Within the core definition one finds two key

variables; *the type of measure or legal source* to which a margin of discretion is analytically attached (an administrative decision, an executive decision, a legislative provision, a policy area) and the *type of decision-making body* responsible for it (an administrative body, an executive, the legislator).

These variables are intertwined and, importantly, conditioned at the outset by the structure of the legal claims and *the set of legal sources,* including the contested measure, involved in that legal conflict. In other words, certain legal claims will trigger certain legal sources and the margin of discretion will operate specifically in relation to these sources and engage the national decision-makers responsible for them. Hence, the margin of discretion is a source-sensitive technique of adjudication. This last point will be thoroughly evidenced in the following three chapters but it is also the starting point when constructing the typologies.

I introduce their characteristics in four steps. I will start by first explaining *the legal conflict* (1), which the margins of discretion address. This means understanding the litigant's claim and the legal sources that such claims typically trigger. Second, I will contextualize the legal conflict and delineate where in the EU legal system conflicts of this type are found. I refer to this as *the EU law geography* (2). Third, I will highlight the specific technical difficulty in the operation of the margin of discretion. I refer to this as *the technicality* (3).

Ultimately, I provide a set of *case law examples* (4) of the typology of margin of discretion-use. The exemplifications are not streamlined and therefore look different. This is so especially since they follow the idea of lines of cases. In other words, the structure organically follows the evolution of a specific margin of discretion typology. In some instances the lines are very clear and consist only of a few cases and in other instances I have had to make a selection due to the vastness of the material. The rationale of each exemplification is carefully motivated in the beginning of each chapter.

With the help of these four steps, the three typologies presented in this work are ***the deviation margin of discretion***, ***the balance margin of discretion*** and ***the compliance margin of discretion***.

The *deviation margin of discretion* is triggered in a setting where a litigant challenges a national measure on the grounds that it violates an EU-sourced fundamental right. The deviation margin of discretion then functions so as to accommodate a national deviation form the EU-sourced right.

The *balance margin of discretion* handles clashes between EU internal market law fundamental freedoms and the protection of fundamental rights. The balance margin of

discretion is attached to a national instance of decision-making understood to have achieved balance between these two competing interest.

The *compliance margin of discretion* is operationalized when secondary EU legislation is challenged on the grounds that it violates fundamental rights. The compliance margin of discretion is addressed to the competent national authority to ensure that the secondary EU source is applied in a fundamental rights compliant way.

This summary account already illustrates how the deviation margin of discretion handles EU-sourced fundamental rights as expressed in primary or secondary law, that the balance margin of discretion handles a measure which could be understood to embody a clash between EU-sourced fundamental freedoms and a fundamental right, and how the compliance margin of discretion handles EU secondary legislation accused of violating fundamental rights.

Thus the labels deviation, balance and compliance all relate to what the national decision-making, to which a margin of discretion is designated, is supposed to achieve. Deviation, balance and compliance thus represent the purposes of the margin of discretion as formulated by the CJEU, and concretely, what should be represented in the outcome of specific national decision-making. Hence, deviation, balance and compliance answer the question of why the CJEU chooses to operationalize the margin of discretion-technique, and what the national decision-maker is supposed to do within its designated margin of discretion.

Therefore the typologies truly illustrate the richness of the technique in terms of achieving certain outcomes, that in and of themselves go well beyond sorting subject-matters as belonging either to the European Union or to any specific Member State.

The point of this work is not however, to argue that deviation, balance and compliance margins of discretions are the only thinkable typologies of margin of discretion-use. Nor do I argue that this work covers every possible margin of discretion-case. For instance, I believe that *Åkerberg Fransson,*[184] and the body of admissibility decisions rejecting fundamental

[184] *Åkerberg Fransson* questions the compatibility between the protection of fundamental rights and national law that falls within the scope of EU law. However, the case comes from the family of fundamental rights adjudication that expands the scope of EU law because the EU trigger of the cases is considered ambiguous. The need for a technique which operationalizes national discretion is accordingly limited, and the reasoning often circles around explaining why the legal question is a question of EU law. In *Åkerberg Fransson* and its sister case *Melloni* the CJEU formulates a roadmap on how to handle the application of the Charter in this type of case. If there is an EU law primacy-problem the Charter standard of protection applies (like in *Melloni* para. 58), even if it lowers the overall standard of protection. In other words, it ties the rights protection to a minimum standard. If there is no primacy-problem however, the national court (or competent national authority) has a margin of discretion to apply the standard that it chooses (*Åkerberg Fransson* para. 36), a national constitutional right, ECHR right and so forth. However, it cannot "go under" the protection provided for by the Charter (*Åkerberg Fransson* para.29).

rights based challenges to the euro zone crisis measures[185] could both be areas within which it may prove fruitful to look for the construction of other typologies.

I do however argue that the deviation, balance and compliance margins of discretion represent at this point in time, the main uses of the margin of discretion-technique in the area of fundamental rights. In other words, the typologies presented in this work embody the central representations of the CJEU's use of the margin of discretion-technique to adjudicate fundamental rights.

Beyond this hint of further possible typologies, it is important to note the possibilities as well as the limits of typologizing. Young captures this tension when framing the operation of typologies as working to "classify previously disjointed features, and present clusters of analysis that were previously kept apart. Nonetheless, in advancing new clusters, and the insights that they deliver, typologies create blind spots and contradictions, or can operate to rationalize the status quo."[186]

In this vein, typologies draw their possible routes of analysis from the research agenda in which they are embedded. In this work the central research question is *how are margins of discretion used by the CJEU in its adjudication of fundamental rights?*

As explained before, in order to answer this question a variegated group of case law is handled, which cuts through several sectorial distinctions, the analysis expands on areas of EU law that are distinct from each other, such as the internal market, the secondary law social policy *acquis*, agricultural policy and immigration law, and hence presents clusters of analysis that were previously kept apart. Furthermore, these typologies place different fundamental right utilities in the same analytical framework: national constitutional rights, EU secondary law rights and EU primary law rights, the latter derived from both the Treaties and the Charter.

The analysis enabled by these typologies, I argue, gives a fuller picture of the use of margins of discretion to adjudicate fundamental rights while simultaneously making the detection of more complex patterns of interaction more likely. However it is equally important to appreciate that this method of creating typologies that I have used, which focuses on what the margin of discretion is designed to do with the legal source in question, is only

---

This points towards a use of a margin of discretion-technique whereby the competent national authority may choose a fundamental rights standard as long as this does not challenge the primacy of EU law. The Court therefore opens avenues for critique of the instrumentalism famously described by intrusion-narrators.
Case C-617/10, Åklagaren v Hans Åkerberg Fransson and Case C-399/11, Stefano Melloni v Ministerio Fiscal, both published in the electronic reports of cases.

[185] Kilpatrick and De Witte 2014, supra note 144 and Kilpatrick, C 2014, Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?, *European Constitutional Law Review* 10 (3), pp. 393-421.

[186] Young, KG 2012, *Constituting Economic and Social Rights*, Oxford University Press, Oxford, p. 195.

one possible focus. For instance, one could imagine constructing a research question and accordingly arranging typologies along the lines of: *did the use of margins of discretion increase between 1979-2009?* Or, *how is the margin of discretion-technique used in relation to specific fundamental rights?*

I thus maintain that the research question guides the construction of the typologies. In contrast with the rationales of these alternative research questions, the typologies presented in this work – deviation, balance, compliance – will not provide detailed statistical knowledge of the increasing or decreasing use of the technique. Rather the construction of typologies in this work will be an exercise in the re-reading of case law, which reconstructs lines of case law that traces the use of margins of discretion back to early fundamental rights litigation.

Moreover, I will thus not understand the CJEU's of the margin of discretion-technique in relation to specific fundamental rights, for instance each Charter-right, as is a common line of inquiry into the ECtHR's use of the margin of appreciation. I will only use the right-specific approach in the exemplification of the deviation margin of discretion, which notably originates in a legal conflict similar to that which the ECtHR is constructed to handle. Namely, a litigant challenges a national measure on the grounds that it violates a *E(U)ropean* right. This means that the method used in this work for typologizing the CJEU's use of margins of discretion that originates in the structure of the legal conflict may serve as a model for a comparative study of a portion of the CJEU's use of margins of discretions and the ECtHR's use of the margin(s) of appreciation. As already noted in chapter 2.2.2 however, such a comparative study will not be conducted in this work.

I started this chapter by extracting assumptions of separation of subject matter along jurisdictional lines from the core definition. Now, I will set out how the typologies of deviation, balance and compliance open up readings of the margin of discretion-material selected that centre on the interconnected decision-making enabled by the technique.

4.2.2 Function: Capturing Interconnected Norm-Articulation Beyond the Euro-National Binary

I maintain that already at the outset, the three typologies of deviation, balance and compliance, by virtue of their construction destabilize the euro-national dichotomy underpinning much of the analysis in important strands of legal thinking on the CJEU's adjudication of fundamental rights. The starting point I take when answering the question of how does the CJEU use margins of discretion to adjudicate fundamental rights, is centred on the legal conflict that the technique is operationalized to solve, namely when a litigant relies

on an EU fundamental rights source against a national measure, when an internal market fundamental freedom clashes with a fundamental right, and when EU secondary law is challenged on fundamental rights grounds. These points of departure allow for inquires which inevitably depart from the euro-national binary.

Indeed as explained above, notwithstanding their merit and importance binary-based questions and starting-points tend to lead away from investigations that seek to establish more complex patterns of interconnected forms of norm-articulation that cross jurisdictional boundaries.[187] As a result, and as illustrated by the dominant narratives of intrusion, improvement and diversity, analysis rooted in the euro-national dichotomy produces a categorization that exists both *ex ante* and *ex post* a European fundamental rights conflict. By this I mean looking for and focusing on the potential conflict between a fundamental rights standard of protection that is pertinent to the Member State and a fundamental rights standard of protection that is pertinent to the EU. Following this form of euro-national, conflict-oriented line of inquiry, one ends up both sticking to the binary – indeed the conflict depends on the binary – and being drawn to frame EU fundamental rights protection as centred around its (perceived) perennial conflict between national rights protection on the one hand and European Union rights protection on the other.

Instead, by carefully detailing how the operation of the margin of discretion relates intimately to the legal source in question in order to achieve deviation, balance or compliance, received euro-national categories will be questioned. Which in turns opens up the possibility of finding new ways of reading the EU's fundamental rights material. This is the methodological ambition underpinning the reconstruction of the three typologies.

In the following three chapters, I will present a reading that centres on the detection of interconnected forms of decision-making.

Looking at this multitude of sources and decision-makers in one analytical framework, hence aligning with the architecture of EU law and the set of legal conflicts it produces, helps make clear various patterns of interconnection. From the point of view of supranational adjudication, these sources and decision-makers create a web of possibilities for a euro-national, rather than European or national, formulation of the applicable standard of protection.

In order to convey the importance of departing from the euro-national binary as clearly as possible, the narratives of improvement, intrusion and diversity will be interwoven as points

[187] Such as, is the EU dominating the Member States in the area of fundamental rights protection? Yes. Is there a conflict between the EU and the national concerning the level of protection? Yes.

of contrast into the construction of the three typologies. I will show how the respective margin of discretion typologies, if studied *separately,* can perhaps more easily support narratives of improvement, intrusion or diversity. I will thus highlight when there is a correspondence between a narrative and the structure of a typology. However I will also describe how the different typologies represent profound challenges to the rationales of the dominant narratives. This will serve to fortify my characterization of the margin of discretion technique as an enabler of interconnected elaboration of the applicable standards of protection, which *ex post facto* an EU fundamental rights conflict, blurs jurisdictional boundaries.

This inquiry has important analogues in literature on transnational law and global pluralism. For instance, paralleling this dynamic, Glenn asks the question: "How is the transnational hampered by binary thought and logic and how might such a profoundly anchored manner of thought be overcome?"[188]

Berman gives one possible answer when he outlines his vision for a research agenda in the context of international legal pluralism, namely one that "emphasizes the micro-interactions among different normative systems. Such a case study approach would serve as a contrast to rational choice and other forms of more abstract modelling, by focusing instead on thick description of the ways in which various procedural mechanisms, institutions, and practices actually operate as sites of contestation and creative innovation."[189]

In sum, constructing margin of discretion-typologies along the lines of the legal conflict, and consequently the sources triggered, frees the analysis in such a way as to go beyond the euro-national binary. I argue that whatever its relative merit, boundary-driven analysis of the EU fundamental rights protection space has overshadowed other possible readings and organizational frames. Perhaps most importantly, at the expense of readings that focus on the collaborative and interconnected nature of EU fundamental rights protection, where the use of margins of discretion would be one example.

[188] Glenn 2014, supra note 75 at 63.
[189] Berman Schiff 20016, supra note 16 at 1168.

5. The Deviation Margin of Discretion

*

In this chapter I will look at how national margins of discretion are used to deviate from a fundamental right protected in a European Union legal source. The common core of these cases is that a litigant argues that a Member State's measure potentially violates an EU fundamental right, and a margin of discretion is used to accommodate that norm-deviating national measure.

The contested national measure could be a piece of national legislation, national policy or acts taken by public employers.[190] As such, the margin of discretion is directed towards legislative and policy-making bodies within the Member State and covers subject matters or broad policy areas, as opposed to for instance, specific administrative decisions.

The questions of rights violation that drive this type of case are typically posed by individuals who assume that the EU fundamental rights apparatus will give them stronger protection then their own state. Indeed, this is the situation cherished by the *improvement narrators*, where a litigant manoeuvres two legal systems to which he or she belongs, aiming to let the supranational improve the national.

Instead of unilateral EU rights enforcement however, I will consider examples of how national discretion is used to formulate acceptable norm-deviations and how the output of this national participation becomes an important component in the elaboration of the applicable standard of protection of the EU fundamental rights source. In other words, the structure of the deviation margin of discretion lives in a symbiotic relationship with the EU fundamental rights source.

I will study this type of EU fundamental rights conflict using the family of EU sex equality rights. This case study has the benefit of being understood as a prime example of EU rights enforcement, particularly by improvement narrators. Therefore studying national margins of discretion in this context is particularly instructive for laying out how the national is involved in formulating the standard of EU fundamental rights protection.

The principle of equal treatment is regulated in detail in a set of EU sources, particularly in secondary law, and the margin of discretion, as will be shown, relates closely to the wording of these directives, in particular their derogation provisions. The source-sensitivity of the

[190] I will not study horizontal relationships, see further footnote 236.

deviation margin of discretion makes the analysis of the form and shape of the margin of discretion more complex to detect and, once detected, less generalizable.

I have searched for margins of discretion within case law where litigants rely on their fundamental right to equal treatment between men and women in employment and occupation, as regards matters of social security, pay, the self-employed, in access to and supply of goods and services, and to their fundamental rights to maternity and parental leave.

Within this material, already extracted from a vast body of sex equality case law, I have identified three main lines of case law. I will start by looking at the right to protection from direct discrimination and how national deviations excluding women from the sphere of violence and men from the sphere of childcare have been accommodated using a national margin of discretion (1). These two themes will be discussed separately, albeit they bear a close resemblance. Then I will turn to the right to be protected from indirect discrimination and study a line of case law where the national social policy with *a priori* discriminatory effects have been constructed as being within a margin of discretion (2). Finally I will investigate the way in which a deviation margin of discretion has been used to constrain the right to maternal leave and paternal leave (3).

In sum, this chapter will show how national decision-makers have been involved, throughout the history of EU sex equality rights promotion, in the formulation of the applicable standard of protection.

5.1 Legal Conflict: A litigant relies on an EU fundamental rights source against a national measure

The origin of national margins of discretion, I stated earlier, is the fact of people living in overlapping jurisdictions. Here, my interest lies in the type of case where individuals become litigants and seek to use this overlap to show that the smaller units in which they live violate a right guaranteed by the larger unit. It is a quintessential supra-national fundamental rights conflict, cherished by those who, like the improvement narrators, understand judicial review by supranational courts as a possibility for betterment of the individual's fundamental rights protection.[191] These cases are therefore important testimonies about the working of EU

[191] Case 26/62, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, ECR [1963] I-209: "the vigilance of individuals concerned to protect their rights amounts to an effective supervision additional to that supervision entrusted by article 169 and 170 to the

fundamental rights from a litigant's perspective - will the EU's court correct national actions and establish that the individual was right in thinking that the EU gives a higher standard of protection? Or will it not?

This is, as has already been pointed out, a similar legal conflict to that which the ECtHR was created to handle. It asks to what extent a national deviation from a European (Union) right can be accepted. Hence, it is a similar context of legal conflict to that within which the ECtHR's margin of appreciation is operationalized.

I have outlined the rationales of the mainstream commentary on the ECtHR's margin of appreciation according to which the technique works to organize subject matters along jurisdictional lines. In contrast, and as will be explained below, the CJEU's deviation margin of discretion lives in a symbiotic relationship with secondary legislation in which a grand part of sex equality rights, as well as EU fundamental rights in general, are sourced. This detailed and source-sensitive operation of the deviance margin of discretion is therefore more intricate than the logics of mainstream commentary on the ECtHR's margin of appreciation. In sum, even though the underlying legal conflict is similar, the CJEU's deviance margin of discretion, as distinct from the ECtHR's margin of appreciation, relates to detailed sources in a way that conditions its shape. This point will be developed further in this chapter.

The question of rights violation that drives this line of case law, posed by individuals who assume that the EU fundamental rights apparatus will give them stronger protection than their own state,[192] does not mean that the right concerned is not protected on the national level. Importantly though, the protection might be formulated in a different way, be perceived by the litigant as covering them to a lesser extent and so forth. This means however, that in the cases discussed here, the right relied upon by the litigant is an EU-sourced right, derivable from primary law, secondary law and the Charter.[193] Hence, the EU fundamental rights source is the EU law trigger in the case.

Therefore the cases discussed in this chapter concern an area of law where the EU has played a visible role in progressively promoting fundamental rights protection.

---

diligence of the Commission and the Member State."

[192] Alternatively, the Commission might bring infringement procedures (article 258 TFEU) the CJEU may establish that the national decision-maker has a margin of discretion and as such does not violate EU law.

[193] As an exception, however, it should be noted that if a litigant seeks to rely on a Charter right not guaranteed in primary or secondary law sources, he or she needs to argue that the Member States implement EU law in the conflict-situation concerned. After *Åkerberg Fransson* implement is equivalent to being within the scope of EU law. Case C-617/10, Åklagaren v Hans Åkerberg Fransson, ECR [2013] nyr., para. 21.

5.2 EU Law Geography: The Sex Equality Case Study

Testing the use of national discretion in cases where an individual relies on an EU-sourced right to strike down a national measure could be an exercise covering a wide and diverse policy area. For instance, immigration law, data protection, environmental law and criminal law are fundamental rights areas where there are significant pieces of EU sources that contain, *inter alia*, individual fundamental rights.

In this section however, the use of national discretion will be tested within the group of rights constituting the EU's enforcement of sex equality. Namely, the right to equal treatment between men and women in employment and occupation, as regards matters of social security, pay, the self-employed, and in access to and supply of goods and services. Also included in this group of rights aiming to establish equal treatment of working men and women are the right to maternity leave and the right to parental leave.[194] Craig and de Búrca refer to the secondary sources of the above-mentioned sex equality rights as the *Gender Directives*.[195]

The motivation for this choice of case study is that EU law on equal treatment between men and women has a solid historic trajectory within the EU's fundamental rights system (1), these rights are sourced multiply and secondary sources are of central importance, which reflects the standard EU fundamental rights framework (2), and "equal treatment" has triggered narratives of improvement, yet very little on diversity, which would suggest the usefulness of reconstructing a trajectory of deference to national decision-makers (3).

Beginning with *history (1)*, equal treatment of working women and men is in the DNA of EU fundamental rights protection and has determined its development since the 1970s. This might seems like a strong claim but when thinking about the EU as a *promoter* of fundamental rights rather than a *respecter* or *incorporator* of national constitutional rights in particular, equal treatment in employment as well as social rights more broadly, are centrepieces. This point is illustrated by the way in which the fundamental right to property played an important role in developing the line of case law where the CJEU elaborated on how the EU *respects* fundamental rights and *incorporates* national constitutional traditions of

[194] Hence located within the broader EU social policy *acquis.* See article 153 TFEU.
[195] Craig, P and de Búrca, G 2011, *EU Law: Text, Cases, and Materials*, 5th edition, Oxford University Press, Oxford, p. 873-891. The authors, on p. 854, refer to this body of law as an "impressive constitutional framework."

protection.[196] In contrast social rights, and in particular the right to equal treatment, have been the subject of substantial pieces of EU secondary legislation ever since the 1970s and have triggered classic rights-promoting cases such as *Defrenne*.[197] In other words, the early right to property cases derived the right to property from national constitutions whereas the rights to equal treatment were derived from the EU legal material.

As such, the sex equality cluster of rights figures as an affirmative project within the EU and as a consequence, social rights as minimum protection of workers and equal treatment are normatively entrenched, albeit not uncontested,[198] within the EU legal order.

The law on equal treatment between men and women with EU genesis are formalized in a combination of *sources (2),* albeit centralized in secondary law. Indeed, primary law, secondary law and the Charter together constitute the right to equal treatment between men and women in employment and occupation,[199] as regards matters of social security,[200] pay,[201]

---

[196] See Case 11/70, Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel ECR [1970] 01125 and Case 44/79, Liselott Hauer v Land Rheinland-Pfalz ECR [1979] Page 03727.

[197] For secondary legislation consult the following: Firstly, social rights have been a subject of legislation before Maastricht, for instance, Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies, [1975] OJ L 48; Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, [1975] OJ L 39; Council Directive 77/187/EEC of 14 February 1977 relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, [1977] OJ L 61 and Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, [1977] OJ L 283. See however Bercusson for how the insufficiencies of this body of law led to the adoption of the non-legally binding Charter of Fundamental Social Rights for Workers: Bercusson B 1990, The European Community's Charter of Fundamental Social Rights of Workers, *The Modern Law Review* 53 (5), pp. 624-642. Secondly, social rights have been a subject of legislation between Maastricht and Lisbon, for instance, Council Directive 93/104/EC of 23 November 1993, concerning certain aspects of the organisation of working time, [1993] OJ L 307; Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, [1996] OJ L 145. And both the directives on collective redundancies and transfer of undertakings were amended in the pre-Lisbon period: Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, [1998] OJ L 225 and Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, [2001] OJ L 82. Furthermore, social rights feature prominently in the Charter in the chapters on Equality and, especially, Solidarity.

[198] For recent examinations of how EU fundamental social rights based challenges, especially with reference to the Charter, have failed to challenge the austerity policies taken in the economic crisis see: Kilpatrick 2014, supra note 144 and Kilpatrick, C 2015, On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts, *Oxford Journal of Legal Studies* 35 (2), p. 333ff. Furthermore, writing in 2015, this set of social rights features in the British renegotiations of EU membership.

[199] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), [1996] OJ L 204 has replaced the classic Directive 76/297/EEC. See article 2 TEU and 8 and 10 TFEU and the Charter's chapter on equality and especially article 23.

[200] See Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, [1979] OJ L 6 and article 2 TEU and 8 and 10 TFEU and the Charter's chapter on equality and especially article 23.

the self-employed[202] and in access to and supply of goods and services.[203] The right to maternity leave[204] and parental leave[205] also feature in secondary law and the Charter.

The EU sex equality framework thus represents the form of source-multiplicity that has characterized EU fundamental rights protection since its inception. A general evolution in the legal framing of sex equality within the EU project is discernable however; from a tendency to think about this set of equal treatment law as EU social policy to an increasing use of fundamental rights language.[206] The reasons for this evolution represent an interesting inquiry in its own right. I will however merely focus on the outcome.

The centrality of secondary legislation in the EU's mode of protection of equal treatment as a fundamental right inevitably challenges the ordinary understanding of constitutionalism as centred on one bill of rights.[207]

Eskridge and Freejohn, writing on US constitutionalism, take issue with the deeply rooted standard account of constitutionalism, namely that legislation does not bind and condition the way a constitution does. Hence, this is an idea of constitutionalism that gives rise to an understanding of legislation as a weaker form of source and as such as a lesser protection.[208]

---

[201] The right to equal pay is found in Article 157 TFEU (former article 119 EEC and former article 141 EC) and article 23 in the Charter. See Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, [1975] OJ L 45 and Chapter 1 of Directive 2006/54.

[202] See Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, [2010] OJ L 180 and article 2 TEU and 8 and 10 TFEU and the Charter's chapter on equality and especially article 23.

[203] See Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, [2004] OJ L 373 and article 2 TEU and 8 and 10 TFEU and the Charter's chapter on equality and especially article 23. This protection clearly goes beyond the labour market.

[204] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, [1992] OJ L 348 and article 33 of the Charter.

[205] Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, [2010] OJ L 68 and article 33 of the Charter.

[206] See Di Sarcina, F 2010, *L'Europa delle donne: la politica di pari opportunità nella storia dell'integrazione europea, 1957-2007*, Il Mulino, Bologna.

[207] As discussed in chapter 2.3 however, the idea of one bill of rights for every legal order has never been the best description of the EU's system of fundamental rights protection at large. For a formulation of questions guiding such discussion see Eskridge's and Ferejohn's examination of statutes and constitutionalism: "The new scholarship increasingly integrates the Constitutional doctrine, statutory interpretation, and administrative law in ways that call into question the central role that the Constitution of 1789 and judicial review are thought to play in American public law." Eskridge and Ferejohn 2010, supra note 57 at 61. For an argument about how the constitution can live in a closer relationship with people (non-lawyers) by popularising the "thin constitution" of aspirational values and principles, see Tushnet, M 2000, *Taking the Constitution away from the Courts*, Princeton University Press, Princeton.

[208] By contrast, Eskridge and Ferejohn, argue that that "an important institutional difference between adjudication (courts) and statutes (legislatures) is that the former normally cannot resolve problems that are polycentric, future oriented, and reallocational." This runs along the lines of thinking about fundamental social

The type of conflict situation studied in this section within the supranational setting of the EU, however, challenges the notion that legislation lacks the higher-law position that binds legislatures, governments, official and courts. Within the EU, and especially in line with the principle of supremacy, secondary legislation binds national legislatures and decision-makers. This means that from a litigant's point of view, in his or her quest to strike down a national measure EU secondary law functions as higher law. However, as will be evidenced in this section, national discretion could be operationalized in the process of adjudication in ways that renegotiate the precise conditions for supranational norm compliance.[209]

Moreover, secondary legislation has a structure that allows for a more detailed formulation of the fundamental right that it sets out to protect. For instance, questions about how discrimination should be detected, how long parental leave should be, and what is a permissible derogation from equal treatment feature with greater precision in the secondary source. This, as will be evidenced further below, affects the discretional space and the structure of the margin of discretion.

Given this background, it is noteworthy that "equal treatment in the EU" has triggered *narratives (3)* of improvement, yet very little on diversity. This point would suggest that the existence of deferential positions by the CJEU, connected to discourses on constitutional pluralism and national constitutional identity, is less examined in this area than the idea of using European rights to improve national standards of protection. This relative lack of interest in national discretion and equality law within the broader fundamental rights diversity discourse makes a study on the operation of national discretion more pertinent.

Put together, this creates interesting spaces for a study of the operationalization of the margin of discretion-technique in the area of EU sex equality law, and in particular on the type of conflict-situation examined in this section.[210]

---

rights as being particularly apt for protection in other forms that in "traditional" bill of rights. Eskridge and Ferejohn 2010, supra note 57 at 54.

[209] In this same vein, one could frame the issue of national discretion in the process of adjudication of social rights, understood broadly, within the rich (not necessarily European) literature on how "courts can enforce socio-economic rights but should do so in a weak-form or dialogical manner, whereby they point out violations of rights but leave the remedies to the political branches." Landau, D 2012, The Reality of Social Rights Enforcement, *Harvard International Law Journal* 53 (1), p. 192. Although the CJEU's use of national discretion is more multi-faceted than merely leaving the question of remedies to the national legislator, the literature on weak review is useful because it highlights and problematizes how fundamental social rights in different legal settings have been subjected to less rigorous forms of judicial protection, especially with reference to the distinction between negative and positive rights and to the realloctional function of social rights. This is a contextualization worth making when thinking about the CJEU's operationalization of national discretion in the adjudication of social rights more broadly. See also Young 2012, supra note 186.

[210] In Young's work on constituting social right she reasons about how the feasibility of social rights goes beyond formal law. Arguably, this thinking represents a classic line of critical inquiry but she argues that such approaches are vital in the area of social rights: "To make sense of the actuality of economic and social rights, it

5.3 Technicality: Versions of Source-Sensitive Norm Departure

This chapter will study departures from the norm of equal treatment. Within the parameters of EU law one finds a set of methods for legitimating a wide range of rule departures.[211] When the CJEU arranges departures from a fundamental rights norm that it is entrusted to protect, hence *de facto* establishing the applicable standard of fundamental rights protection in the case at hand, the deviation margins of discretion may be used to facilitate this process of constructing norm-departures.

In this way, the use of margins of discretion complements departures already formally sustained within the legal system.[212] These margins of discretions, in other words, live in a close symbiosis with the infrastructure for deviations from norms, such as sex equality, which are already structured in the EU legal material. This symbiotic relationship with the fundamental rights source represents the technical difficulty, indeed the elusiveness, of the deviation margin of discretion. This proximity to the sources means that it is more challenging to detect the ultimate function, or indeed the added value of the deviations margin of discretion.

I will present three lines of cases containing departures from the norm of equal treatment facilitated by a margin of discretion. These deviation margins of discretion represent a series of enterprises with substantial commonalities, albeit modelled in relation to differently structured sources and legal reasoning models.

The first version of such deviation margins of discretion deals with departures from the right to protection against direct discrimination as sourced in the Equal Treatment Directive (ETD) form 1976 (1). I will present two lines of cases in which the CJEU has used a margin of discretion to deviate from rights to protection against direct discrimination, while connecting its reasoning explicitly to the three derogation-provisions contained in the directive: occupational activities where sex constitutes a determining factor by reasons of

---

is necessary to depart from the study of purely formal law (…). Legal artefacts, including constitutions, statutes, human rights treaties, and judicial decisions, purport to give economic and social rights the authority of formal law. Reason, through providing the means to answer questions of social significance, universal reciprocity, and feasibility of the satisfaction of fundamental material interest, is required to sustain arguments that such interests amount to fundamental rights. (…) Under this construction, we are invited to explore the contours of interpretation, enforcement, and contestation that constitutes economic and social rights (…)" Young 2012, supra note 186 at 289.

[211] Kadish, MR and Kadish, SH 1973, *Discretion to Disobey: A Study of Lawful Departures from Legal Rules*, Stanford University Press, Stanford, p. 184.

[212] Ibidem at 208.

their nature or the context in which they are carried out, provisions protecting women as regards pregnancy or maternity, and provisions that regulate positive discrimination.

In sum, in these cases the CJEU refers to margins of discretion to indicate a prerogative to formulate the circumstances that may trigger one of these three grounds for derogation sourced in the directive.[213] In cases where women ask for equal access to work that might entail violence the CJEU grants a margin of discretion for the formulation of the circumstances subsequently understood to fit with the directive's derogation, which holds that where sex constitutes a determining factor for carrying out a specific work for reasons of nature or context no equal treatment is required (article 2(2) ETD). In the case of men asking for equal access to the care of babies, the margin of discretion is instead attached to national formulations of how pregnancy and maternity is best protected (article 2(3) ETD).

From the point of view of crystalizing the shape of the margin of discretion, the challenge lies in understanding the technique's symbiosis with the source's structure and how it operates so as to allow the Member States to formulate the circumstances, which the CJEU deems to fit the wording of the directive's derogation provisions. This method is more intricate than say, the mere establishment of a division of competence. With the use of a margin of discretion, compared to no use of a margin of discretion, the national level is explicitly consulted on how acceptable deviations should be formulated.

The second version of the deviation margin of discretion in this case study deals with departures from the protection against indirect discrimination (2). The protection against indirect discrimination based on sex has its own logic whereby the Court first establishes whether there is a *prima facie* indirect discrimination. Which is to say, does a certain measure, though formulated in neutral terms, affect one sex more than the other? However, and this is the second step, the CJEU will accept this condition, the *prima facie* discrimination, if it can be objectively justified. The deviation margin of discretion encompasses the contested measure and its aim, which may ultimately be considered by the CJEU to be objectively justified. This means that the margin of discretion fits with the reasoning structure the CJEU ordinarily deploys to evaluate a litigant's claim of indirect discrimination.

The third and last version of deviation margin of discretion within the sex equality case study (3) works so as to accommodate constraints of the EU-sourced rights to maternity leave

[213] Somek might be interpreted as arguing along these lines: "Whereas in cases of indirect discrimination objective factors are considered in the course of a more or less rigorous application of a proportionality test, cases of direct discrimination can be disposed of by evoking one special, and wholly diffuse, objective factor, namely the difference in situations. The derogating reason is thus presented as though it resided in the facts themselves." Somek 2011, supra note 111 at 124.

and parental leave. Again, closely formulating the margin of discretion in connection with the wording, the CJEU uses the technique to ultimately constrain the material scope of these fundamental rights. In other words, the CJEU involves the national decision-maker in such a way as to provide a standard of protection that incorporates the Member State's reading of maternity or parental leave into its own adjudication. Thus, as distinct from the second means of handling indirect discrimination, the CJEU understands the EU as advancing a general policy aim (for instance the protection of women during pregnancy) and the Member State is given a margin of discretion to elaborate on the content of the right (for instance maternity leave) as long as it respects the policy aim. This means that the litigant who sought to rely on the jurisdictional overlap in order to access a higher protection regulated in the EU sources ends up with nothing.

In sum, the structure of the secondary sources discussed in this work counts on the Member State to organize social policy to which rights to equal treatment may be relatable. EU law, like legal systems in general, has mechanisms for legitimizing rule departures and the deviation margin of discretion operates and is structured in a way that fits with these.

The difficulty with deviation margins of discretion being used in the context of these source-sensitive norm departures lies in defining on the one hand when a margin of discretion is used to accommodate the norm departure, and on the other when the CJEU can satisfyingly solve the case by relying solely on the structure of the secondary source.[214]

This closeness to the source structure thus means that there is a fragile distinction between the instances where the CJEU experiences a need to resort to a margin of discretion and the instances where the structure of the source itself provides the necessary infrastructure for norm-departure. Indeed, this might even be said to be particularly problematic in the

[214] For instance in Kreil, a women and violence case, AG La Pergola sums up case law up to that point which contains deviations from the norm of equal treatment motivated by the women and violence and men and babies paradigms. In this summary one finds operationalized both margins of discretion and the lack thereof, illustrating again the difficulty of immediately identifying the criteria guiding the use of deviation margins of discretion in the Court's case law. See Opinion of Mr Advocate General La Pergola delivered on 26 October 1999, para 18: "In Commission v United Kingdom, respect for patients' sensitivities led the Court to regard as justified certain restrictions placed on men only in relation to the activity of midwife. In Johnston, the exclusion of women from armed units of the British police stationed in Northern Ireland was permitted because the presence of women could have created additional risks of their being assassinated and might therefore have proved incompatible with the requirements of public safety, thereby causing harm to local people. In Case 318/86 Commission v France, the Court held that it was justified, within the meaning of Article 2(2), to recruit male and female staff separately, for both the post of prison warder, which involves regular contact with detainees, and the post of head warder, with responsibility for running a prison, in view of the professional experience gained in the corps of custodial staff, which is useful for the exercise of an activity that involves managing all the other warders. In Sirdar, finally, I concluded that, in principle, a policy of men-only recruitment into the élite corps of the Royal Marines appeared to be justified since it could not be ruled out that the admission of women could have an adverse effect on the morale and cohesion of the soldiers within the commando units, thereby undermining their combat effectiveness to the detriment, in the final analysis, of the United Kingdom's defence requirements."

thoroughly regulated (by EU standards), sex equality fundamental rights field. While this choice of case study is useful given that equal treatment is a well known fundamental rights achievement, it is equally complex because of the multiple and detailed sourcing.

Consequently, these lines of cases, which I have carved out in of a vast body of equal treatment case law, are still surrounded by case law where the CJEU allows for deviations from the principle of equal treatment but where there is no direct or indirect reference to margin of discretion language. I will not comprehensively answer the question of why the margin of discretion is not used in certain cases. I will only tentatively note that the deviation margin of discretion seems to enter as a supplement when the CJEU appears to consider the EU sources as not entirely sufficient to motivate the norm departure ultimately accepted in the case. However, as stated earlier, perhaps more important is the output where a margin of discretion is used, compared to no use of a margin of discretion - the national level is explicitly consulted on how acceptable deviations should be formulated.

These specificities mean that even though the structure of the legal conflict to which the deviation margin of discretion responds is the same as the legal conflict which the ECtHR's margin of appreciation handles, the CJEU's deviation margin of discretion is modelled to fit a detailed fundamental rights source. These EU secondary-sourced rights, compared to the vaguely worded European Convention rights, condition the operationalization of the margin of discretion by adapting it to the narrow setting of the source structure.

As distinct from the ECtHR's margin of appreciation, the detailed structured of the EU sources invite the national decision-maker to contribute to the CJEU's elaboration of the applicable standard of protection within the specific framework of the source. In contrast, at the very least according to mainstream commentary on the ECtHR, the margin of appreciation does not attach the national practice to any explicit exit route contained in the Convention, rather it separates in its reasoning the subject matter from the European Convention's world.

The deviation margin of discretion, because of its source-sensitive nature, provides material to the CJEU's own fundamental rights interpretation, which is relatable and attachable to the EU source.

In other words, a subject matter that could be characterized *a priori* as a national matter (violence, babies, social policies), becomes the material that motivates lawful departures from the enforcement of the protection of a EU fundamental right. This understanding is further substantiated by the CJEU's own vision of these cases as being within the scope of EU law. The CJEU regularly returns to the affirmation that since an EU fundamental right applies to the situation the deviations and the circumstances constituting these deviations are not outside

of the scope of EU law. In addition, these cases frequently contain references to the evolution of EU law such as "Community law as it stands" or "Community law in its current state," and hence alludes to the notion that the acceptability of these deviations might be subjected to oversight in the future.

In sum, I argue that the better understanding of this interaction is not one which centres on upholding a jurisdictional dichotomy, but rather interprets the CJEU's choice to resort to margin of discretion language as an invitation to the national decision-maker to participate in the formulation of the applicable standard of protection, which is different from the CJEU formulating its own view of the outer limits of EU law. The national formulations, through the margin of discretion, become incorporated into the CJEU's reading of its own fundamental rights material. The margin of discretion thus incorporates the circumstances constituting norm deviation into the framework of the EU source.

5.4 Examples of Deviation Margins of Discretion

5.4.1 Direct Sex Discrimination: The Women and Violence-Deviant

Motivated, he said, by the high number of assassinated police officers in Northern Ireland, the Chief Constable of the Royal Ulster Constabulary (RUC) decided not to equip women serving in the reserve forces with firearms. Since however, a majority of the tasks of the reserve police force required the carrying of arms, the chief constable thought it best not to renew the contract of his female employees. Marguerite Johnston had been in the full time reserve force since 1974 and worked without formal complaint until 1980, when the Chief Constable refused to renew her contract. Marguerite Johnston's case was referred to the CJEU.[215]

Johnston does not contain any margin of discretion-language. However the case introduces a method, which becomes a point of reference for subsequent cases in this line of case law on derogations from the right to equal treatment triggered by the combination of women and violence. In contrast, the subsequent cases do refer to margin of discretion-language. I include *Johnston* in this section because it serves to illustrate how closely the deviation margin of discretion is linked to the directive's derogation provision. Though *Johnston* appears to be a case about the mere application of the derogation clause, in addition one finds a legal

[215] Case 222/84, Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary, ECR [1988] 01651.

reasoning structure, which in future case law opens up a space for the use of a margin of discretion.

The Court's reasoning hinges on the derogation to equal treatment provided for in article 2(2), which allows Member States to exclude from the field of the directive's application those occupational activities for which by reason of their nature or context the sex of the worker constitutes a determining factor.

Despite the "exclude from its field of application" formula in the directive, the CJEU does not hold that the organization of reserve forces is outside of the scope of EU law. Furthermore, the CJEU concludes that merely guaranteeing public safety or general policing activities are not sufficiently strong reasons to depart from the principle of equal treatment guaranteed in the directive.

The CJEU instead continues by referencing the situation in Northern Ireland,[216] and states: "In such circumstances, the context of certain policing activities may be such that the sex of police officers constitutes a determining factor for carrying them out. If that is so, a Member State may therefore restrict such tasks, and the training leading thereto, to men."[217]

The CJEU does not state that the Member State has a margin of discretion to formulate circumstances and responding policies which deviate from the principle of equal treatment, which fits with the directive's vaguely formulated derogation provision. Reading this paragraph closely however, one notes how the CJEU indicates the Member State's discretion to formulate policies through the wording "may be such" and "if that is so." Hence, the national formulates the acceptable circumstances, which fleshes out the directive's derogation-formulations of "nature" and "context." This template is reused in subsequent case law.

In *Johnston* the Member State participates in formulating the circumstances, which triggers the norm departure, but the CJEU does not fully conceptualize it even though, in a sign of deference to decision-makers on the national level, it finally left it to the national court to decide whether the measure was proportionate. In sum, this case becomes a point of reference for future cases with straightforward margin of discretion-language, most prominently *Sirdar* and *Kreil*.

Angela Maria Sirdar had been in the British army since 1983; in February 1994 she was made redundant for economic reasons, a decision that affected over 500 people serving in the

[216] *Johnston*, para. 36: "characterized by serious internal disturbances the carrying of fire-arms by policewomen might create additional risks of their being assassinated and might therefore be contrary to the requirement of public safety."
[217] *Johnston*, para. 37.

British military forces.[218] In July however, she received an offer of transfer to the Royal Marines who needed to rehire. The Royal Marines subsequently discovered that she was a woman and therefore the offer of service in the "point of the arrow head" was made to her erroneously. Her case was referred to the CJEU.

With explicit reference to *Johnston* the CJEU begins by affirming that the subject matter of the case (equal treatment applied to the use of force in the context of military service) does not fall outside the scope of EU law.

Relying on the same article 2(2)-derogation as in *Johnston* the CJEU this time makes explicit reference to margin of discretion-language and states that "depending on the circumstances, national authorities have a certain degree of discretion when adopting measures which they consider to be necessary in order to guarantee public security in a Member State."[219] The CJEU thereafter states, by referencing the information in the documents in the case, that "the organisation of the Royal Marines differs fundamentally from that of other units in the British armed forces, of which they are the 'point of the arrow head.' They are a small force and are intended to be the first line of attack. It has been established that, within this corps, chefs are indeed also required to serve as front-line commandos, (…). In such circumstances, the competent authorities were entitled, in the exercise of their discretion as to whether to maintain the exclusion in question."[220]

This time explicitly, the CJEU notes that certain circumstances trigger norm departure and that the Member States are given a margin of discretion to formulate these circumstances. Subject of course, to proportionality review and the requirement of a legitimate aim such as public security.

What is the margin of discretion used for? It is used to create a space where the national decision-maker can formulate circumstances that will trigger a deviation from the right to equal treatment. The CJEU will then accept these circumstances and turn them into the applicable standard of protection by defining what is a justifiable derogation, in accordance with the 2(2) wording of "nature" and "context," from the right to equal treatment. The margin of discretion does not encompass any question relatable to national security but is structured so as to formulate the circumstances (the point of the arrow head), which fits with

[218] Case C-273/97, Sirdar v Army Bd, [1999] ECR 7403.
[219] *Sirdar*, para. 27.
[220] *Sirdar*, paras, 30- 31.

the structure of the directive,[221] rather than merely excluding the sphere of national security, internal and external, from the enforcement of EU sex equality rights.

In sum, this national prerogative of interpretation in relation to women in violent and extreme circumstances is within the margin of discretion and embodies, as long as the measure is proportionate, a justifiable derogation under the directive's nature and context wording. The *circumstances* thus both motivate the use of margins of discretion and constrain the right to equal treatment.

These circumstances could however, be too widely conceived,[222] as in *Kreil*, where the German military argued that all armed positions should remain male.[223] Such an exclusion of women, which applied to almost all positions, "cannot be regarded as a derogating measure justified by the specific nature of the posts in question or by the particular context in which the activities in question are carried out."[224] As such, Germany went outside of its margin of discretion by presenting circumstances so broad that they did not fit the 2(2) derogation provisions. Consequently, this measure could not be considered proportionate to the aim of maintaining public security.[225]

The CJEU, as has been shown, insists on the subject matter as being within the scope of EU law but invites the national to formulate a compelling narrative of violence and describe why sex discrimination is acceptable in that context. Subsequently, with *Kreil* and as of late *Napoli,* as exceptions, the CJEU accepts these formulations and fits them into the directive's categories of context and nature.[226]

In other words, we are not looking merely at a division of competence*,* but rather a local or national formulation of a context, which determines the applicable standard of protection of the EU right to equal treatment.

---

[221] See also, Case 318/86, Commission of the European Communities v French Republic ECR [1988] I-03559, where the CJEU found that the French authorities were free to restrict women's access to certain positions in prisons, such as wardens and head prison wardens. This case does not mention margin of discretion but simply dismisses the Commission's claim of violation of the right to equal treatment, as if the reasons were self-evident.
[222] See also in Case C-186/01, Alexander Dory v Bundesrepublik Deutschland, ECR [2003] I-02479, concerning the potentially discriminatory consequences of compulsory military service being imposed only on men, the CJEU, drawing on the degree of discretion language in *Sirdar* and *Kreil*, concludes that the organisation of the armed forces cannot be completely excluded from the application of the EU's equal treatment protection, especially since it relates to employment and occupation. In Dory, the CJEU constructs the question as being about military organisation more broadly (not directly related to employment and occupation), and therefore "Community law does not preclude" such organizational choices. Overall then Alexander Dory tried, but according to the CJEU failed, to show that compulsive military service delayed his career and possibilities of employment.
[223] Case C-285/98, Tanja Kreil v Bundesrepublik Deutschland, ECR [2000] I-00069.
[224] *Kreil*, para. 27.
[225] *Kreil*, Para. 29: "even taking account of the discretion […] the national authorities could not, without contravening the principle of proportionality" adopt the position that the *Bundeswehr* remained all male.
[226] Case C-595/12, Loredana Napoli v Ministero della Giustizia, ECR [2014] nyr.

Women and state sanctioned use of violence is the recurring theme of this line of cases, which address derogations to *the right to protection from direct discrimination*. This combination – the use of violence and women – introduces a parallel storyline to the theme of the EU driven promotion of the right to equal treatment, which is an important source of inspiration for the improvement narrative. While potentially susceptible to historicization, it still represents an important counter narrative to an often-told story.

These cases thus constitute an example of the meeting of a strong EU fundamental rights-achievement and a subject matter that is traditionally considered an example *par excellence* of state competence, namely legitimate uses of violence for reasons internal or external to the state territory. I began with this line of cases because of this *a priori* separation of the two subject matters along territorial lines. Yet this line of cases reveals a shared responsibility for norm departure.

5.4.2 Direct Sex Discrimination: The Men and Babies-Deviant

I will now turn to a line of cases where men seek access to *parental leave litigated through the right to equal treatment*. Essentially, these male litigants argue that they too should have access to the leave granted to mothers. Just as in the case of women in violent contexts the CJEU observes how certain "circumstances" trigger national discretion to deviate from the principle of equal treatment through the exit-routes provided in secondary sources. The CJEU does not unilaterally formulate these circumstances but imports them from the national level.

The year is 1983 and the Commission litigates a series of cases against Member States who, according to the Commission, had failed to implement the 1976 Equal Treatment Directive. The Commission, for instance, challenges an exclusion of men from the midwifery profession,[227] and an exclusion of adoptive fathers from leave granted to adoptive mothers.[228] In both these cases the CJEU is reluctant to follow the Commission's lead and enforce the

[227] Case 165/82, Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland, ECR [1983] 03431, para. 20. In this case, the CJEU accepted that men could be excluded from the midwifery profession and therefore did not strike down a systematic rejection of their right to equal treatment by stating in paragraph 20: "it may be stated that by failing fully to apply the principle laid down in the directive, the United Kingdom has not exceeded the limits of the power granted to the Member States by Articles 9 (2) and 2 (2) of the directive."

[228] Case 163/82, Commission v Italy, ECR [1983] 3273, para. 16: "However, the adoptive father does not have the right given the adoptive mother of maternity leave for the first three months following the actual entry of the child into the adoptive family. That distinction is justified, as the Government of the Italian Republic rightly contends, by the legitimate concern to assimilate as far as possible the conditions of entry of the child into the adoptive family to those of the arrival of a newborn child in the family during the very delicate initial period. As regards leave from work after the initial period of three months the adoptive father has the same rights as thee adoptive mother."

principle of equal treatment and instead the Court accepts these national deviations as fitting article 2 ETD.

Still 1983, and the Commission turns to Germany to challenge the rules on maternity leave which, beyond the 8 weeks following child birth, held that mothers were in addition exclusively entitled to remunerated leave following these eight weeks until the child reached the age of six months.[229] They drop the case however, when Ulrich Hofmann, father of a newborn child, decided to challenge the German legislation on the ground that it violated his EU-sourced right to equal treatment. [230]

Ulrich Hofmann, with the consent of the mother of the child and Hofmann's employer, had been at home with the child after the 8 weeks period, however without being paid.

The CJEU stated that even though the directive was designed to implement the principle of equal treatment, the derogation-provision of article 2(3) stated that the "directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity." The CJEU continues by fleshing out this protection as concerning "a woman's biological condition during pregnancy and thereafter until such time as her physiological and mental functions have returned to normal" in addition to the protection of "the special relationship between a woman and her child over the period which follows pregnancy and childbirth."[231]

The CJEU then goes on to explains how the materialization of these questions are linked to the system of social protection and that "the Member States enjoy a reasonable margin of discretion as regards both the nature of the protective measure and the detailed arrangement for their implementation."[232]

The "nature of the protective measure" enabling the protection of pregnant women is left to the Member State to formulate. This policy area is described as being embraced by a margin of discretion. In other words, men and their babies that for equal treatment reasons try to enter into the childcare sphere find their circumstance placed within the margin of discretion of the Member States. This means that when it comes to men's equal access to their babies the Member State may assist in formulating, through the margin of discretion-technique, the definition of the applicable standard of the EU-sourced right to equal treatment. A definition that is re-applied in Spain 20 years later.

[229] See Case 248/83, Commission v Germany, ECR [1985] 01459.
[230] Case 184/83, Ulrich Hofmann v Barmer Ersatzkasse, ECR [1984] 03047.
[231] *Hofmann*, para. 24-25.
[232] *Hofmann*, para. 27.

In 2013, Betriu Montull is confronted with a similar situation to that of Ulrich Hofmann.[233] Betriu Montull and Macarena Ollé's son was born on 20 April 2004. Ollé worked as a self-employed lawyer and was as such was not entitled to the full 16 weeks maternity leave granted to employed people but only to the mandatory 6 weeks immediately following childbirth. Betriu Montull, on the other hand, was employed and applied for the subsequent 10 weeks. His request was rejected on the grounds that he was the father, not the mother of the child.

Throughout its reasoning the CJEU makes close reference to *Hofmann*, hence indirectly referencing margin of discretion-language, and upholds the essence of that ruling, without however making explicit reference to a margin of discretion as in *Hofmann*. The CJEU states: "by reserving to the Member States the right to retain or introduce provisions which are intended to protect women in connection with pregnancy and maternity, Article 2(3) of Directive 76/207 recognises the legitimacy, in terms of the principle of equal treatment of the sexes, first, of protecting a woman's biological condition during and after pregnancy and, second, of protecting the special relationship between a woman and her child over the period which follows childbirth (…)." A measure such as that at issue in the main proceedings is, in any event, intended to protect a woman's biological condition during and after pregnancy."[234]

The CJEU upholds the protected policy area "by reserving to the Member States the right to retain or introduce provisions" in which the mother's biological condition and her special relationship with the child reside. The state may thus deviate from the right to equal treatment in access to parental leave for employed parents if it verifies that it has the purpose of protecting maternity leave as a space that celebrates the special connection between mother and child.

The Member State is in this way permitted to fill this space with regulatory exclusions of men and their babies, and accordingly to formulate acceptable deviations to the EU rights to equal treatment.

5.4.3 Indirect Sex Discrimination: How To Objectively Justify Departing from Social Policy

The CJEU stated: "Those principles and objectives form part of a social policy which in the current state of Community law is a matter for the Member States which enjoy a reasonable

[233] Case C-5/12, Marc Betriu Montull v Instituto Nacional de la Seguridad Social (INSS), ECR [2013] nyr.
[234] *Montull*, paras. 62-63.

margin of discretion as regards both the nature of the protective measure and the detailed arrangement for their implementation."[235]

Here, the CJEU refers to the principles and objectives of national legislation accused of violating the EU-sourced right to protection from indirect sex discrimination. In this section, the author of the contested measure is the *national legislator* or a competent national policy-making body.[236] The theme is thus an encounter between social policy, which is a domain considered as pertaining first and foremost to the Member States, and the EU-sourced right to equal treatment.

I will sketch the contours of a method for establishing objectively justifiable departures from the right to protection against indirect sex discrimination, namely the way the CJEU understands a national measure and the aim of that measure to analytically reside within a margin of discretion, albeit subject to review by the CJEU.

There is an impressive line of cases on *the right to equal treatment as a protection against indirect discrimination between men and women*, which is the extension from direct

[235] This wording or very similar framings appear in all cases discussed in this section. Apart from the cases discussed in some detail below see also, on indirect discrimination in relation to matters of social security: Case C-229/89, Commission of the European Communities v Kingdom of Belgium, ECR [1991] I-02205, para. 22; Case C-226/91, Jan Molenbroek v Bestuur van de Sociale Verzekeringsbank, ECR [1992] I-05943, para. 15. On indirect discrimination in employment: Case C-322/98, Bärbel Kachelmann v Bankhaus Hermann Lampe KG, ECR [2000] I-07505, para 30.

[236] In addition to this group one could consider cases regarding private employees who use the EU-sourced right to protection against indirect discrimination to challenge decisions by their employers (horizontal relationship). No margin of discretion language is used and it is submitted that this is due to the fact that the author of the discriminatory measure represents him or her self rather than the Member State. The CJEU use the following standard formula to empower the national court in decision-making "it is for the national court, which has *sole jurisdiction to make findings of fact*, to determine *whether and to what extent* the grounds put forward by an employer to explain the adoption of a (…) practice which applies independently of a worker's sex but in fact affects more women than men *may be regarded as objectively justified* (…). If the national court finds that the measures chosen (…) correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued and are necessary to that end, the fact that the measures affect a far greater number of women than men is not sufficient to show that they constitute an infringement (…).". See Case 170/84, Bilka - Kaufhaus GmbH v Karin Weber von Hartz, ECR [1986] 01607, para 36. For similar constructions see: Case 96/80, J.P. Jenkins v Kingsgate ECR [1981] 00911 para. 14; Case 171/88, Ingrid Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co. KG, ECR [1989] 02743, para. 15; Case C-281/97, Andrea Krüger v Kreiskrankenhaus Ebersberg, ECR [1989] 1999 I-05127, para 28 – 29 (collective agreement excluding people in minor employment from social security).

The CJEU allows the national court to decide on whether an *a priori* case of indirect discrimination by a private employer is objectively justified. It thus parallels the margin of discretion structure in that it invites the national court to handle the assessment of the justifiable. But as distinct from the margin of discretion that indicates a decision or a subject matter that is within a national margin of discretion, here the CJEU outsources review and fact-finding.

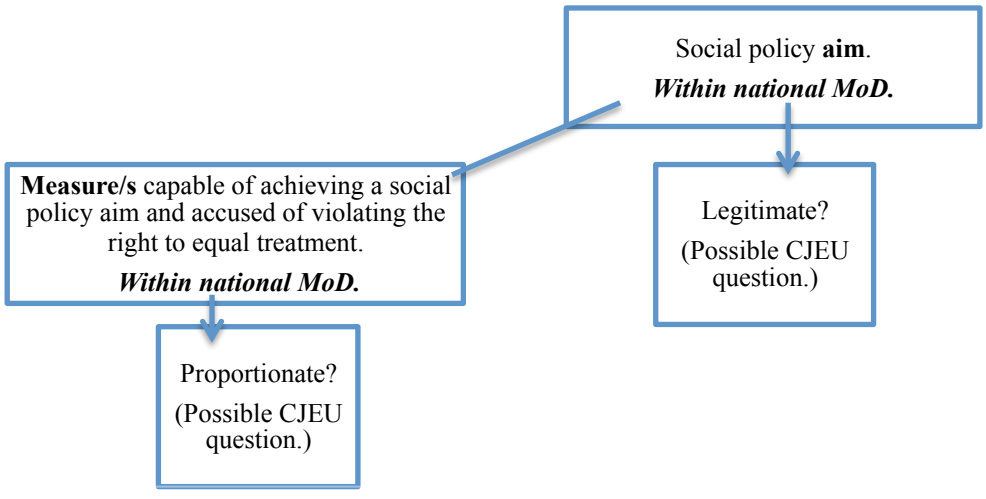
However, it is important to not be deceived by the "has the sole jurisdiction" formula, Sabine Defrenne challenged her employer before the CJEU and won, a case that remains an important centrepiece in EU fundamental rights promotion.

discrimination to such treatments that have the effect, if not the formal language, of disadvantaging one of the two sexes.[237]

In the Court's work on indirect discrimination it first establishes whether there is a *prima facie* indirect discrimination. Which is to say, does a certain measure, albeit formulated in neutral terms, affect one sex more than the other? However, and this is the second step, the CJEU will accept this condition, the *prima facie* discrimination, if it can be objectively justified by the author of the measure.

In this scheme the margin of discretion enters at the stage of determining what is objectively justified. This means that the margin of discretion fits with the reasoning structure the CJEU ordinarily deploys to evaluate a litigant's claim of indirect discrimination. The margin of discretion is analytically attached to the contested measure and the aim of that measure, which is illustrated in the diagram below. This construction with both measure and aims enables the CJEU to place broader policy areas within a margin of discretion, rather than just specific decision-making.

This means that the deviation margin of discretion embraces both the national legislator's definition of the aspiration of its policy, which for instance could be *recruitment*, *budget cuts,* or framed more loosely as *employment and social policy*, and the manner in which this should be achieved.



The margin of discretion encompasses contested measures and their goals as formulated by a national body. A measure accused of violating the right to equal treatment, analytically placed within a margin of discretion may also be subjected to review to establish whether it is

[237] In most Member States, EU law introduced the concept of indirect discrimination. See Prechal 2004, supra note 105 at 535.

objectively justified. As illustrated in the diagram, the CJEU may ask whether the measure is proportionate and the aim of the measure is legitimate. Importantly, the intensity of the review varies and the CJEU can omit these questions and implicitly or explicitly assume that a measure is proportionate and the aim is legitimate. This means that the margin of discretion varies in terms of what it indicates. It could thus encompass what is instantaneously understood by the CJEU to be objectively justified, without any further active review. However the deviation margin of discretion could also signal what should be reviewed for proportionality and legitimacy in order to ultimately be classifiable as objectively justified.

Even though the counterpart is the national legislator, the CJEU does not itself refer to the protection of democratic deliberation as a superior value motivating a margin of discretion, but merely defines social policy as "a matter" for the Member States. The CJEU talks to national constituent power from the position of ultimately having the power to strike down its decision.[238] It is "a matter" thus not exclusively in the hands of the Member State's democratic institutions.

In sum, in this type of case handling legislative decisions, the margin of discretion embodies an elusive mixture of classic judicial review prerogatives and a value-neutral selective inclusion of democratic choice into the adjudication of EU-sourced rights. The CJEU decides when to open up its adjudication of the EU-sourced right by inviting the national legislator to participate in the formulation of the applicable standard of protection through establishing objectively justifiable deviations. Again, the margin of discretion operates as a method for facilitating legitimized norm departures within the EU system of fundamental rights protection, rather than to externalize subject matters from one jurisdiction to the other. I will now turn to a series of examples illustrating this point.

Inge Nolte, Ursula Megner and Hildegard Scheffel worked part time cleaning offices a few hours each day of the week.[239] Under German law under 15 hours of work per week was considered minor employment and therefore did not qualify Nolte, Megner and Scheffel for basic social security such as old age, invalidity and sickness insurance.

Nolte by herself, and Megner and Scheffel together challenged the German legislation on the ground that a significantly larger portion of people in minor employment were women and therefore the exclusion from basic social security had a discriminatory effect.

---

[238] See Young: "In exercising deferential review, courts give credence to the democratic authority and epistemic superiority of, and textual conferral of tasks to, the legislative and executive branches." Young 2012, supra note 186 at 143.

[239] Case C-317/93, Inge Nolte v Landesversicherungsanstalt Hannover, ECR [1995] I-04625, Case C-444/93, Ursula Megner and Hildegard Scheffel v Innungskrankenkasse Vorderpfalz, ECR [1995] I-04741.

This is an emblematic example of a litigant relying on the supranational structure, in this case the right to *protection against indirect discrimination in matters of social security* sourced in a directive, to challenge a Member State's nation-wide policy. The CJEU holds that "in the current state of Community law, social policy is a matter for the Member States (…). Consequently, it is for the Member States to choose the measure capable of achieving the aim of their social and employment policy. In exercising that competence, Member States have a broad margin of discretion."[240]

It is important to start by noting how the CJEU does refer to the treaty provisions that "reserve to the Member States the power to define their social policy."[241] However this does not alter the application of the directive. In other words, I argue that this use of margins of discretion cannot be explained as a way of withdrawing the application of equal treatment rights, because they *do apply,* not only as a general principle but also as specified by the directive. The EU right is there, the individual is within its scope, the CJEU has jurisdiction.

Instead, the CJEU operationalizes a margin of discretion to establish by legal reasoning that social policy that *a priori* deviates from the norm of equal protection, is indeed objectively justified. Here more so than in the two lines of case law on deviations from direct discrimination, the margin of discretion operates more independently from the fundamental rights source but still within a well-established legal reasoning structure. While the equal treatment in matters of social security directive contains a provision that excludes from its scope certain aspects of old age pensions and certain derived entitlements (article 7), it does not have similar provisions to the equal treatment directive's fairly open-ended derogation provisions establishing sex as a determining factor, dealing with the protection of pregnant workers and maternity, and measures promoting positive discrimination.

Therefore I argue that the best understanding of this technique is that the margin of discretion independently identifies social policy which deviates from the norm of equal treatment, and that is ultimately understood by the CJEU to be objectively justified. The national legislator's norm departure that resides within a margin of discretion therefore reshapes the neatly European element of the EU-sourced right and opens up the formulation

[240] *Nolte*, para 33.

[241] See also on the same point: Case C-280/94, Y. M. Posthuma-van Damme v Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen and N. Oztürk v Bestuur van de Nieuwe Algemene Bedrijfsvereniging, ECR [1996] I-00179, para. 26: "Directive 79/7 leaves intact the powers reserved by Articles 117 and 118 of the EC Treaty to the Member States to define their social policy within the framework of close cooperation organized by the Commission, and consequently the nature and extent of measures of social protection, including those relating to social security, and the way in which they are implemented. In exercising that competence, the Member States have a broad margin of discretion (Nolte, paragraph 33, and Megner and Scheffel, paragraph 29)."

of its standard of protection to national participation. The national legislature, when included in the formulation of the fundamental right to equal treatment, contributes with its understanding of what the contours of protection are supposed to look like, which is subsequently accepted by the CJEU.

Consistent with this last suggestion of intertwined elaboration, there are methods of sharpening the CJEU's scrutiny of what is legitimate and entering into a more detailed imaginary discussion with the national legislator, as intimated above.[242]

In concrete, the CJEU can formulate criteria guiding how the proportionality test should be constructed in relation to measures accused of violating the right to equal treatment, or as is more frequent, the CJEU can engage in an elaboration of what constitutes a legitimate aim of national social policy.

First, in general terms, in *Seymour-Smith and Perez*, a challenge to a British rule that required two years of employment prior to dismissal in order to have standing to challenge the dismissal, the CJEU circumcises the broad margin of discretion used in *Nolte* and *Megner and Scheffel* by stating that it (the margin of discretion) cannot have the effect of frustrating the implementation of a fundamental principle of Community law (equal treatment).[243] In *Seymour-Smith and Perez* the Court continues by reflecting on the social policy aims that in previous case law have been constructed as residing peacefully within a margin of discretion. "Mere generalizations concerning the capacity of a specific aim to encourage recruitment" are not enough to show that the *aim* is legitimate.[244]

Scrutinizing the aim of the social policy, which resides within a margin of discretion, asking questions of its legitimacy and specifically whether it is really unrelated to any discrimination based on sex, the CJEU introduces a conversational-styled reasoning about what constitutes objectively justifiable departures from the principle for equal treatment.

---

[242] See Barnard and Hepple for a discussion of the difference between the standard of scrutiny: "There seem now to be at least three tests for objective justification: the strict Bilka test for indirectly discriminatory conduct by employers, recently affirmed in Hill and Stapleton, the weaker Seymour-Smith test for indirectly discriminatory employment legislation, and the very diluted test for social security legislation in Nolte/Megner. No explanation has been offered for these different tests." Barnard, C and Hepple. B 1999, Indirect Discrimination: Interpreting Seymour-Smith, *The Cambridge Law Journal* 58 (2), p. 411.

[243] Case C-167/97, Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez, ECR [1999] I-00623, para 74-75.

[244] *Seymour-Smith and Perez*, para. 76. See also *Gerster* for a similarly constructed reasoning on legitimate social policy aims. Case C-1/95, Hellen Gerster v Freistaat Bayern, ECR [1997] I-05253, para 40.

In *Jørgensen* the aim of the policy was put into question once again.[245] With reference to budgetary constraints, Denmark had reorganised the rules governing medical practices in a way that according to Birgitte Jørgensen, had an adverse effect on self-employed women.

The Court rejects the idea that a measure with the aim of ensuring budgetary constraint is legitimate and therefore would justify discrimination based on sex, but, the Court continues, to "ensure sound management of public expenditure on specialised medical care" is indeed a legitimate aim of social policy. The Court is essentially holding that the aim of social policy measures that deviate from the right to equal treatment have to be modelled somewhat narrowly, even though the difference between "budgetary constraint" and "sound management of public expenditure" is hard to grasp.[246]

In *Kutz-Bauer* and *Steinicke*, the CJEU continues to reflect on the legitimacy of the social policy aim covered by a margin of discretion and holds that "mere generalizations" are not acceptable.[247] Thus social policy aims could be so broadly defined that they do not "fit" within the national margin of discretion. This is similar to *Kreil,* where the violent circumstances were defined too broadly to be accepted as a deviation from the principle of protection from direct discrimination. In such cases the CJEU will penetrate the margin of discretion and declare the rights-violating social policy aim illegitimate.[248] Here, needless to say, the CJEU does not defer to democratic deliberations in "matters" traditionally connected to Member State competence, but operates in a classic judicial review mindset.

Lastly and more recently there are two cases worth noting in terms of the way in which the margin of discretion covering policy aims and the measures taken to achieve them is brought into the 2000s. In *Brachner*, on indirect discrimination of women in matters of social security[249] the CJEU refers directly to "margin of discretion," but omits that explicit reference in *Leone and Leone,* on indirect discrimination of men in relation to pay.[250]

The CJEU in *Leone and Leone*, referring to the case law discussed in this section, hence indirectly referencing a margin of discretion, adds that a measure capable of embodying a

[245] Case C-226/98, Birgitte Jørgensen v Foreningen af Speciallæger and Sygesikringens Forhandlingsudvalg, ECR [2000] I-02447.
[246] *Jørgensen*, para 41. The CJEU admits that the Member State, according to settled case law, enjoys a "reasonable margin of discretion" in relation to the nature of social protections provided that they meet a legitimate aim of social policy.
[247] Case C-187/00, Helga Kutz-Bauer v Freie und Hansestadt Hamburg, ECR [2003] I-02741 and Case C-77/02, Erika Steinicke v Bundesanstalt für Arbeit, ECR [2003] I-09027.
[248] This is also what happens in *Kutz-Bauer* and *Steinicke,* Helga Kutz-Bauer and Erika Steinicke effectively litigated their equal protection case against the discriminatory effect of the national legislation on "part time work for older employees."
[249] Case C-123/10, Waltraud Brachner v Pensionsversicherungsanstalt, ECR [2011] I-10003.
[250] Case C-173/13, Maurice Leone and Blandine Leone v Garde des Sceaux, ECR [2014] nyr. The CJEU in *Leone and Leone* refers explicitly in its operative part to case law containing margin of discretion-language.

legitimate social policy aim "requires that it genuinely reflect a concern to attain that aim and be pursued in a consistent and systematic manner in the light thereof."

Already in *Brachner,* but specifically in *Leone and Leone* another element of a more elaborated stringency requirement is added to the formula contemplating legitimacy.[251] Still, the aim capable of legitimizing an *a priori* infringement of the right to equal pay is defined by the Member States, and even though the CJEU in *Leone and Leone* suggest that a "consistent and systematic manner" is desirable, the structure is clearly recognizable from *Nolte* and *Megner and Scheffel* twenty years earlier. The CJEU in other words shows a consistent use of national margins of discretion in cases where national legislation is accused of violating the right to protection from indirect discrimination, specifically in its secondary-sourced expressions.

In the 2000s with its treaty-based, Charter-based and secondary law-based rights guarantee of equal protection, as well as in the early 1980s, the CJEU covers Member States' policy choices with margins of discretion and similarly opens up the creation of the applicable standard of protection of the right to equal treatment for the national legislator's participation.

5.4.4 The Right to Maternity and Parental Leave: Margins of Discretion to Constrain Rights

Earlier I outlined the way in which national margins of discretion have been used where men tried to access maternity leave entitlements by relying on the principle of equal protection. In this last section I will turn to the right to maternity leave, guaranteed in secondary EU law since 1992, and the right to parental leave, guaranteed in secondary EU law since 1996. Both rights are protected since 2009 in the Charter.

I will show how margins of discretions are used in the area of sex equality law, particularly important for the life/family balance of Europeans. It should be remembered that these respective rights to leave[252] are building blocks in the process of promoting the overarching goal of equal treatment, as evinced in the preambles: maternity leave is guaranteed for the sake of protecting women and not treating women on the labour market unfavourably, and parental leave as an important means of reconciling work and family life and promoting equal opportunities and treatment between men and women.

In the case of maternity leave these secondary sources guarantee "a continuous period of maternity leave of a least 14 weeks allocated before and/or after confinement in accordance with national legislation and/or practice" with "maintenance of payment or adequate

[251] See *Brachner*, paras, 73, 91 and 104.
[252] Whether the distinction between these two rights is normatively desirable will be left out of this discussion.

allowance."[253] The right to parental leave guarantees a period of four months, which in principle should be provided on a non-transferable basis.[254]

It is clear from the formulation of the secondary sources that national legislation and practice is responsible for defining the structure surrounding the entitlement to maternity leave and parental leave.[255] This means that national involvement takes different shapes in terms of establishing the contours of the respective rights to leave, and that again the deviation margin of discretion adapts to the structure of the sources. Therefore, it is important to make a distinction between the margin of discretion and instances where the CJEU decides that the directive does not regulate a specific issue. A good example of the latter in terms of maternity leave are rules governing what happens when leave coincides with sickness, or pregnancy-related sickness does not coincide with the leave, which are questions of rights-content that have been left to the Member State because the directive does not address the issue straightforwardly.[256]

The operationalization of margins of direction instead happens when it is not possible for the CJEU to establish that the question in the case before it is outside of the directive's wording.

This means that the CJEU uses national margins of discretion in formulating rights-content immediately connected to the minimum criteria governing the leave, not to expand the right but to find acceptable ways of constraining the right. In others words, there is no margin of discretion to make the protection thicker but national discretion is used to constrain and limit what the rights to maternal and parental leave mean in Europe. The following case law-sequence on payment levels during maternity leave illustrates this point very well.

In *Alabaster*, where back-dated pay increasing imminently before maternity leave was not reflected in the level of statutory maternity leave,[257] in *Parviainen* where a flight purser transferred to ground duties during pregnancy got reduced pay which subsequently affected

[253] Article 8 of Council Directive 92/85/EEC.
[254] Clause 2 of Council Directive 2010/18/EU.
[255] In relation to maternity leave the CJEU frames this in the following way "reference to national legislation and national practice (…) leaves to the Member States a certain degree of latitude when they adopt rules in order to implement it, that fact does not affect the precise and unconditional nature of the provisions. The implementing rules cannot, by any means, apply to the content of the right enshrined (…) and cannot thereby limit the existence or restrict the scope of that right." Case C-194/08, Susanne Gassmayr v Bundesminister für Wissenschaft und Forschung, ECR [2010] I-06281, para. 48.
[256] See Case C-411/96, Margaret Boyle and Others v Equal Opportunities Commission, ECR [1998] I-06401, para. 50. And, before the directive, the principle of equal protection was held to not cover the issue: Case C-179/88, Handels- og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening, ECR [1990] I-03979, paras. 3 and 15.
[257] Case C-147/02, Michelle K. Alabaster v Woolwich plc and Secretary of State for Social Security, ECR [2004] I-03101.

her maternity leave allowance,[258] and in *Gassmayr* where a doctor sought to argue that on-call duty benefits should be included in the calculation of maternity leave allowance, national discretion was operationalized in the shaping of the right to maternity leave.[259]

These three women relied on the directive's formula on "maintenance of a payment to, and/or entitlement to an adequate allowance for workers" which have recently given birth.[260] Arguably, this is vague wording, yet it is an EU law requirement that the CJEU is called to interpret.

In *Gassmayr*, handed down in 2010, which draws on *Alabaster* and *Parviainen,* the CJEU holds that the "exercise by the Member States and, where appropriate, management and labour of that discretion when determining the entitlement to income of a pregnant worker temporarily granted leave from work by reason of her pregnancy cannot undermine the objective of protecting the safety and health of pregnant workers pursued by Directive 92/85."[261]

Then the CJEU goes on to agree that the national solution of excluding on-call duty allowance does not go against the aim of the directive which is "to protect a woman's biological condition during and after pregnancy and, second, to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth."[262]

The structure of the EU fundamental rights clash is the same, a litigant relies on an EU-sourced right to strike down a national measure, but the CJEU operationalizes discretion to involve the national legislator and "where appropriate management and labour"[263] more explicitly in an elaboration of the content of the right. The *aim of the social policy* is instead set by the European Union. We are therefore looking at the opposite structure to that seen in the cases of direct and indirect discrimination where the *national policy aims,* in different ways, are within a national margin of discretion.

In *Gassmayr* the Member State shapes the crucial details and the CJEU accepts them as long as they do not jeopardise the EU policy aims, which in this case are the physical

[258] Case C-471/08, Sanna Maria Parviainen v Finnair Oyj, ECR [2010] I-06533. To be precise, in part of the judgement the CJEU does rule that she has the right to at least the same extra allowances as the people working in the position to which she has been transferred, although not to her level of pay in at the previous position.
[259] *Gassmayr*, para 67.
[260] Article 11 of of Council Directive 92/85/EEC.
[261] *Gassmayr,* para.68.
[262] These criteria originate from *Hofmann*. The conclusion in *Gassmayr* is furthermore motivated by the CJEU's questionable distinction between *payment* in the directive and the *right to equal pay* in primary law.
[263] *Parviainen*, para. 55 and *Alabaster*, para. 53: "it is within the discretion of the competent authorities of the Member State concerned, provided that they comply with that requirement and with all provisions of Community law, in particular those stemming from Directive 92/85."

protection of pregnant workers (equal treatment), and the protection of the special relationship between mother and child. The CJEU determines in general terms that it does not violate the aim of the policy and goes on to accept the national standard.

Importantly, and as already stated, the measures represent a constraint of the content rather than an expansion, which would have been allowed in any case as the directive only sets minimum standards and therefore accepts that a Member State's protection is higher. Furthermore, it is important to consider that the litigant believes that the Member State is violating the EU right in question when challenging the national measure.

It should be noted that *Parvainen* and *Gassmayr* are handed down after the Charter comes into force, even though it is not explicitly referred to by the CJEU. I will now turn to *Chatzi*, a case on parental leave with explicit reference to the Charter, where the national margin of discretion is still used to constrain rights-content in such a way as to establish the applicable standard of protection.[264]

Zoi Chatzi is a Greek citizen and like many women in Europe, at least before the economic crisis, she worked as a public servant. On 21 May 2007 she gave birth to twins and was granted nine months of paid parental leave. When that period of parental leave expired she applied for a second period arguing that two children should entitle her to a longer period of leave from work.

The Thessaloniki Administrative Court Of Appeal concluded that the national law was clear on this matter, the number of children does not affect the number of months of parental leave. However, in line with Chatzi's argumentation, the Court doubted whether or not Directive 96/34 on parental leave read in the light of the Charter would guarantee a more generous standard of protection.[265]

First, the CJEU engages in an eleven paragraph-long discussion on whether the directive confers an individual right to parental leave on the child. The answer, bypassing both article 24 and 33(2) of the Charter, is that it does not.

Second, the CJEU considers whether the directive states if the number of periods of parental leave is equal to the number of newborn children. The language is ambiguous, the CJEU says, and so it goes on to reflect on the aim of the directive, which is to facilitate work and family balance. The CJEU observes that doubling parental leave for parents of twins is not the only way to ensure work and family balance. This observation about the EU aim is read together with the fact that the directive's requirements are "minima." This is in itself a

[264] Case C-149/10, Zoi Chatzi v Ypourgos Oikonomikon, ECR [2010] I-08489.
[265] *Chatzi*, para. 20.

questionable formula since the issue at stake regarded the core of the right rather than say, levels of payment or how to calculate the start-date of the leave.[266] The CJEU concludes that not adapting parental leave to the birth of twins does not violate the EU right to parental leave as expressed in the directive. Again, as in the maternity leave cases above the CJEU tests the national measure against the overall policy aim of the EU rights source. However the margin of discretion technique is used in relation to the last question.

In the final section the CJEU examines whether this practice disturbs the principles of equal treatment when considered in relation to parents with and without twins. Interestingly it considers this question particularly important since the Charter recognizes the right to parental leave as a fundamental social right.

However, the CJEU again turns to the directive without returning to the Charter, and restates that the Member State has a "wide freedom of action" (which I understand as margin of discretion language) when establishing the parental leave regime. Moreover, the CJEU ultimately leaves it to the national court to "determine whether the body of national rules offers sufficient possibilities to meet, in a specific case, the particular needs of the parents of twins in their work and family life."[267]

Again, the CJEU understands the EU as providing a general policy aim and the Member State is given a margin of discretion to elaborate on the content of the right as long as it respects the policy aim. Zoi Chatzi is asking a substantial question of the EU right to parental leave, assuming that the EU through the CJEU will give a better answer than Greece. Yet the CJEU refers to the national court, giving it the opportunity to embed the Greek solution in its reading of the EU right to parental leave. Thus, in *Chatzi* the CJEU both identifies a margin of discretion to allow for deviating understandings of the content of parental leave and outsources the scrutiny to the national court.

5.5 Concluding Remarks: Sharing Deviance

Schematically, this chapter has considered EU fundamental rights understood as contrasting with the national legal milieu to the potential benefit of the individual. This schema is the antithesis of the intrusion narrative's focus on the damage done to the national system for

[266] *Chatzi*, para. 60.
[267] *Chatzi*, para. 71 and 74.

fundamental rights protection by the CJEU's adjudication and, as noted above, highly emblematic for the improvement narrator's main analysis of transnational law.

I stated at the outset that the diversity narrative has demonstrated little interest in applying analytical frameworks such as constitutional pluralism or national constitutional identity to this line of case law, despite the fact that the national decision-makers are involved in formulating acceptable deviations from EU-sourced rights. Perhaps this could be explained by the fact that this type of use of margins of discretion complicates the meaning of nation state-centred diversity.

After all, the margin of discretion in this line of cases ultimately internalizes national policy formulations into its system of fundamental rights protection rather than deferring to national identity, or what is nationally unique. For example, in the women and violence and men and babies line of cases, the litigants in the United Kingdom, Spain, Germany and Italy wanted to strike down measures aimed at separating women from violence and men from babies on the grounds that they violated equal treatment. My point is that the pattern of these conflicts are so similar that the United Kingdom, Spain, Germany and Italy have more in common compared to anything that could be described as uniquely German, British, Spanish or Italian in the context of this case law.

Framed in more legalistic terms, this use of national margins of discretion by the CJEU has been examined within this *prima facie* dichotomy between the EU and the national legal sphere, triggered by an individual belonging to both.

One way of reconstructing the basic components of these cases is to think of their structure as a norm (the EU right) and a reasonably divergent understanding of the norm (contested measure). With such a framing, both *ex ante* and *ex post* the CJEU's adjudicative process, the EU norm and the national divergent understanding of the norm remains separable.

While this understanding might be fruitful *ex ante*, I have sought to illustrate that where deviation margins of discretion are used, the outcome of the adjudicative process is intertwined. The CJEU's use of margins of discretion interlinks the national and *EUropean*, even if there is a detectable underlying split in competence regarding the subject matters and an *a priori* dichotomy represented in the case-structure. With the use of a margin of discretion compared to no use of a margin of discretion, the national level is explicitly consulted on how acceptable deviations should be formulated.

Thus, the CJEU hardly operates as an improver of the national standard of protection but instead employs a method whereby the national level is allowed to participate in the formulation of the standard of protection. In other words, the superior court of the larger

jurisdiction that deems some rights to be fundamental nonetheless permits subunits to constrain and deviate from these norm-commitments.

This happens when the CJEU adjudicates by internalizing circumstances and subject matters that deviate from the core of the fundamental right and subsequently attaches these circumstances and subject matters to the structure of the EU-sourced right. Therefore the deviation margin of discretion functions in such a way as to allow a myriad of national, and indeed subnational circumstances to become the flesh of the applicable standard of protection, derivable from European Union fundamental rights sources.

6. The Balance Margin of Discretion

*

In this chapter I will examine how the margin of discretion-technique has been used in cases where the CJEU finds that the protection of fundamental rights clashes with one of the four internal market freedoms. The notion of achieving balance between these two competing interests is at the heart of this complex use of the margin of discretion-technique.

Distinct from the *deviation margin of discretion*, which is directed towards broadly formulated policy areas and subject matters, the balance margin of discretion addresses single specific national measures. This could be a specific legislative provision or, and indeed more frequently, an administrative decision.

The CJEU begins its reasoning by looking at the contested national measure taken to protect a fundamental right and asks whether it constitutes a justified restriction of one of the fundamental market freedoms. To answer this question the CJEU constructs the national measure as the output of a balancing act between the fundamental right and the fundamental freedom. This balancing act is better understood as a move in legal reasoning made by the CJEU rather than an account of the national decision-maker's working method. Thereafter the CJEU reviews the proportionality of the national measure taken within a margin of discretion.

Thus, the national margin of discretion addresses one specific moment in time. The balance margin of discretion does not belong to a particular fundamental right, a certain policy area (like the deviance margin of discretion), and is not addressed to a decision-maker applying a specific provision of EU law (like the compliance margin of discretion). Instead, the balance margin of discretion handles composite interests attributed to one instance of decision-making.

This chapter will aim to show how the balance margin of discretion signals that the original contested decision will remain intact, together with the important additional move where the CJEU inserts certain EU law considerations into the imagined rationales of the national decision-making and ultimately reviews its outcome.

The complexity of this typology of margin of discretion-use stems from these modes of interaction. The contested national decision remains at the core of what ultimately becomes

the applicable standard of protection but the CJEU inserts a balancing act into the decision itself and reviews it, in this way maintaining an elaborative role.

This reading of an intricate form of micro-interactive elaboration of the applicable standard of protection complements the extensive literature on this line of case law, which tends to focus on the grand clash of fundamentals.[268] Without categorically negating the importance of highlighting the fundamental aspects of the interests at play, I will draw attention to the *local* nature of this string of case law and the CJEU's focus on *moments* of what it understands to be composite decision-making in its legal reasoning.

The balance margin of discretion-cases discussed in this section have traction in *diversity narrative commentary* that promotes ideas such as constitutional pluralism to protect the national constitution from EU-mainstreaming, and the scholarly quest to operationalize "national constitutional identity." Celebrity cases such as *Schmidberger*, *Omega* and *Sayn-Wittgenstein* (all featured in this chapter) have embodied the diversity narrator's interest in explaining how "national constitutional traditions" could be protected within the adjudicative machinery of the CJEU, especially in the area of the internal market, traditionally the Court's core interest.

The reading that I will present of cases containing balance margins of discretion tilts away from, though does not discard the conventional wisdom of *the diversity narrative*. With a view to carefully constructing this point challenging the dominant diversity narrative, I will present the balance margin of discretion cases under two separate headlines. The first is entitled "National Margins of Discretion to Balance Equal Weight," and features a line of cases with no operationalization of the national as a value affecting the balancing act attributed to the national decision. In the second section entitled "The National as Counterweight in National Margins of Discretion," I will show how the CJEU highlights the

[268] See for instance, commentary on Case C-112/00, Eugen Schmidberger Internationale Transporte v Republik Österreich ECR [2003] I-05659 and Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn ECR [2004] I-09609, which are at the epicentre of this line of case law: Gonzales, G 2004, EC Fundamental Freedoms v. Human Rights in the Case C-112/00 Eugen Schmidberger v. Austria [2003] ECR I-5659, *Legal Issues of Economic Integration* 31 (3), pp. 219-229; Biondi, A 2004, Free Trade, a Mountain Road and the Right to Protest: European Economic Freedoms and Fundamental Individual Rights, *European Human Rights Law Review*, pp.51-61; Morijn, J 2006, Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution, *European Law Journal* 12 (1), pp. 15-40; Chu, G 2006, 'Playing at Killing' Freedom of Movement, Case C-36/02, Omega Spielhallen-und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, *Legal Issues of Economic Integration* 33 (1), pp. 85-94; Bulterman, MK and Kranenborg, HR 2006, What if Rules on Free Movement and Human Rights Collide? About Laser Games and Human Dignity: the Omega case, *European Law Review* 1, p.93-101; de Vries, SA 2013. Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice, *Utrecht Law Review* 9 (1), pp. 169-192.

specifically national and accentuates what appertains to the national in its reasoning, without abandoning the core structure of the balance margin of discretion.

This means that I promote a reading where the balance margin of discretion technique provides for interconnected decision-making even in cases where the CJEU features nationally unique outputs of a Member State's constitutional protection in its legal reasoning. I will thus maintain that these references to the specifically national quality of decision-making do not *per se* affect the discretional space. This line of argumentation challenges the narrative of diversity (as well as indirectly the narrative of intrusion) and default favouritism of the national legal locus. Interestingly, as has been noted, this favouritism is rarely acknowledged as such and several authors claim to merely have an ahistorical interest in jurisdictional divides and legal conflicts between different jurisdictions, while actually arguing along the lines of classic European fetishization of the national locus and demos.

Using this framework focusing on the micro-interactions enabled by the technique, constructed so as to enable a critical assessment of the diversity narrative's rationale, I will emphasise the situation-specific nature of this use of margins of discretion rather than understanding the use of this technique as aiming to protect a fundamental right understood in isolation from the conflict in which it is found. Accordingly, I draw a distinction between a situation in which the CJEU would defer in broad terms to the protection of a fundamental right as the output of national identity or the uniquely national in general, and a situation in which the CJEU addresses the balance margin of discretion to a specific national decision and reads it as the output of a balancing act between a fundamental right and an internal market fundamental freedom.

I am thus promoting an interpretation holding that a narrow national discretional space is carved out within the premises of an adjudicative method where the CJEU remains an active participant in the elaboration of the applicable standard of protection.

6.1 Legal Conflict: An Internal Market Fundamental Freedom Clashes with a Fundamental Right

In this line of case law the CJEU identifies a clash between an internal market fundamental freedom and a fundamental right. Within the EU law structure the four internal market fundamental freedoms, and EU fundamental rights are equal but different. *Equal*, because these two sets of norms have the same legal value within the EU law system, a point which

has been thoroughly cemented in the case law of the CJEU and at the same time equally carefully criticized by those who question this non-hierarchical relationship on normative grounds.[269] A good example of the latter would be the critique advanced by intrusion narrators who hold that fundamental rights sourced in national constitutions and legislation should be superior to EU internal market law.

Different, at the same time, because the internal market fundamental freedoms and fundamental rights have distinguishable functions within the legal order. Whereas the former constitute the internal market, the function of fundamental rights is decisively more variegated. This condition is mirrored in the different sourcing. The four fundamental freedoms traditionally feature prominently in EU primary law, and as of late in relation to the case of persons and services, also in the Charter. Whilst EU fundamental rights, as already described, are characterised by their derivability from a vast set of national, EUropean and international sources.

In the case law discussed in this section these sets of norms clash within the framework of the question of whether a national measure embodying the protection of a fundamental right constitutes a *justified restriction* of one of the fundamental freedoms.[270]

I have thus extracted the series of cases discussed in this chapter from a very broad group of cases rooted in the classic EU law question of whether a national measure constitutes a justified restriction of an internal market fundamental freedom. Due to the vastness of this material it is important to clearly identify which legal clashes between fundamental rights and fundamental freedoms I am interested in analysing.

Essentially, and in line with the method of case selection presented earlier, I am interested in cases with two specific features: cases that operationalize a national margin of discretion (1), and cases that according to the CJEU involve a fundamental right (2).

This means that firstly (1) I am looking at cases that deviate from the reasoning structure often adopted by the CJEU to handle restrictions on internal market freedoms, by which I mean the template whereby the CJEU identifies the existence of a restriction, the possibility of a justification and then performs a proportionality analysis. In the following I will thus only

[269] See for instance *Schmidberger*, Case C-438/05, International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eest ECR [2007] I-10779 and Case C-341/05 and Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, ECR [2007] I-11767.

[270] This point is obviously not limited to the type of case containing margins of discretion, see for instance how the four fundamental freedoms have on occasion been the trigger of EU fundamental rights protection, which is also indicative of their different functions within the EU law system. See for instance, Case C- 60/00, Mary Carpenter v Secretary of State for the Home Department, ECR [2002] I-06279 and Case C-109/01, Secretary of State for the Home Department v Hacene Akrich, ECR [2003] I-09607.

look at cases that add a national margin of discretion to this reasoning structure.[271] This follows the basic method that I have used for the other two typologies for margin of discretion use, however it is important to note that in this instance I am carving out a string of cases that share similarly structured legal clashes from a very broad body of case law.

The second criterion (2), which is used for all the typologies but is particularly problematic and artificial in relation to the balance margin of discretion as this line of cases is extracted from a vast corpus within which one could also note an evolving understanding of what is to be considered a fundamental right.[272]

The reason for this selection-method whereby I will only analyse cases with clear references to fundamental rights sources, stemming from European legal material, national legal material, or both, is my desire to crystalize this use of the margin of discretion-technique in this prototype of an EU internal market fundamental rights conflict.[273] To be clear however, cases without explicit reference to fundamental rights sources might indeed contain fundamental rights by way of argumentation.

Taking the CJEU's own qualification of what constitutes a fundamental rights case as a starting point, I will furthermore highlight how these very often simultaneous readings of

[271] As explained in chapter 2.2, balance margins of discretion do not define what is outside of the scope of EU law. Put differently, the CJEU is not using the margin of discretion-technique when it holds that a subject matter that has clashed with, for instance, the free movement of goods, is outside of the scope of EU law. For examples of such cases see: Case C-159/90, The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others ECR [1991] I-04685 and Case C-249/96, Lisa Jacqueline Grant v South-West Trains Ltd, ECR [1998] I-00621. See also for a less straightforward example, Case C-432/05, Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern ECR [2007] I-02271, where, in a potential conflict between a fundamental freedom and a fundamental right, the CJEU ultimately holds that EU law does not require the Member State to make changes to their legal system.

[272] For examples where this distinction might be somewhat artificial, i.e. cases where national legislation aimed at social protection clashes with a fundamental market freedoms and/or competition law, see Joined Cases C-180/98 and C-184/98, Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten ECR [2000] I-06451 (pensions); Case C-12/08, Mono Car Styling SA, in liquidation v Dervis Odemis and Others ECR [2009] I-06653 (collective redundancies/workers right to action); Joined Cases C-159/91 and C-160/91, Poucet and Pistre v Assurances Générales de France and Others [1993] ECR I-637 (social security); Case C-244/94, Fédération Française des Sociétés d' Assurance [1995] ECR I-4013 (social security); Case C-55/96, Job Centre [1997] ECR I-7119 and Case C-222/98, Hendrik Van der Woude v Stichting Beatrixoord ECR [2000] I-7111 (collective agreement).

Also, cases on the expansion of freedom to provide service into national broadcasting and media markets triggered a series of questions in the 1980s and 1990s, some explicitly involving freedom of expression and the protection of media pluralism, but at the outskirts, related but not explicitly connected one finds considerations such as cultural policy, and cultural expressions as a connection to that right. See Case C- 148/91, Vereniging Veronica Omroep Organisatie v Commissariaat voor de Media ECR [1993] I-00487 (media pluralism) and Joined cases C-60/84 and C-61/84, Cinéthèque and others v Fédération nationale des cinemas française, ECR [1985] 2605 (protection of the cinema as an cultural expression).

[273] There are two exceptions to this approach. I have included *Spanish Strawberries*, which lacks margin of discretion language. Its inclusion is motivated by the fact that in subsequent case law the CJEU qualifies is as a case about fundamental rights protection, Case, C-265/95, Commission of the European Communities v French Republic (Spanish Strawberries), ECR [1997] I-06959. Moreover, I have excluded the extensive body of case law handling environmental protection, even when it is qualified as a fundamental right. For an overview of this line of case law see further: Case C-28/09, European Commission v Republic of Austria, ECR [2011] I-13525.

differently sourced fundamental rights, affect the discretional space. To be clear, this will also involve addressing how the mirroring of specific rights in a variety of sources, national and *EUropean*, does not significantly alter the operation of the margin of discretion-technique. In other words I will trace the interplay between the CJEU's use of the margin of discretion technique and the genesis of the fundamental rights source.

6.2 EU Law Geography: The Internal Market

As outlined above, this group of clearly qualified fundamental rights cases constitutes a subgroup of a broad and well-researched set of case law that deals with restrictions of the internal market. I will therefore succinctly contextualize the origin of, and the narratives triggered by, this subset of case law.

The internal market is the classic epicentre of the European Union integration process. Its expansion through the elimination of what have been considered obstacles to the free movement of people, goods, services and capital, has been the historic setting of core EU law achievements, and conflicts. Like, for example, the one between national social protection and the internal market, highlighted as a centrepiece of the intrusion narrative.

One might argue that this centrality was to be expected since the expansionist internal market has been the meeting point between core EU law and what have been conceived as national particularities. How some people buy and sell alcohol,[274] how some people gamble,[275] how some people buy and sell sex,[276] and, which is the focus here, how the EU and European peoples protect fundamental rights according to the CJEU, and what happens when that protection clashes with the internal market's fundamental freedoms.

Fundamental rights as trade barriers however, could be understood as a more recent development triggered by, in the words of Weatherill "ingenious and well-funded litigants, able to exploit the ambiguous outer reach of EU trade law."[277] A perspective that is worth

[274] Case C-458/06, Skatteverket v Gourmet Classic Ltd, ECR [2008] I-04207.
[275] Case C-275/92, Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler, ECR [1994] I-01039.
[276] Case C-268/99, Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie, ECR [2001] I-08615.
[277] Weatherill states that the "obvious – physical, discriminatory – trade barriers get tackled first, leading then in time to the excavation of and challenge to more subtle trade barriers. But the process is driven by ingenious and well-founded litigants, able to exploit the ambiguous outer reach of EU trade law, and strengthened further by the constitutional principles of direct effect and supremacy which ensure easy access to national courts in pursuit of their quest to liberalise the EU market." See Weatherill, S 2013, From Economic Rights in Fundamental Rights, in de Vries, S, Bernitz, U and Weatherill, S (eds.), *The Protection of Fundamental Rights in the EU After Lisbon*, Hart Publishing, Oxford, p. 12.

keeping in mind since some of the cases discussed in this section may strike the reader as eccentric, rather than emblematic of European 21st century fundamental rights violations.

We are thus looking at a subset of a group of cases where the example *par excellence* of EU-unification, namely the internal market, meets something that could be constructed as nationally unique. Because of this set-up the *diversity narrative* finds inspiration in this type of case. According to the lines of argumentation of some of these commentators, if there is national discretional space within the internal market, clearly the CJEU takes national particularities seriously. In other words, there is a presumption in diversity commentary about this line of case law as examples of legal reasoning that uphold jurisdictional divides. This commentary understands the CJEU as sculpting the borders of national fundamental rights protection within the internal market, and as a consequence making the national separable from the *EUropean.*

In contrast to the diversity narrative, the way in which the unified European market clashes with the protection of fundamental rights will be studied as in the closest possible quarters. By this I mean a focus on the micro-interactions within the decision-making rather than understanding this line of case law as a choice between one out of two modes of protection offered by separable legal entities.

This chapter will discuss eight cases where the classic core of European integration meets fundamental rights sourced in different places, and where a margin of discretion is used to handle this encounter. The aim of this re-reading of frequently read case law is the deconstruction of the complex interconnected decision-making enabled by the use of national margins of discretion.

6.3 Technicality: Imagined Balancing

When studying the reasoning in this line of case law, where a margin of discretion is used to handle what the CJEU understands as a clash between a fundamental freedom and a fundamental right one feature stands out as distinct, namely the way in which the margin of discretion covers a decision where a balancing act is imagined to have taken place.

Imagined is used here to highlight how the act of balancing the competing interests of fundamental rights and fundamental freedoms is attributed to a moment in time that has already taken place (or exceptionally, will take place). *Imagined* thus serves to underline that

nothing in the case files suggest that the method used by the various national decision-makers was an act of balancing fundamental freedoms against fundamental rights in the strict sense.

The attribution of balance is done in the following way; first the CJEU identifies a clash between a fundamental freedom and a fundamental right in a specific legislative provision, or more frequently in an administrative decision. These identified interests are generally in line with the litigant's claim. Specifically, the measure is understood by the CJEU as restricting one of the four fundamental internal market freedoms. Second, the CJEU attributes a balancing act to the contested national measure, which means that the national decision-maker is understood to have conducted a weighing of the competing interests at play. Third, the CJEU holds that the decision imagined to be based on a balancing-act is within a national margin of discretion.

Is the restriction justified, the CJEU subsequently asks? It then conducts a proportionality review of the decision placed within a margin of discretion, or alternatively and less frequently, the CJEU instructs the national court on how the proportionality principle should be handled. Accordingly, through the operationalization of the margin of discretion technique the national participates *prior* to the ultimate call on justifiability. By way of contrast, the CJEU could have simply reviewed the national decision, without inserting a balancing act.

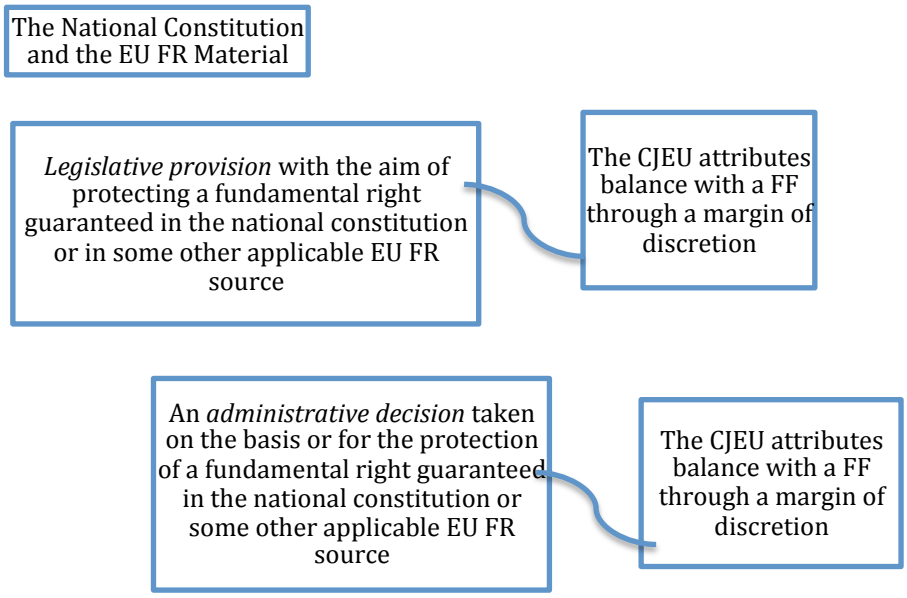
The notion of imaginary balancing could be contrasted with the CJEU's use of the deviation margin of discretion, which covers broadly constructed policy areas or subject matter.

The balance margin of discretion is restricted to the instance of balancing (or the presumed instance of balancing) which as such limits the discretional space in time. In the deviation margin of discretion-cases by contrast, the CJEU internalizes national policy choices and renders them the applicable standard of protection, which are not limited in time despite being potentially subject to revision. For instance, think about the example of the exclusion of women from military service as a CJEU-accepted deviation from the EU-sourced right to equal treatment between men and women. In that instance broadly constructed circumstances such as public security and violence are the triggers of the margin of discretion-technique. This comparison might help make clear how the balance margin of discretion is attached to a specific decision and not a certain type of right or a specific topic.

Arguably, within this adjudicative method where the balance margin of discretion is operationalized there is a set of complex temporal constructions, enabling interaction between the national and the European level. The CJEU's interlocutor is the referring national court but neither of these two actors performs a balancing act. Instead the balance between

competing interests is supposed to have been conducted by the public official or by the legislator. This supposed encounter between a fundamental freedom and a fundamental right is in turn placed within a margin of discretion. The national, or indeed subnational decision is woven in this way into the net of internal market law and within that context constitutes the applicable standard of EU fundamental rights protection. What is imagined is thus not void but facilitates the participation of the national decision-makers in establishing the applicable standard of protection.

Moreover, this imaginary balance-construction allows for interesting moves in perspective – from the detailed, usually local decision that triggered the case in the first place (micro-perspective), to the attributed balancing act between norms of high importance such as fundamental rights and fundamental freedoms (wide-perspective). However, it is not the aim of the fundamental rights protection *per se* that is placed within a margin of discretion (such as freedom of expression, the right to strike or the protection of human dignity), instead it is the decision.



This is a method that differs from the diversity narrator's reading of these cases, which centres on deference directed to the nationally unique output of national fundamental rights protection. The picture I intend to draw sketches a more complex form of interaction.

I therefore divide the construction of the balance margin of discretion into two separate sections to better deconstruct the national element in this typology of margin of discretion. In

particular, I use this presentation method to illustrate that the balance margin of discretion technique in the *Schmidberger*-line does not draw on the homogeneously national in its legal reasoning (1), and even when the national outputs of a Member State's constitutional protection features in the CJEU's legal reasoning, as in the *Omega*-line, the margin of discretion technique continues to enable interconnected decision-making (2).

6.4 Examples of Balance Margins of Discretion

6.4.1 National Margins of Discretion to Balance Equal Weight

The CJEU's ruling in *Schmidberger* received much attention when it was handed down in 2003. And it continues to be a centrepiece in any analysis of the CJEU's legal reasoning when adjudicating fundamental rights.[278] The case sets out what appears to be a method of how to handle straightforward clashes between a fundamental freedom and a fundamental right. Eugen Schmidberger, the owner of a transport undertaking, accused a lawful environmental demonstration on the Brenner motorway in Austria of limiting his right to free movement of goods. The enjoyment of a fundamental freedom is contrasted with the enjoyment of the fundamental rights to freedom of assembly and freedom of expression.

In *Schmidberger* for the first time the CJEU transparently places a fundamental freedom on one side of the scale and a fundamental right on the other and operationalizes a margin of discretion. However it was not the first time the CJEU was asked to handle a conflict structured in a similar fashion and formulate a comparable legal solution.[279] In particular in

[278] Case C-112/00, Eugen Schmidberger Internationale Transporte v Republik Österreich ECR [2003] I-05659.

[279] *Danish Bottles* from 1988 and *Familiapress* from 1997 frequently serve as reference points for case law in the Schmidberger-line and have very similar structures. *Danish Bottles* lacks both fundamental rights language and references to a margin of discretion. However, so as to structure the free movement of goods clashes with environmental protection (not qualified as a fundamental right) embodied in the particular Scandinavian version of designing bottles to facilitate their recycling, the Court states that the protection of the environment is "one of the Community central objectives, which may as such justify certain limitations to the free movement of goods," but ultimately the measure is deemed disproportionate. Case 302/86, Commission of the European Communities v Kingdom of Denmark, ECR [1988] 04607, para 8. *Familiapress,* which explicitly rejects a margin of discretion but is however a straightforward fundamental rights case, addresses the question of whether or not provisions aimed at protecting press diversity could constitute an overriding requirement justifying a restriction of the free movement of goods and, simultaneously, an acceptable limitation of freedom of expression as guaranteed in article 10 ECHR. In this case the Court rejects the use of a "degree of latitude to determine what is required" in terms of protection. Instead, the CJEU asks the national court to perform a proportionality review ("it is for the national Court to determine whether those conditions are satisfied on the basis of a study of the Austrian press market") and gives detailed instructions as to what should be taken into consideration when performing the test. Case C-368/95, Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag ECR [1997] I-03689, paras. 28-31. It is a deferential case that outsources the proportionality principle but its does not operationalize a margin of discretion. However, because of the broadly constructed proportionality test, I find *Familiapress* a challenging case to categorize for present purposes.

Spanish Strawberries from 1997, the CJEU uses a margin of discretion but omits reference to fundamental rights.[280] In *Schmidberger* however, the CJEU retroactively requalifies the conflict in *Spanish Strawberries* as one between the free movement of goods and the right to assembly and freedom of speech, and therefore I include this case in this chapter.[281]

In *Spanish Strawberries*, the European Commission accused France, and especially its police force, of not safeguarding the free movement of goods by not preventing French farmers from hindering the entry of Spanish strawberries into France by means of (at times) aggressive demonstrations.

The significance of *Spanish Strawberries* lies in its comparability to *Schmidberger* and the Court's statement that the Member States must take all necessary and appropriate measures to ensure that that fundamental freedom is respected in that territory. In the latter context, the Member States, retaining exclusive competence as regards the maintenance of public order and the safeguarding of internal security, unquestionably enjoy a margin of discretion in *determining what measures* are most *appropriate* to eliminating barriers to the importations of products in a given situation."[282]

In other words, the CJEU understands the activity (or lack thereof) of French police as being guided by the respect for fundamental freedoms on the hand, and appropriately handles barriers, that is to say demonstrations, on the other. This weighing of interests is placed within a margin of discretion.

However, it falls on the Court to verify whether "the Member State concerned has adopted *appropriate measures.*"[283] In other words, the actions of the French police will be *ex post facto* reviewed by the CJEU.

This structure is largely upheld in *Schmidberger*. But the reasoning in the latter case is more transparent and concerns one decision, whereas *Spanish Strawberries* concerns series of decisions.

In *Schmidberger* the CJEU starts by stating that a demonstration, which embodies the right to freedom of speech and the right to assembly, may be a justifiable a restriction of one of the four economic freedoms.[284] This affirmation that a fundamental right can restrict a

[280] Case, C-265/95, Commission of the European Communities v French Republic (Spanish Strawberries), ECR [1997] I-06959.
[281] Alhough the difference between the cases according to the Court is the purpose of the respective demonstrations, *Schmidberger*, paras. 84 -88.
[282] *Spanish Strawberries*, para. 32-33 (emphasis added).
[283] *Spanish Strawberries*, para. 33 and 35 (emphasis added).
[284] *Schmidberger*, para. 64.

fundamental freedom by virtue of being qualified as a fundamental right is what makes *Schmidberger* novel.

More importantly for present purposes however, in reconciling freedom of expression and the right to assembly with the free movement of goods, a fair balance must be struck between the two, and "the national authorities enjoy a wide margin of discretion in that regard."[285] In other words, the administrative decision that allowed the demonstration was within a margin of discretion, and according to the Court this decision embodied a balancing act between the freedom of movement of goods and the rights of freedom of speech and assembly.

Subsequently, the Court states that it is its responsibility to "determine whether the restrictions placed upon intra-Community trade are proportionate in the light of […] the protection of fundamental rights."[286]

Consequently, the Court gives a series of arguments in favour of the proportionality of Austria's "omission" of not banning the demonstration or restricting it, and concludes that "the national authorities were reasonably entitled, having regard to the wide margin of discretion which must be accorded to them," to consider that the aim of the demonstration (to demonstrate against air pollution), could not be achieved by measures less restrictive of intra-Community trade.[287]

What does the Court achieve by referring to a margin of discretion? The national decision in the hands of the CJEU is transformed into a) a balancing act between equally weighing interests, and b) by way of *ex post facto* review the applicable standard of EU fundamental rights protection.

This template crafted in *Schmidberger* is micro-interaction within the framework of an adjudication process. As such, this case interestingly allows one decision to embody a massive clash but in order to rein in the scope of national discretion to handle such clashes the margin of discretion encompasses only the specific decision. This move, which I have labelled the balance margin of discretion, is the method that the CJEU uses to allow the national level to participate in the elaboration of the applicable standard while simultaneously defining the legal considerations of the decision-making (imaginary balancing) and reviewing the outcome.

This later proportionality review by the CJEU is not formulated as a question of whether or not the Member State went outside of its margin of discretion when deciding how to handle

[285] *Schmidberger*, para. 82.
[286] *Schmidberger*, para. 82.
[287] *Schmidberger*, para. 93.

the respective demonstrations, rather the CJEU elaborates on criteria and examines if the measure was *reasonable* (*Schmidberger*), *appropriate* (*Spanish Strawberries*), and *proportionate* (both cases). This illustrates how the Member State's margin of discretion in these cases, although described as wide and unquestionable, can be coupled with a proportionality test that limits the actual discretional space. It is not, which should be underlined, a margin of discretion to protect freedom of speech and the corollary rights that come with it in whatever way the national level seems fit. It is thus not deference to a fundamental right in its national expression. It is deference to a national decision that presumably balanced a fundamental right and a fundamental freedom.

Staying with the free movement of goods, the CJEU applies the *Schmidberger* balance in the slightly differently styled *Karner*, where free movement of goods and free speech (for commercial purposes) on the one hand clashes with a legislative provision aimed at ensuring the right to consumer protection in the context of advertisement.[288]

Here the CJEU is attributing balancing to a piece of legislation addressing consumer protection, not an administrative decision, and it states: "It is common ground that the discretion enjoyed by the national authorities in determining the balance to be struck between freedom of expression and the abovementioned objectives varies for each of the goals justifying restrictions on that freedom and depends on the nature of the activities in question. When the exercise of the freedom does not contribute to a discussion of public interest and, in addition, arises in a context in which the Member States have a certain amount of discretion, review is limited to an examination of the reasonableness and proportionality of the interference. This holds true for the commercial use of freedom of expression, particularly in a field as complex and fluctuating as advertising."[289]

The CJEU thus places a legislative provision within a margin of discretion and performs a loose review, which is motivated primarily by the fact that the freedom of expression at stake is merely for commercial purposes.

I will now turn to a case where the CJEU uses a margin of discretion to handle legislation and administrative decisions in a more complex fashion. In *United Pan-Europe Communications* freedom of services encounters cultural policy aiming at maintaining media pluralism. In meticulously bi-lingual Belgium, four broadcasting companies challenged a must-carry provision, which required these companies (carriers) to broadcast programmes

[288] Case C-71/02, Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH, ECR [2004] I-03025.
[289] *Karner*, para. 51. In this quote the CJEU refers to *Schmidberger*.

decided by the Belgian authorities.[290] In other words, these companies could not choose freely what to broadcast (*nota bene*, not an exceptional practice in the 20th century).

The CJEU concludes that media pluralism (embodied in the state guaranteeing bi-lingual television) is connected with the freedom of expression guaranteed by both the ECHR and the EU legal order. The Court subsequently examines whether the national legislation could justify a restriction on the free movement of services and states that "while the maintenance of pluralism, through a cultural policy, is connected with the fundamental right of freedom of expression and, *accordingly*, that the national authorities have a wide margin of discretion in that regard (…) measures designed to implement such a policy must in no case be disproportionate (…)."[291]

However, the CJEU continues by saying that "such legislation cannot render legitimate discretionary conduct on the part of the national authorities which is liable *to negate the effectiveness* of (…) a fundamental freedom (…)." The CJEU concludes that the award of must-carry status must be based on transparent criteria "to ensure that the discretion vested in Member States is not exercised arbitrarily."[292]

Since the dispute originates in a legislative provision the margin of discretion is both arranged differently compared to *Schmidberger,* which concerned a specific decision, and in contrast to *Karner* it encompasses future balancing-acts based on the legislative provision. Indeed, what seems to be a limitation of the discretional space is a construction whereby the CJEU gives the national level a margin of discretion in the specific future instances when their competent national authorities award a must-carry status.

It should be clarified that with this structure of designating the margin of discretion to cover the balancing act taken by administrative bodies, the legislative provision is kept in place and will not be altered. In other words, the CJEU is not satisfied with merely stating that the provision in itself, textually and without application, is within the margin of discretion of the Member State. The margin of discretion is clearly more carefully and narrowly constructed.

An underlying distinction is emblematic of this typology: the margin of discretion is triggered by the provision's aim of protecting a fundamental right but the margin of discretion

[290] Case C-250/06, United Pan-Europe Communications Belgium SA and Others v Belgian State, ECR [2007] I-11135. See Case C-213/07, Michaniki AE v Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias, ECR [2008] I-09999, para. 59, where the CJEU upholds a similar line of reasoning without, however, using the language of fundamental rights.
[291] *United Pan-Europe Communications*, para. 44 (emphasis added), *nota bene* the Court makes a reference to *Schmidberger*.
[292] *United Pan-Europe Communications*, para. 45-46.

is understood to be operationalized in every decision on the award of must-carry status. These future decisions should balance the interest of protecting the right to freedom of expression whilst not "negating the effectiveness" of the fundamental freedom of services. It is thus not a margin of discretion placed around the right to freedom of expression but instead it is a margin of discretion to balance the right to freedom of expression (understood as the maintenance of media pluralism) against freedom of services in future administrative decisions on the award of must-carry status.

Moreover, the CJEU also gives careful instruction on how the proportionality of these decisions should be reviewed *ex post facto* by *the national courts*. The Court's detailed remarks are again a sign of a close review by the CJEU of the Member States' actions within their ascertained area of discretion.

In 2010, *Pérez and Gómez* follows up on the *United Pan-Europe Communications*-structure. In this case, a Spanish legislative provision regulated where pharmacists could open pharmacies, in particular concerning minimum distance vis-à-vis other pharmacies.[293] José Manuel Blanco Pérez and María del Pilar Chao Gómez, both pharmacists, challenged the legislation on the grounds that it violated the freedom of establishment.

Without much eloquence, the CJEU starts by explaining that "the health and life of humans rank foremost among the assets and interests protected by the Treaty."[294] It then operates as usual by affirming that the provision constitutes a restriction of the freedom of establishment, which could be justified by the protection of public health. The CJEU then goes on to argue, and this is how *Pérez and Gómez* becomes a case structured as a rights clash type of case, albeit hesitantly, that the interest of public health is reinforced by the Charter, where it is affirmed in article 35. In other words, the interest of public health is guaranteed in the Charter and the CJEU makes a point of establishing this connection. As stated earlier, the CJEU may omit such references even though the Charter *per se* provides ample textual space for drawing such connections.

The margin of discretion (the wording in the case is "measure of discretion") is organized in the same way as the one granted in *United Pan-Europe Communications*.[295] The right to public health triggers the use of a margin of discretion, but as always, it is not broadly placed around this subject matter but operationalized in the licencing procedure for opening new

[293] Joined cases C-570/07 and C-571/07, José Manuel Blanco Pérez and María del Pilar Chao Gómez v Consejería de Salud y Servicios Sanitarios and Principado de Asturias, ECR [2010] 2010 I-04629.
[294] *Pérez and Gómez,* para. 44. In french "il doit être tenu compte du fait que la santé et la vie des personnes occupent le premier rang parmi les biens et les intérêts protégés par le traité (..)."
[295] *Pérez and Gómez,* para. 44.

pharmacies provided for in the legislation, which will be carried out by the competent authorities.[296]

The Court essentially resolves the case by accepting the legislative provision, adding however that the competing interests at play must be balanced when according licences in future cases. It is for the national court to decide whether or not this is done and will be proportionate. In other words, just like in *United Pan-Europe Communications*, the CJEU states that it is for the national court to review these decisions taken by the competent national authorities while performing a balancing act.

Looking at *Spanish Strawberries*, *Schmidberger*, *Karner, United Pan-Europe Communications* and *Pérez and Gómez,* it is important to note the judicial construction whereby the CJEU understands the national decisions to contain, or as containing in future decisions, a balancing act where different interests of equal legal value are weighed against each other. This means that the CJEU organizes its reasoning so that the national discretional space is limited to a decision or a specific legislative provision, not an area of national policy or a fundamental right *per se*. The balance margin of discretion thus signals that the original decision, which was challenged by the litigant, will remain intact.

As to the rhetoric of the margin of discretion, the motivation for using the technique is drawn from the fundamental rights status of the legal source that is at stake. The fundamental rights are traced back to the mirroring EU-source in all of these cases. This could be done in addition to a national fundamental rights source or without an additional national source having been relied upon by the litigants in the case. In other words, the margin of discretion is not attached to the nationally unique in the fundamental rights source at stake. Rather, it is the national reading of a fundamental right that the CJEU qualifies as also stemming from EU sources, which is given space to exist within the parameters of the CJEU's adjudication. This rhetoric might thus indicate the significance of the CJEU qualifying a case as being about a fundamental right compared to when it does not.[297]

[296] *Pérez and Gómez,* para 90-91, "it should be observed that the freedom of establishment of economic operators must be weighed against the imperative requirements of the protection of public health, and the seriousness of the objectives pursued in that domain may justify restrictions which have adverse consequences, and even substantial adverse consequences, for certain operators. Secondly, according to the file, the competent authorities are to organise at least once a year a procedure for issuing licences for setting up new pharmacies in step with demographic developments. Thus, by decision of 14 June 2002, the Autonomous Community of Asturias launched a licensing procedure for the opening of 24 new pharmacies on its territory with effect from 2002."

[297] See footnote 279 on *Danish Bottles*.

6.4.2 The National as Counterweight

So far I have highlighted instances of national decision-making being understood as embodying a balance between equally weighted interests. Without attributing more weight to a fundamental right than a fundamental freedom, the CJEU has nevertheless signalled the importance of fundamental rights status for triggering the use of a margin of discretion.

In this section the national quality is added to this picture. It could be argued that the uniquely national feature of the protection of the fundamental right serves as an accumulative criterion to the source's fundamental right-status. According to the Court, these qualities together then motivate the use of a margin of discretion and the national quality adds weight to the fundamental right in its confrontation with the fundamental freedom.

However, notwithstanding the CJEU's emphasis on the national quality, the structure whereby a fair balance is struck within the closed context of one specific national measure remains. This means that the pattern whereby the margin of discretion enables interconnected elaboration of the applicable standard of fundamental rights protection is one that recurs. While the national considerations are given more weight, they are still understood as having been made compatible with the interests of a specific internal market freedom of movement.

In *Omega*, the starting point of this line of case law, the Bonn police authorities in early autumn of 1994 issued a prohibition order which read that Omega Spielhallen, which organized laserdrome games in part imported from the United Kingdom, was forbidden from "facilitating or allowing in its […] establishment games with the object of firing on human targets using a laser beam or other technical devices (such as infrared, for example), thereby, by recording shots hitting their targets, "playing at killing" people […]."[298] The police authorities supported their decision on the basis of the maintenance of public order through prohibiting insults on the constitutional value of human dignity.

Omega Spielhallen appealed the decision, and 10 years later the CJEU had to give an answer to the question of whether the restriction of the free movement of services for reasons arising from the protection of human dignity was compatible with EU law.

Essentially, the margin of discretion is motivated, as distinct from its location in *Schmidberger*, as a consequence of the fact that recourse to the concept of public policy, such as establishing the essence of human dignity, *may vary* from one country to the other.

This first part of the judgement leading up to the margin of discretion could fruitfully be broken down into smaller units of legal reasoning to better illustrate how the CJEU shares

[298] Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn ECR [2004] I-09609, para. 5.

interpretative authority. First, the CJEU states that the protection of public policy is an acceptable derogation from the right to freedom of movement of services regulated in primary law. Since it is uncontested that the Bonn police authority's order was taken with the aim of guaranteeing the right to human dignity and ultimately averting threats to public policy, the CJEU could have moved directly to the proportionality test. However it does not. This is an important point in terms of identifying what the use of the margin of discretion technique is signalling. At this point the Court states that it retains the power to perform judicial review of the contested police order, especially since the Member State cannot determine the scope of freedom of services unilaterally.[299] Thus, the CJEU must remain involved in determining the scope of freedom of services. However, directly following this statement, the Court opens up its judicial review process by affirming that the "fact remains, however, that the specific circumstances which may justify recourse to the concepts of public policy may vary from one country to another and from one era to another. The competent national authorities must therefore be allowed a "margin of discretion within the limits imposed by the Treaty."[300]

In issuing that prohibition order limiting the free movement of services for the sake of protecting the right to human dignity, the policy authorities of Bonn were operating within a margin of discretion. If human dignity is not protected, to use the language of the CJEU, a danger is posed to public policy. The margin of discretion is explicitly constructed with reference to the primary law provision on public policy. Yet this does not alter the structure of the margin of discretion as addressing one decision, which in the understanding of the Court has found a balance between competing interests. However, the national or indeed sub-national (the Bonn precinct) qualities of the human dignity consideration are given a lot of weight in the CJEU's subsequent proportionality review of the order, *ex post facto* understood as having been taken within a margin of discretion.

When the CJEU performs the proportionality review it maintains that the contested decision corresponds to "the level of protection of human dignity which the national constitution seeks to guarantee in the territory of the Federal Republic of Germany."[301] This correspondence, albeit unconvincingly evidenced, emphasises how *the national* works as a counterweight when the CJEU *ex post facto* reviews the justifiability of the decisions that the Bonn police authority took within its margin of discretion. Subsequently and more in line

[299] *Omega*, para. 30.
[300] *Omega*, para. 31. This formula is re-used in Case C-208/09, Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien, ECR [2010] I-13693, para. 87.
[301] *Omega*, para. 39.

with orthodox proportionality review, the CJEU underlines that the Bonn police authority only prohibited the variant of laser game where the simulated target is human.

In sum, unlike in *Schmidberger*, there is an identification of the national dimension of the rights protection, not only a focus on aligning with Union-law rights sources.[302] Beneath this deceivingly emphasized identification of the uniquely German way of protecting human dignity I maintain that one finds the core of the balance margin of discretion. This is especially so since the margin of discretion is constructed as addressing one specific administrative decision understood to guarantee the protection of the human dignity of the people of the Federal City of Bonn in harmony with the freedom of movement of services. This decision, which embodies an acceptable compromise between competing interests, becomes the applicable standard of protection. As such the national authorities participate dominantly in the formulation of the EU's standard of protection, but the CJEU both blends EU law considerations into the national decision and performs a proportionality review. Indeed, the margin of discretion does not belong simply to the right to human dignity but to the specific decision-making by the Bonn police authority that restricted the free movement of services.

In *Dynamic Medien* the CJEU continues in the same vein and asks the question whether or not the rights of the child constitute a justified restriction of the free movement of goods.[303] The Germany media distribution-company Dynamic Media complained that its competitor Avides Media, by mail order sales in Germany of Japanese cartoons bearing only an age-limit label from British authorities, acted in breach of the provisions of the German legislation on the protection of young persons.

The CJEU examines a set of fundamental rights sources and finds that the EU Charter protects the rights of the child and that there are significant United Nations sources identifying the rights of the child. Here, the CJEU might appear to open up a common European reading of the rights of the child.

Instead, the CJEU draws a distinction between the shared *concept* of the protection of the fundamental rights of the child, and what it understands as the various national *conceptions* by affirming that: "As that conception may vary from one Member State to another on the

[302] See *Omega,* para 34 and, by contrast *Schmidberger*, para. 75. Indeed the laserdrome equipment was imported from the United Kingdom, without being stopped by any police authority, and so the CJEU *de facto* accommodates two different visions of human dignity, stemming from two different Member States.
[303] Case C-244/06, Dynamic Medien Vertriebs GmbH v Avides Media AG ECR [2008] I-00505.

basis of, inter alia, moral or cultural views, Member States must be recognised as having a definite margin of discretion.[304]

So, like in *Omega* but without a link to treaty based public policy derogations, the Court affirms that the difference in fundamental rights protection between the Member States may motivate the use of a national margin of discretion. Unlike both *Schmidberger* and *Omega*, the CJEU does not simply move from qualifying the rights of the child as a legitimate interest to reviewing the proportionality of the contested legislative provision. Instead the Court opens up the judicial review process and operationalizes a margin of discretion.

In *Dynamic Medien*, the margin of discretion is understood to demarcate a legislative provision which allows the free movement of goods to live "in conformity" with the German conception of how the rights of the child is best guaranteed.[305] Hence, the Court operationalizes the core structure of the balance margin of discretion. Again, the technique does not embrace a specific fundamental right but it belongs to a specific legislative provision in which the CJEU *ex posto facto* identifies that a certain conception of the rights of the child is fairly balanced ("in conformity") with the requirements stemming from the free movement of goods.

Subsequently, the weight of the national quality resonates in the criteria guiding the proportionality review of this provision, which is within a margin of discretion. Indeed the proportionality review is constructed very loosely. The Court concludes that the measure to require a label indicating the suitable age for image storage media is a suitable means of obtaining the goal of protecting children and that it *appears* that the rule is necessary to attain the objective concerned. Thereafter it allocates the ultimate evaluation of proportionality to the national court.[306]

It is important to note that notwithstanding the similarity in reasoning, the discretional space in *Dynamic Median* is arguably broader than in *Omega*. This is so since within the reasoning of the former case the margin of discretion is operationalized in the context of a legislative provision applicable throughout Germany, whereas the administrative decisions at issue in *Omega* only bind a limited geographical area, despite the CJEU affirming that the decision appears to reflect the standards of the German constitution.

[304] *Dynamic Medien*, para. 44.
[305] *Dynamic Medien*, para. 45.
[306] *Dynamic Medien*, para. 51: "However, it is for the national court, before which the main action has been brought and which must assume responsibility for the subsequent judicial decision, to ascertain whether that is the case."

In *Sayn-Wittgenstein* the applicant was born during WW2 in Vienna, and in 1991, when she was 47 years old, the German citizen Lothar Fürst von Sayn-Wittgenstein adopted her and she was subsequently given the name Ilonka Fürstin von Sayn-Wittgenstein.[307] During the period of time of her adoption and at the time of the proceedings before the CJEU she lived in Germany.

On 27 November 2003, the Austrian Constitutional Court held that, as summarized by the CJEU, "the Law on the abolition of the nobility, which is of constitutional status and implements the principle of equal treatment in this field, precludes an Austrian citizen from acquiring a surname which includes a former title of nobility by means of adoption by a German national who is permitted to bear that title as a constituent element of his name: in accordance with the Law on the abolition of the nobility, Austrian citizens are not authorised to bear titles of nobility, including those of foreign origin."

This ruling in turn triggered the State Governor of Vienna to write a letter to the applicant in the main proceeding stating that he would proceed to correct her surname in the Austrian civil status registry to Ilonka Sayn-Wittgenstein. She questioned the lawfulness of this decision. This conflict eventually ends up before the CJEU and the Court has to decide whether or not this decision by the State Governor, which according to the applicant restricts freedom of movement, is justifiable on the grounds that the Austrian abolition of formal nobility embodies the fundamental right to equal treatment.

At the outset of the CJEU's reasoning, *the national* functions as a counterweight in a balancing act, which the State Governor of Vienna is understood to have conducted when writing the letter ordering Sayn-Wittgenstein's name to be changed. The CJEU states "in the context of Austrian constitutional history, the Law on the abolition of the nobility, as an element of national identity, may be taken into consideration when a balance is struck between legitimate interests and the right of free movement of persons recognised under European Union law."

Subsequently, the CJEU follows *Omega* and qualifies this form of equal treatment as public policy and states that "the concept of public policy may vary from one Member State to another and one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty."

The CJEU immediately follows this affirmation by stating that equal treatment is a general principle of EU law that is *inter alia* protected by the Charter. However, to be clear, the CJEU

[307] Case C-208/09, Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien, ECR [2010] I-13693.

does not provide an EU-general reading of equal protection but uses the margin of discretion-technique to turn the Austrian reading of equal treatment in the specific instance of the State Governor's order of name change, into the applicable standard of protection

Notwithstanding the heavy national rhetoric manifested in the rich references to national constitutional law, to national identity, to article 4(2) TEU, and to the *de facto* preserved difference in standard of protection between Austria and Germany, the CJEU ultimately does not leave any part of the proportionality review to the national court but unilaterally answers that question of proportionality in the affirmative.[308]

Sayn-Wittgenstein represents an example of how a balance margin of discretion is addressed to a decision that is *ex post facto* understood to contain a balancing act between competing interests. The CJEU thus intervenes in what *prima facie* appears to be national dominance in term of interpretative authority. Firstly, by *ex post facto* inserting EU law considerations into the State Governor's decision-making, and secondly by conducting a proportionality review of the decision taken within the margin of discretion. Both legal reasoning interventions are emblematic of this line of case law.

Just as in *Spanish Strawberries*, *Schmidberger*, *Karner, United Pan-Europe Communications,* and *Pérez and Góme,* there is a visible judicial construction whereby the CJEU understands the national decisions to contain, or to contain in future decisions, a balancing act or an act of making different interests compatible, and where this decision or provision, which embodies the outcome of this weighing of interests, is subsequently placed within a margin of discretion. The CJEU accordingly organizes its reasoning so that the national discretional space is limited to this decision or a specific legislative provision, not an area of national policy or a fundamental right *per se*.

---

[308] The case *Runevič-Vardyn and Wardyn* follows a similar pattern but does not contain a margin of discretion language. The CJEU outsources a set of proportionality analysis (resembling in this way *Familiapress*, see footnote 279). The first claimant, who is a Lithuanian national belonging to the polish minority, married the second claimant, who is a Polish national. Her name is spelled in the Lithuanian way and her husband's name in the Polish way and therefore she applied for the spelling to be changed. The Civil Registry refused. The CJEU examines the refusal to change the marriage certificate. First, the CJEU holds that the national court needs to decide whether the refusal constitutes a "serious inconvenience" and as such a restriction of the freedom of movement. Then, the CJEU turns to the justification which derives from, the CJEU argues, the preservation of rich linguistic and cultural diversity as guaranteed by article 22 of the Charter and reads it together with article 4(2) TEU.

The question of whether the balancing exercise between the abovementioned competing interests embodied in the Vilnius civil registry's refusal is proportionate, is also left to the national court. In other words both the verification of a restriction and the proportionality of that restriction is left to the national court. The CJEU ultimately pronounces on whether the administrative decision appears proportionate or not: "the disproportionate nature of the refusal (…) may possibly appear from the fact that the Vilnius Civil Registry Division entered that name, in respect of the second applicant in the main proceedings, on the same certificate in compliance with the Polish spelling rules at issue." See case C-391/09, Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others, ECR [2011] I-03787.

Omega, *Dynamic Medien* and *Sayn-Wittgenstein* have the added distinct feature that they handle two different ideas of one specific conception of fundamental right protection (human dignity, the right of the child, and equal treatment). I have highlighted this acceptance of national, or indeed sub-national difference in relation to each case. I have also underlined how this approach, taken together with the use of a margin of discretion to signal that the contested decision or legislative provision represents a balanced approach to a fundamental right/fundamental freedom-clash, embodies an interactive form of elaboration of the applicable standard of protection rather than a choice between one of two modes of protection offered by separable *EUropean* and national legal entities.

Moreover the way in which the CJEU couples these references to national conceptions to the "mirroring" EU fundamental rights source should be noted.[309] This exercise underlines how the applicable standard of protection, with its core in the national reading placed within a margin of discretion, is connected to EU law sources. In other words, the CJEU affirms that the applicable standard of protection is connected and not alien to the EU law sources, even though the CJEU does not aim to provide a unified or autonomous reading of the EU source.

6.5 Concluding Remarks: Signalling Balance

I have delineated how a paradigmatic clash between two often-analysed sets of norms turns into micro-interaction with peculiar temporal twists. In particular, I have shown how this process has been facilitated by a balance margin of discretion.

The margin of discretion signals that the contested national, or perhaps sub-national decision aimed at guaranteeing the protection of a fundamental right remains intact. However, the CJEU participates in establishing the applicable standard of protection by *ex post facto* formulating the motivation of the decision by attributing an act of reconciliation of competing interests. In addition, the CJEU participates in the elaboration by conducting a more or less strict proportionality review.

This adjudicative scheme moves the legal events both in time and in perspective from a local decision to a grand clash of EU fundamentals, only to land in a carefully carved out discretional space where the rationales of the contested decision are determined retroactively and its outcome is reviewed.

[309] *Omega*, paras. 33-34; *Dynamic Medien*, para. 41; *Sayn-Wittgenstein*, paras. 52 and 89.

This picture contrasts with ideas that could be associated with the diversity narrative's vision of how clashes between fundamental freedoms and fundamental rights traceable to national constitutions should be resolved along jurisdictional lines, by which I mean handled as a choice between one out of two modes of protection offered by separable legal entities.

In contrast to these categories received by the diversity narrative however, the balance margin of discretion does not belong to a specific fundamental right. Instead, the balance margin of discretion belongs to a decision or a specific provision representing a composite set of interests.

Therefore despite the fact that the diversity narrators often return to this group of cases, I have aimed to show how notwithstanding the national rhetoric, the CJEU handles the national decision by constructing its motivations and EU rationales, which enables a common elaboration of the applicable standard of protection. Thus, importantly, the national decision-maker does not unilaterally formulate what ends up being the applicable standard of protection.

Given this picture, one could think of the margin of discretion as a device which signals that the original contested national measure will remain intact, even though its rationales will be elaborated by the CJEU. This perspective is particularly useful for this margin of discretion typology since it is derived from a vast body of internal market case law. In other words, it is a useful way of understanding the difference in outcome between when a margin of discretion is used and when it is not used.

As is well known, *Viking* and its sister-case *Laval* have been the subject of criticism in commentary for, among other reasons, the CJEU's failure to use a margin of discretion as it did in *Omega* and *Schmidberger*.[310] Most importantly, and as explained earlier, this criticism has been developed by intrusion narrators who hold that these cases are emblematic examples of the intrusiveness of the Court's adjudication of fundamental freedoms. Understood in the context of the interconnected decision-making enabled by the margin of discretion-technique, *Viking* and *Laval* might be better understood as exceptional, rather than emblematic, examples of how the CJEU handles clashes between fundamental freedoms and fundamental rights. Still, *Viking* and *Laval* represent an opportunity to reflect on the difference between the use and the non-use of a balance margin of discretion.

[310] Weatherill refers to this fact as "the ruling's main weakness." See Weatherill 2013, supra note 277 at 28.
Case C-438/05, International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eest ECR [2007] I-10779 and Case C-341/05 and Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, ECR [2007] I-11767.

In *Viking* the right to take collective action clashes with the freedom of establishment, and in *Laval* with freedom of services. The clash-creating trade union whose action is accused of restricting the freedom of establishment and services respectively, is not ascribed a balancing act. Instead the EU as a whole, according to the Court, aims to achieve balance.[311] In *Laval* the CJEU concludes straightforwardly that the strike constitutes a disproportionate restriction and is therefore not allowed under EU law. In *Viking* the referring English Court is given the task of deciding on the proportionality of the collective action governed by Finnish law, under the close supervision of the CJEU.[312]

This chapter has aimed to show that the balance margin of discretion ultimately functions as a legal reasoning method through which the CJEU involves the national decision-makers, while remaining involved itself. In *Viking* and *Laval* that possibility of an interactive establishment of the applicable standard of protection was not used. The result is arguably two of the most criticized rulings in the history of the CJEU.

Perhaps the imaginary balancing would have been taken to its extreme in *Viking* and *Laval*. How can a trade union, which functions to preserve and promote the interests of its members, be understood as having been conducting a balance between the equally weighted rights to strike and one of the internal market freedoms?

As unreasonable as such a question may seem, the CJEU has indeed attributed such balancing to trade unions and collective agreements, namely in *Commission v Germany*, without however subsequently operationalizing a margin of discretion.[313]

With these examples of non-uses of the technique in mind, when analysing the method running through the cases in this chapter it is important to appreciate the way in which the balance margin of discretion facilitates interaction between the national decision-makers and

[311] The proportionality test in *Viking* is closely supervised by the CJEU through its formulation of detailed criteria. It should be observed that the Court in the following statement is British and the legislation is Finnish, see para. 85: ”it must be pointed out that, even if it is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent such collective action meets those requirements, the Court of Justice, which is called on to provide answers of use to the national court, may provide guidance, based on the file in the main proceedings and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment in the particular case before it.”.

[312] This case was later settled outside of court.

[313] See Case C-271/08, European Commission v Federal Republic of Germany, ECR [2010] I-07091, para. 85. The ”TV-EUmw/VKA” is the contested provision of a collective agreement, please take note of the reference to Schmidberger: ”Answering this question entails verification, in the light of the material in the file, as to whether, when establishing the content of Paragraph 6 of TV-EUmw/VKA, which is referred to by the Commission in its action inasmuch as that paragraph served as the basis for the contract awards at issue, a fair balance was struck in the account taken of the respective interests involved, namely enhancement of the level of the retirement pensions of the workers concerned, on the one hand, and attainment of freedom of establishment and of the freedom to provide services, and opening-up to competition at European Union level, on the other (see, by analogy, Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraphs 81 and 82).”

the CJEU. The original encounter between fundamental freedoms and fundamental rights (*ex post facto*) embodied in the contested national measured is preserved in its core and the CJEU remains involved since it attributes balancing and, to varying degrees, performs a proportionality test.

This is what the balance margin of discretion signals, which is distinct from a scenario with a similar legal conflict but without an operationalization of a margin of discretion. The balance margin of discretion is not a mechanism that predictably turns on when certain conditions are met. This is an important point for individual litigants. Indeed, because of the national margin of discretion being thoroughly tied to specific moments, provisions and decisions, these cases do not necessarily serve as a roadmap for subsequent litigants. It is the CJEU alone that signals when it will share interpretative authority through the use of a balance margin of discretion.

7. The Compliance Margin of Discretion

*

In this chapter I will show that the margin of discretion-technique has been used by the CJEU to ensure compliance between secondary EU legislation and fundamental rights protection. At the heart of this type of case one finds a litigant who argues that provisions of a directive or a regulation violate a fundamental right.

This is a distinct type of use of the method in the area of fundamental rights because it is not designed to handle a decision embodying a clash between internal market law and fundamental rights like the *balance margin of discretion,* or to accommodate deviations from EU fundamental rights like the *deviation margin of discretion*. Rather, the CJEU answers by giving a margin of discretion to enable the competent national authority to *apply* EU law in compliance with fundamental rights. Here, in contrast to a more classical judicial review scenario where the CJEU either nullifies the challenged piece of secondary legislation or declare it fundamental rights compliant, the compliance margin of discretion, operating at the stage of application, represents a third way.

As a consequence of these characteristics the technique has limited traction within the three dominant narratives. Take the *intrusion narrative*. The notion that the CJEU is reluctant to nullify EU secondary legislation on fundamental rights grounds (hence not taking right seriously) is central to the critique formulated by intrusion narrators and fits, on the face of it, with the compliance margin of discretion-method that ultimately saves EU law from nullification. However, the intrusion narrative's main act of intrusion is linked to the CJEU's expanding adjudication and authoritatively overriding of national courts over both ordinary legislation and constitutions. In contrast to this fear held by intrusion narrators, the compliance margin of discretion leaves the competent national authorities a margin of discretion to independently handle EU sources.

At the same time, *improvement narrators* find very little worth appreciating in a system where the CJEU outsources the responsibility for diligently reviewing the EU legislation's fundamental right compliance. Moreover, the compliance margin of discretion allows for non-unitary application of EU law, which disrupts the idea of the EU as a potentially progressive fundamental rights standard-setter.

Equally, the *diversity narrators*, albeit in principle appreciative of non-unitary fundamental rights protection, will find very little deference motivated by the nationally

unique. Instead, the reader of this strand of margin of discretion-use is confronted with a strikingly functionalist approach, where the competent national authorities are engaged in avoiding the nullification of EU legislation.

The mapping of this use of national discretion will start with *Stauder* from 1969,[314] the first case in which the CJEU recognized fundamental rights, but perhaps also the first step towards the operationalization of national discretion for fundamental rights compliance. Thereafter, the in-depth inquiry into the use of this technique begins with a substantial re-reading of the *Wachauf*-case from 1989.[315] I will argue that *Wachauf* is not only about judicial review of a Member State's action but also contains a margin of discretion to ensure that EU law is fundamental rights compliant.

Continuing this same line of inquiry, I will turn to the *Parliament v Council*-line of case law, which reconnects explicitly with the method used in *Wachauf*,[316] and thereafter turn to *Lindqvist*,[317] where the CJEU gives the competent national authority discretional space to interpret EU law in compliance with fundamental rights.

All of this will suggest a way of reformulating the possible routes in a supranational fundamental rights-based judicial review scenario.[318] This reformulation, though traceable to case law dating back to 1969, defies the dominant narratives of improvement, intrusion and diversity, ultimately because of the compliance margin of discretion's profound reliance on collaboration, which destabilizes the binary logic operationalized by dominant narrators.

7.1 Legal Conflict: EU Secondary Law Challenged on Fundamental Rights Grounds

In the *deviation margin of discretion* scenario a litigant seeks to use an EU fundamental rights source to strike down a piece of national legislation. In this section in contrast, an individual litigant or an institution seeks to argue that EU secondary legislation is in breach of a fundamental right protected by the European Union legal order.

This legal conflict is historically important in the development of the CJEU's fundamental rights case law. Once it became evident in the late 1960s that EU legislation would trigger fundamental rights based challenges rooted in national constitutions, the CJEU responded by

[314] Case 29/69, Erich Stauder v City of Ulm – Sozialamt, ECR [1969] Page 00419.
[315] Case 5/88, Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft ECR [1989] 02609.
[316] Case C-540/03, European Parliament v Council of the European Union, ECR [2006] I-05769.
[317] Case C-101/01, Criminal proceedings against Bodil Lindqvist, ECR [2003] I-12971.
[318] For a classic presentation see Cappelletti, M 1971, supra note 151.

reviewing the legislation itself, and formulated the way in which the EU legal order also protected fundamental rights. This piece of the EU law canon is at the heart of the intrusion narrator's preoccupation that EU legislation which potentially violates national constitutional rights would not be reviewed and later, if reviewed, that the challenge would be rejected in the absolute majority of cases.

The *expectation* of a certain set of outcomes of judicial review and indeed, as pointed out by intrusion narrators, the tensions between EU and national legal authority that this legal conflict represents within the EU legal space have perhaps overshadowed the third way represented by the compliance margin of discretion. While the conflict is well researched, the operationalization of national discretion to solve it has not received the same attention.

Furthermore, because of this structure of the legal conflict the litigant may rely on a set of sources within the EU fundamental rights material. In the early cases the litigant will typically turn to their national constitutional text, which is the prototype set-up for the intrusion narrators, later to the European Convention of Human Rights, and more recently, to the Charter.

7.2 EU Law Geography: Fundamental Rights-Sensitive Secondary Law

Any piece of EU secondary legislation – regulations or directives – may potentially be the subject of a fundamental rights-based challenge. Some pieces of secondary legislation however, are particularly likely to be challenged, mainly because they handle subject matters that by their nature, directly or indirectly, are linked to the protection of fundamental rights.

In this chapter I will discuss three different sets of EU secondary legislation that have been challenged and where margin of discretions have been used.[319] Firstly, the regulation of milk quotas and a cluster of regulations seeking to spell out the mechanics of this type of agricultural governance, which have mainly been challenged on property rights-grounds. Indeed, this is a typical example of early EU fundamental rights litigation.

Secondly, I will look at how the compliance margin of discretion-technique has been used to address challenges to the family reunification directive, which directly handles the right to family life. This represents, I would argue, a particularly important area of EU rights

[319] Notably, even though the compliance margin of discretion is used in one case challenging a specific piece of secondary legislation, there is nothing that binds the CJEU to allowing similar national discretion when subsequent challenges are made.

protection since it may be relied upon by minor children and, in general, directly shapes the way in which people, particularly those newly arrived from elsewhere live their personal lives in Europe.

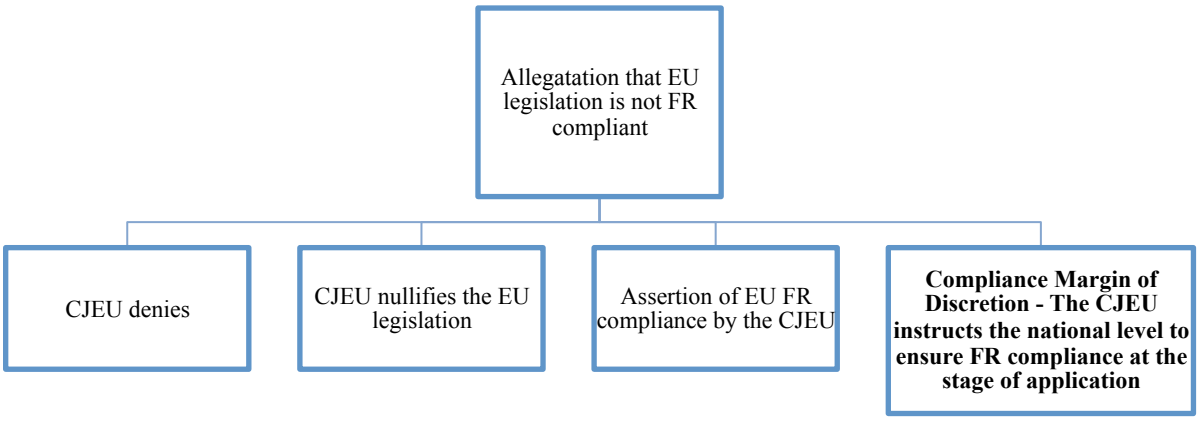
Thirdly, I will discuss the data protection directive, which on several occasions has been subjected to challenges rooted in the right to freedom of expression, and which is furthermore a rapidly developing policy area.

Importantly, this does not mean that the margin of discretion has not been used in a similar fashion to address challenges to other pieces of secondary legislation.[320] However, the above selection illustrates both that the method dates back to the origins of EU fundamental rights adjudication and also that the technique, in the Court's own understanding, is apt to handle different, and from a societal perspective important, fundamental rights subject matters.

As has already been stated, the CJEU does not nullify the contested provision, nor does it dismiss the challenge in the closed context of the case before it.[321] Rather, the Court instructs the competent national authority to ensure compliance between the contested EU legislative source and the protection of the fundamental rights triggered in the case.

Put more generally, the main characteristic of this use of the margin of discretion-technique is that both the CJEU and the competent national authority participate in creating the fundamental rights compliance of secondary law. In this vein, Craig and de Búrca describe the technique used in *Lindqvist* and *Parliament v Council*, both discussed in this chapter, as a means of *saving* the EU legislation.[322]

[320] See for similar lines of reasoning; Case C-275/06, Productores de Música de España (Promusicae) v Telefónica de España SAU, ECR [2008] I-00271 on secondary legislation concerning electronic commerce and intellectual property rights: "the authorities and courts of the Member States must /…/ also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights."
[321] Crucially, it is the EU Courts and not the courts of the Member States, which have exclusive jurisdiction to review the legality of the acts of the EU institutions. National courts do not have power to declare such acts invalid, see Case 314/85, Foto-Frost v Hauptzollamt Lübeck-Ost, ECR [1987] 4199, paras. 12-20.
[322] Craig and de Búrca 2011, supra note 195 at 383.



The method for achieving this aim of compliance lives in close symbiosis with the piece of legislation that is challenged. There is a tendency towards a difference between directives and regulation in terms of the breadth of the discretional space. However, there is no absolute rule by which a certain "amount" of discretion follows a specific type of secondary source. The following however do cast light on the Court's inclination:

If a *regulation* is challenged, because of its directly binding nature without the need for additional national implementing legislation the CJEU tends to give more careful guidance as to where the discretional space is located within the source. Indeed, the CJEU may define how and under what circumstances the source may be re-read and therefore creates a narrower compliance margin of discretion.

In the case of a challenge to a *directive*, which in their construction tend to be reliant on discretionary choices by the Member States as to the precise manner of implementation, the discretional space tends to be wider.[323] This is because rather than formulating narrow possibilities of re-reading, the CJEU calls on the competent national authorities to interpret the directive's rules at the stage of application in a fundamental rights compliant way.

In other words this latter compliance version of the margin of discretion, which focuses on the interpretation, especially of directives, is more opaque. This is mainly because discretional space to interpret the source in a fundamental rights compliant way at the stage of *application*

[323] Article 288 TFEU holds that directives shall be binding as to the result to be achieved but shall leave to the national authorities "the choice of forms and methods."

may to varying degrees be interlaced with the discretional space to *implement* the legislation. Even if we align our thinking with the idea that law requires interpretation all the time and everywhere, I am concerned here with identifying certain moments of interpretation,[324] and particularly focus on *the moment when the legislation is applied in a specific instance within the Member State*. Crucially, where the CJEU cannot construct the fundamental rights based-challenge as purely a question of national implementation legislation, but has to accept that the challenge concerns rules in EU secondary law.[325]

7.3 Technicality: Unitary Application Interrupted

Interestingly, in this line of case law the CJEU separates the *application-phase* from other moments in which the legislation is handled, namely the *legislative-phase* where the content and wording is formulated and the *implementation-phase* where, especially in the case of directives, the competent national authorities transpose EU secondary legislation into the national legal system.

The latter distinction, as noted above, between the Member State's legislative action and the EU's legislative action is emblematic of the operation of EU law. In contrast, the former distinction between secondary law "in itself," [326] which directs responsibility at the *legislative-phase,* and on the other hand, the *application-phase* is more a characteristic of this typology of margins of discretion than of EU law as a whole.

By constituting its legal reasoning on this distinction between different phases, the CJEU understands the compliance margin of discretion as operating exclusively at the application-phase. In the previous section I delineated the two ways in which the CJEU opens the possibility of competent authorities within the Member States *independently handling* the EU secondary sources: first, by allowing the competent national authorities to re-read the source, and second, with an explicit instruction to interpret the source.

---

[324] Dworkin, R 1982, Law as interpretation, *Critical Inquiry* 9 (1), pp. 179-200.

[325] For affirmations that *when adopting measures to implement EU legislation*, national authorities must exercise that discretion in compliance with the general principles of EU law, including fundamental rights, see, *inter alia*, *Wachauf*, para 19; Case C-145/10, Eva-Maria Painer v Standard VerlagsGmbH and Others, ECR [2011] I-12533, para. 105; Case C-313/99, Gerard Mulligan and Others v Minister for Agriculture and Food, Ireland and Attorney General, ECR [2002] I-5719, para. 35; Joined Cases C-213/00 and C-451/00 Cooperativa Lattepiù and Others v Azienda di Stato per gli interventi nel mercato agricolo, ECR [2004] I-2869, para 57 and Case C-496/04, J. Slob v Productschap Zuivel, ECR [2006] I-8257, para.41.

[326] "In itself "or "in themselves" is the CJEU's own wording, see for instance *Lindqvist*, para. 90 and *Parliament v Council*, para. 84.

As has already been pointed out, the CJEU's act of analytically separating the application-phase for the purpose of operationalizing national discretion enables the CJEU to avoid nullifying the contested provision by affirming that the secondary legislation *in itself* is not in breach of fundamental rights since it *will be applied* in a fundamental rights compliant way.

Furthermore, and still enabled by the same separation of phases, since the discretional space is not constructed as addressing one specific national measure but rather tied to the secondary source's application, it is not limited in time as such. Rather, subsequent competent national authorities are mobilised to ensure compliance between the specific legislative provision and a fundamental right at every instance of its application. This temporal open-endedness is a distinctive feature of the compliance margin of discretion when compared to the other two typologies.

Consistent with these observations, the scheme whereby an EU source is made fundamental rights-compliant through the use of the margin of discretion-technique destabilizes the notion of unitary application of EU law. Put differently, rather than the CJEU *reviewing* the secondary law in itself and as a consequence formulating a unitary meaning of its wording, it allows the competent national authorities within the Member State to interpret the source in a way which in itself is not predefined, but that will guarantee the predefined outcome of fundamental rights compliance.

Therefore, in this typology, the work of *how* compliance should be done is left to the competent authorities, even though the degree of freedom of elaboration varies. This means that people subjected to this legislation will have to accept its fundamental rights compliance despite the possibility that the exact shape of this compliance may vary from case to case.

In the context of the discretional space opened up by the compliance margin of discretion, the CJEU might insert certain criteria aimed at structuring the definition of the fundamental rights source. For example this could include stating what would constitute a proportionate infringement, or references to earlier case law where the fundamental rights have been interpreted. In this way the CJEU may participate in the elaboration of compliance. Alternatively, the competent national authorities might handle the reading and interpretation of the fundamental rights source, the other side of compliance in respect of the secondary source, independently. This is a variable within this typology.

The Court's method in the compliance margin of discretion poses a challenge to any presumption of continuum of the CJEU's interpretative authority, which is the basis for

unitary interpretation of EU sources.[327] Instead one finds a common project between competent national authorities and the CJEU of maintaining fundamental rights compliance of the EU source. While this process is clearly initiated by the CJEU, the interpretative authority is divided.

It remains unitary in the sense that the outcome still lies in the predestined end result of compliance. But the content of compliance might vary between geographically different applications and different moments in time. This interruption of the unitary application of EU sources sheds new light on the question of the standard of protection the CJEU applies when reviewing EU sources.

For instance, on the CJEU's handling of secondary sources Weiler states that: "In its dialogue with its national counterparts its claim is jurisdictional: only the European Court is in a position to make the determination on the compatibility of a Community measure with fundamental human rights."[328] This observation comes across as much too reliant on a notion of the inviolable interpretative authority of the CJEU. While I am not arguing that the compliance margin of discretion equals an inactive Court of Justice of the EU, it does rely on a technique that instrumentalizes national interpretation of EU sources and hence shares interpretative authority.

Ultimately, the compliance margin of discretion suggests that a distinction could be drawn between *unitary application* as a method solely administrated by the CJEU and an *integrated system of adjudication* in which different EUropean and national actors together engage in the unitary outcome of fundamental rights compliance. This distinction highlights a way of thinking about unitary application that goes beyond the CJEU. The compliance margin of discretion illustrates a process in which the CJEU trusts national decision-makers to participate and share interpretative authority in what ultimately becomes fundamental rights compliance.

[327] On the importance of unitary application see Kumm's detailed plan for collaboration between the CJEU and the German Constitutional Court where he maintains that unitary application is closely related to the Rule of Law: "The *second* principle prescribes adequate respect to the formal ideal of the realization of the Rule of Law on the European level. This I call the *Principle of Expanding the Rule of Law*. This principle aspires to the uniform application of supranational laws providing for the predictability and regularity." Kumm 1999, supra note 130 at 353.
[328] Weiler 1999, supra note 85 at 115.

7.4 Examples of Compliance Margins of Discretion

7.4.1 Prelude: Stauder

The year is 1969 and the Court of Justice, for the first time, holds that it guarantees fundamental rights because these are general principles of EU law. For this reason alone it qualifies as a significant piece of case law. In addition, which is interesting in its own right, *Stauder* contains a method of legal reasoning similar to a compliance margin of discretion.[329]

Stemming from the infancy of the EU, *Stauder* concerns a Commission decision from 1969 taken in pursuance of Regulation No 804/68 on a common organization of the market of milk products, which authorized Member States to make cheap butter available to selected categories of consumers who received certain social security payments.[330] Article 4 of the Commission's decision provided, in its (literally translated) German version: "Member States shall take all measures necessary to ensure that /…/ those entitled to benefit from the measures laid down in Article 1 may only receive butter in exchange for a coupon issued *in their names.*" In the French version the last portion of that article was phrased *bon individualisé* and, in Italian, *buono individualizzato*. In other words, the French and Italian language versions did not necessarily require a name but could refer to, for instance, a number. Thus people with the cheap-butter benefit were required to show coupons with different types of information depending on which Member State they lived in.

The German citizen Erich Stauder was a recipient of a war victim's pension and as such entitled to the cheap-butter benefit. He considered it to be discriminatory that he had to present a coupon that identified him by name when he bought cheap butter and therefore made a constitutional complaint to the *Bundesverfassungsgericht,* on 22 April 1969. [331]

The CJEU subsequently solves this case by holding that:

> In a case like the present one, the most liberal interpretation must prevail, provided that it is sufficient to achieve the objectives pursued by the decision in question. /…/
>
> It follows that the provision in question must be interpreted as not requiring—although it does not prohibit—the identification of beneficiaries by name. Each of the Member States is accordingly now able to choose from a number of methods by which the coupons may refer to the person concerned.

[329] Case 29/69, Erich Stauder v City of Ulm – Sozialamt, ECR [1969] Page 00419, para. 7.
[330] Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organisation of the market in milk and milk products, [1975] OJ L 148.
[331] Opinion of Advocate General Roemer delivered on 29 October 1969 in Case 29/69, Erich Stauder v City of Ulm – Sozialamt.

> Interpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court.[332]

Naturally, this ruling must be read in the less coordinated multi-lingual context of the history of early European Union integration. The different languages versions specifying how to individualize a butter coupon allows the Court to ascertain that Member States have sufficient discretion to interpret the Commission's decision in a fundamental rights compliant way. Thus, at first glance the CJEU uses linguistic confusion rather than legal construction to achieve fundamental rights compliance. Moreover, the Commission's decision was, by the time it reached the Court, amended to reflect the French and Italian versions. A fact the CJEU highlights in its reasoning.

Having said this, *Stauder,* which is the first fundamental rights case in the history of the CJEU, represents a method of ensuring fundamental rights compliance by giving the competent national authority discretion to conduct "the most liberal interpretation." As such, *Stauder* is constructed as discretion for interpretation rather than a re-reading of the sources, despite the fact that the interpretation consists of an act of choosing the most liberal language version out of a set of language versions, which arguably limits the reach of the discretional space.

What I wish to highlight with *Stauder*, a case lacking explicit margin of discretion language, is that when reading subsequent sections of this chapter it should be borne in mind that the idea that the national level can accommodate, by means of interpretation, compliance between EU law and fundamental rights, dates back to 1969.

7.4.2 Crying Over Spilt Milk: Re-reading Wachauf

What began with a legal claim traceable to the bad relationship between a milk farmer and a landlord ended up being a cornerstone in the EU fundamental rights architecture. The dominant narrative of *Wachauf* is that the case established the principle that: "Member States are obliged, as a matter of Community Law, to observe fundamental rights whenever they implement EU law." This in turn prompted intrusion narrators to criticise the CJEU for an offensive and expansionist use of fundamental rights adjudication.[333]

---

[332] Case 29-69, Erich Stauder v City of Ulm – Sozialamt, ECR [1969] Page 00419, para. 6-7.

[333] Jacobs, FG 2010, Wachauf and the Protection of Fundamental Rights in EC Law, in Maduro, M and Azoulai, L (eds.) *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Hart Publishing, Oxford; Portland, p. 133.
For a different version of the same point; in 1992 Coppel and O'Neill described *Wachauf* as expressing the Court's "offensive use of human rights", "because for the first time, the European Court applied fundamental

Writing about metaphor, narrative and time Ricoeur states that: "narrative attains its full meaning when it becomes a condition of temporal existence."[334] In line with that logic *Wachauf*, twenty years after it was handed down, defines the scope of application of the Charter of Fundamental Rights of the European Union. The Explanation on Article 51 of the Charter stipulates that, just like in *Wachauf*, the Charter applies when the Member State is implementing EU law.[335]

I will not challenge this dominant reading of *Wachauf* as false as such. However, I will deconstruct the facts and the chain of events in this twenty-four-paragraph case and argue that the standard focus on the CJEU's handling of national implementation rules represents only half of the chain of events and only half of the legal questions posed by *Wachauf*. I will argue that *Wachauf* is about two separate sets of rules, the national implementation rule *and* a cluster of provisions (stemming from Council Regulation No 857/84 and Council Regulation No 1371/84),[336] both these sets of rules have the effect of breaching Hubert Wachauf's right to property. Crucially though, these sets of rules are dealt with differently; whereas the national implementation rule is nullified, the CJEU uses the compliance margin of discretion to handle the provisions of the EU regulations.

It would be inaccurate however, to state that *Wachauf* has never been conceived as a case about a national implementation-rule and a set of community rules. Indeed Coppel and O´Neill concluded that: "Once again the problem was said to lie in the Member State's implementation provisions and not in the Community regulations" - even though the authors never explain in depth what that means.[337] Furthermore, the idea that *Wachauf* is pointed more towards a form of dialectic between the CJEU and the Member State than is normally

---

rights principles to national acts formulated in implementation of Community legislation." See, Coppel and O'Neill 1992, supra note 30 at 676. Striking a slightly different note, Weiler in 1999 contextualized the case in a broader constitutional setting as "agency review." He described Member States as the executive branch of the Community and therefore the CJEU, when it strikes down a Member State implementation rule, is engaging in agency review. See, Weiler 1999, supra note 85 at 120. "Member States as agents of the EU" is also the way in which Craig and de Búrca frame the *Wachauf* ruling, See: Craig and de Búrca 2011, supra note 195 at 382. For recent commentary in this tradition see: Kühn, Z 2010, Wachauf and ERT: On the Road from the Centralised to the Decentralised System of Judicial Review, in Maduro, M and Azoulai, L (eds.) *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Hart Publishing, Oxford; Portland; Kaila, H 2012, The Scope of Application of the Charter of Fundamental Rights of the European Union in the Member States, in Cardonnel, P, Rosas, A and Wahl, N (eds.), *Constitutionalising the EU Judicial System, Essays in Honour of Pernilla Lindh*, Hart Publishing, Oxford; Portland.

[334] Ricœur, P 1984, *Time and narrative, Vol.1*, University of Chicago Press, Chicago, p. 52.

[335] EXPLANATIONS RELATING TO THE CHARTER OF FUNDAMENTAL RIGHTS, Official Journal of the European Union C 303/17.

[336] Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector, [1984] OJ L 90 and Commission Regulation (EEC) No 1371/84 of 16 May 1984 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68, [1984] OJ L 132.

[337] Coppel and O'Neill 1992, supra note 30 at 676.

assumed, has been discussed, albeit not in detail, by Cruz Villalón under the title "*Wachauf*: A Common Task."[338]

Moreover, the Court itself has subsequently referred to *Wachauf* in cases where discretion is used to mandate the competent national authorities to ensure compliance between EU law and fundamental rights.[339] This is in itself a reason to properly map the *Wachauf* ruling in order to understand its function as a point of reference in contemporary fundamental rights case law.

The aim of this chapter is to carefully re-construct the chain of events and the content of the applicable provisions, because if Ricoeur is right and a dominant narrative in itself creates meaning, this justifies re-visiting the original text yet another time to investigate if a different interpretation is possible. Hence in the following a different reading of *Wachauf* will be presented, which focuses on the second part of the judgement that deals with the EU regulations. This reading represents the first step towards the construction of the *compliance margin of discretion.*

*

Hubert Wachauf carried out dairy farming at Kückenhof farm in Germany.[340] He did not own the farm himself but leased it from Princess Sayn-Wittgenstein.[341] Being a second-generation dairy farmer at Kückenhof (he had inherited the lease from his parents) all the tools needed to produce and store milk and all the cattle were Hubert Wachauf's property, not the landlord's.

In connection to the expiry of the lease, on 6 June 1984 Hubert Wachauf[342] applied for compensation from the German authorities for giving up milk production and surrendering his

[338] Cruz Villalón, P 2010, 'All the guidance', ERT and Wachauf, in Maduro, M and Azoulai, L (eds.) *The past and future of EU law: the classics of EU law revisited on the 50th anniversary of the Rome Treaty*, Hart Publishing, Oxford; Portland, p. 164.

[339] Furthermore, there is quite an impressive list of recent AG opinions that refer to the relationship between *Wachauf*, EU fundamental rights and Member States discretion: Opinion of Advocate General Trstenjak delivered on 22 September 2011 in Joined cases C-411/10 and C-493/10, N. S. v Secretary of State for the Home Department et M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform; Opinion of Advocate General Trstenjak delivered on 8 September 2011 in Case C-282/10, Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre; Opinion of Advocate General Bot delivered on 2 September 2010 in Case C-232/09, Dita Danosa v LKB Līzings SIA; Opinion of Advocate General Cruz Villalón delivered on 1 June 2010 in Case C-570/08 Symvoulio Apochetefseon Lefkosias v Anatheoritiki Archi Prosforon.

[340] Paragraph 6 of the *Wachauf*-ruling states: "Reference is made to the Report of the Hearing for a more detailed account of the facts of the case, the applicable Community and national provisions, the course of the procedure, and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court." The facts of the case are reconstructed on the basis of the CJEU's account and the referring courts recapitulation, see *Re the Küchenhof Farm, (Case I/2-E 62/ 85) Before the Verwaltungsgericht (Administrative Court) Frankfurt Am Main*, [1990] 2 C.M.L.R. 289.

[341] The CJEU and AG Jacobs incorrectly refer to the landlord as a *he*.

[342] It is unclear exactly when the lease expired. The referring Court, AG Jacobs and the CJEU have three different versions. Here the CJEU's "upon the expiry of the lease" has been used. Reading the referring court's

milk quotas to the German agricultural authorities. EU Council Regulation No 857/84 and Council Regulation No 1371/84 enacted in March and May 1984 respectively provided for this procedure. Importantly, the overall aim of these regulations was to minimize the production of milk in the European Community.

Ultimately, Wachauf did not receive any compensation because the national implementation legislation, section 3(2) of the Milk Production (Cessation Payments) Order [1984] I Bgb1. 1023, required a written consent from the landlord before surrendering the lease, which Wachauf did not have. Crucially, the EU regulations did not provide for such a written consent-rule, it was a purely national initiative.

The lease expired and the milk quotas, on the basis of article 5(1) and 5(3) of Council Regulation No 857/84, automatically returned to Sayn-Wittgenstein and subsequently her new lessee, without any compensation having been paid to Wachauf.

In this brief recapitulation of the events lies one important fact - Hubert Wachauf did not fit with the rationale of the milk quota regulations. The reality pictured by the Community legislator was one where the landlord enabled the milk production by investing in all the necessary equipment (hence meriting the milk quotas upon the expiry of the lease as provided for in the automatic transfer-rule), or where the dairy farmer wanted to continue milk production upon the expiry of his or her lease (as provided in article 7(4)). Instead, the dairy farm was Hubert Wachauf's independent lifework and he and his parents had invested in all the necessary equipment, but he did not want to continue dairy farming, he wished to receive compensation.

On 10 January 1985 Hubert Wachauf started legal proceedings claiming that he was entitled to economic compensation.

The Court and Advocate General Jacobs evaluate five different provisions in order to resolve the *Wachauf* case.[343] Both the CJEU and the AG deal with these provisions in the same order by dividing their reasoning into four main steps. In the following, the *Wachauf*-

---

detailed account of the facts it seems like Wachuaf tried to have the lease extended several times. This might be an explanation for the different versions.

[343] AG Jacobs concludes, on this point: "Although the Court' s case-law has hitherto been concerned with respect for property rights by the Community legislator itself, the same principles must in my view apply to the implementation of Community law by the Member States, since it appears to me self-evident that when acting in pursuance of powers granted under Community law, Member States must be subject to the same constraints, in any event in relation to the principle of respect for fundamental rights, as the Community legislator. /…/ In such a case the requirement in the national scheme of the landlord' s consent might be contrary to the principle of non-discrimination." See Opinion of Advocate General Jacobs delivered on 27 April 1989 in Case 5/88, Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft.

ruling will be picked apart in the same order, as summarized in this diagram and as developed under the section headings 1, 2, 3 and 4:

	1.	**2.**	**3.**	**4.**	
	Article 12(d) of Regulation 857/84 "holding"	Article 5(1) and (3) of Regulation 1371/84 "automatic transfer rule"	MS Implementation Rule: Written consent from the landlord in order for Article 4 (1) Regulation 857/84 to apply. (p. 2-3 + 16)	Article 7 (4) of Regulation 857/84 Keep the quotas upon the expiry of the lease if milk production is *continued.*	Article 4 (1) of Regulation 857/84 Compensation if milk production is *discontinued*.
CJEU	Applies (p.7-11)	Applies (p.15) But margin of discretion to not apply it to cases such as Wachauf's (self-made dairy farmer with a lease) if "justified" by circumstances of the case (p.21-23)	Such Community rules would be incompatible with EU FR. Same requirement for MS when implementing = **Incompatible with EU FR**. (p.19)	Margin of discretion to partially apply these provisions and not apply article 5(1) of Regulation 1371/84 to cases such as Wachauf's (self-made dairy farmer with a lease) if "justified" by circumstances of the case (21-23) **Therefore compatible with EU FR.**	
AG Jacobs	Applies.	Applies.	**Incompatible** with EUFR (non-discrimination).	Does not apply.	Does not apply.

1.

As a first step, the CJEU establishes that Kückenhof farm is to be considered a "holding" within the meaning of article 12(d) of Regulation No 857/84, which signifies that regulation No 1371/84 is applicable. This might seems like a straightforward question but since Sayn-Wittgenstein did not provide any milk production equipment the CJEU needed to spend some time establishing that Kückenhof was indeed a dairy farm holding.

2.

The second step is to determine whether the so-called automatic transfer-rule, article 5(1) and 3 of Regulation No 1371/84 applies to the *Wachauf* situation. Importantly, this is one of the central questions of the case.

The effect of the automatic transfer-rule is that: "Where an entire holding is sold, leased or transferred by inheritance, the corresponding reference quantity shall be transferred in full to the producer who takes over the holding."[344]

The technical legal issue at stake is that "leased" in article 5(1) refers to the granting of a lease. So the CJEU has to decide whether an expiry of a lease has "comparable legal effect" to granting.[345] Thus, importantly, if an expiry of a lease is *not* covered, the automatic transfer rule does not apply to Wachauf and "his" milk quotas should never have been automatically transferred to Sayn-Wittgenstein.

Both AG Jacobs and the CJEU conclude that the automatic transfer-rule is applicable to the expiry of a lease and thus to Hubert Wachauf,[346] which meant that the quotas he acquired as a milk producer at Kückenhof could be automatically transferred to Sayn-Wittgenstein when the lease expired.

3.

At this point the Court reaches the third question – the national implementation rule that was not in the EU regulation. This question is at the centre of the classic reading of *Wachauf* as a case where the CJEU strikes down national legislation.

As stated above, Article 4(1) of Council Regulation 857/84 reads that a milk farmer could get economic compensation by surrendering his or her milk quotas to the German authorities. Section 3(2) of the German Milk Production (Cessation Payments) Order, hereinafter the written consent-rule, added the requirement that the landlord had to give written consent before the lessee could access the article 4(1) compensation scheme.

The CJEU deals with this by firstly, in paragraph 16, framing the German court's position as: If the automatic transfer-rule applies (which it does), this would mean that a lessee (such as *Wachauf*) would not be able to get economic compensation according to article 4(1) if the

[344] Article 5(1) of Regulation No 1371/84.
[345] Article 5(3) of Regulation No 1371/84.
[346] The Court's straightforward reasoning in paragraph 15 seems influenced by the teleological conclusion that the Community legislator, as a principle, intended that the quotas should stay with the land as opposed to following the farmer, presumably to avoid the so-called free-floating quotas phenomenon.

landlord does not consent.[347] This would be a fundamental rights violation if, as in Wachauf's case, the lessee worked and invested to earn the milk quotas.

By reading paragraph 16 together with paragraphs 2 and 3 of the judgment we know that the requirement of the lessor's consent is a German construction. Thus, these paragraphs are a slightly opaque affirmation that the written consent rule in this case breaches a national constitutional right.

In paragraph 17 and 18 the CJEU refers to *Hauer* and concludes that German fundamental rights protection is mirrored in the EU legal system.[348] Subsequently and crucially, in paragraph 19, the Court comes to the part where it binds the Member State to the same criteria to which the EU is bound:

> "Having regard to those criteria, it must be observed that Community rules which, upon the expiry of the lease, had the effect of depriving the lessee, without compensation, of the fruits of his labour and of his investments in the tenanted holding would be incompatible with the requirements of the protection of fundamental rights in the Community legal order. Since those requirements are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements."

Decoding this paragraph reveals how it represents the crux of the *Wachauf*-ruling. The Court deals in parallel with the *application* of EU milk quota rules and the national *implementation* rule. In other words it separates the different phases, as discussed earlier.

As to the implementation rule, which has received most attention in commentary: It is clear from paragraph 16 that the written consent-rule violates national constitutional guarantees if applied in conjunction with the automatic transfer-rule. It is also clear from the first sentence of paragraph 19 that such a Community rule would violate fundamental rights guaranteed by the EU. The second sentence of paragraph 19 therefore means that the Member State could not avoid its fundamental rights obligation only because it is *implementing* EU law. If one follows the dominant reading of *Wachauf,* the legal difficulties posed by the case would end with this conclusion - the national implementation rule is struck down on fundamental rights grounds.

Crucially though, the Court makes a parallel move in paragraph 19 when it states that Community rules which have the effect of "depriving the lessee of the fruits of his labour,"

[347] Reading paragraph 16 of the CJEU's judgement it is difficult to detect the written consent-rule, however it is hiding in the formula "if the lessor is opposed to it."

[348] Whereas Advocate General Jacobs considers the written consent rule as being a question of discrimination in treatment between a person who owns land and one who does not, the CJEU sees a potential breach of the right to property ("deprived of the fruits of his labour").

would violate fundamental rights and pairs that with stating: Member States must *apply* these Community rules "as far as possible" in accordance with fundamental rights.[349]

The words *would be incompatible* mean *if applied in the present case these rules would violate fundamental rights*. That is why, as a consequence of that conclusion, the second sentence states that the Member States are required to "as far as possible" *apply* the EU regulations in a fundamental rights compliant way. In the following section I will show how the CJEU goes on to explain *how* the competent national authorities have a margin of discretion to *apply* the community rules in a fundamental rights compliant way.

4.

It is submitted that, the national written consent implementation rule aside, the last four paragraphs of *Wachauf* are equally important. However most commentary stops after paragraph 19, even though the Court itself clearly does not consider the case to be solved merely by nullifying the written implementation rule.

But before deconstructing these last paragraphs, a brief recap is needed to clarify the stakes. It is clear that the automatic transfer rule applies to Hubert Wachauf. Whether or not he fruitlessly tried to access the economic compensation scheme the fact remained that when the lease expired all milk quotas returned to Sayn-Wittgenstein - a result that the CJEU qualified as a breach of fundamental rights in paragraph 19. Indeed, the CJEU is mandated to tackle the milk quota regulations so as to make sure that Hubert Wachauf's right to property is not breached.

Moreover, what about all the other potential Wachauf-like self-made dairy farmers conducting their work on a piece of leased land, how should their cases be resolved? How should the milk quota regulations be *applied* to them?

The Court starts by looking at the compensation-provisions in the regulations. It notes that Article 7(4) of Council Regulation 857/84 states that when a rural lease is due to expire the competent national authorities may decide to allow the departing lessee to keep all or part of the milk quotas if he or she decides to *continue milk production*.

Alternatively, the CJEU states, Article 4(1) of Council Regulation 857/84 provides that the competent national authorities could grant compensation to a producer who discontinues milk production and surrenders their quotas to the national milk quota reserve.

[349] The "as far as possible" is repeated in Joined Cases C-20/00 and C-64/00, Booker Aquaculture Ltd, trading as Marine Harvest McConnel and Hydro Seafood GSP Ltd v The Scottish Ministers, ECR [2003] I-7411, para. 88 and *Parliament v Council*, para. 105.

Clearly, article 7(4) is not applicable to Hubert Wachauf because he wants to quit milk farming and article 4(1) does not fit the chain of events at Kückenhof farm. It is at this point that the compliance margin of discretion comes into play, the CJEU states:

> 21 However, that conclusion does not preclude the possibility for a departing lessee to obtain compensation calculated on the basis of all or part of the relevant reference quantity when that is *justified* by the extent of the lessee's contribution to the building-up of milk production on the holding. In that event, the quantity taken into consideration for the purposes of calculating the compensation must be treated as a freed quantity and, consequently, may not be put at the disposal of the lessor who repossesses the holding.
>
> 22 *The Community regulations* in question accordingly leave the competent national authorities a sufficiently wide *margin of appreciation* to enable them to apply those rules in a manner consistent with the requirements of *the protection of fundamental rights*, either by giving the lessee the opportunity of keeping all or part of the reference quantity if he intends to continue milk production, or by compensating him if he undertakes to abandon such production definitively.
>
> 23 The submission that the rules in question conflict with the requirements of the protection of fundamental rights in the Community legal order must *therefore* be rejected

The CJEU states that when it is "*justified* by the extent of the lessee's contribution to the building up of the milk production" the competent national authorities can decide not to apply the automatic transfer-rule and instead apply article 4(1) (compensation if milk production is discontinued) in the same way as 7(4) (keep the quotas upon the expiry of the lease) would be applied.[350] Hence, to give economic compensation upon the expiry of a lease for discontinuing milk production.[351]

In paragraphs 21-23 the CJEU allows the competent national authorities to re-read the EU regulation when the situation of the milk farmer so requires. Put differently, national discretion is granted to assert whether compensation is *justified* based on the facts of a particular case and if so the national authorities are authorized to re-read the EU secondary sources to ensure fundamental rights compliance.[352] The official at the national agricultural

[350] It should be noted that AG Jacob's solution that the national legislator, as a positive obligation, should adopt national measures to remedy the effect of the automatic transfer-rule is not followed by the CJEU. See the Opinion of Advocate General Jacobs, paras. 29 -30.

[351] Gehrke, writing on milk quota regulations in 1993, describes *de lege lata* as: "the tenant quitting the holding only enjoys protection under exceptional circumstances. The application of this rule is purely at the discretion of the Member States." Gehrke, H 1993, *The implementation of the EC milk quota regulations in British, French and German law*, EUI WP LAW NO. 93/8.

[352] In *Demand* the Court is reusing this technique in the area of milk quota regulations, this time concerning Council Regulation No 3950/92 establishing an additional levy scheme in the milk production sector. Simply put, the case concerns the competent national authority's reallocation of additional milk quotas that Stefan Demand considered as breaching his right to property.
The Court concludes that: "Therefore, it is incumbent on the Member State, *in exercise of that authorization*, to determine the procedures for reallocation (of milk quotas within their country), in *compliance* with general

authority will have to make such a decision based on the extent to which the landlord and the lessee respectively have been involved in the creation of the dairy farm and its milk production.[353]

Because of this construction, the compliance margin of discretion used in *Wachauf* is narrow since the competent national authorities are only allowed to exit the ordinary reading in specific pre-defined circumstances (self-made dairy famer), and the CJEU defines the rereading which would be allowed (compensation upon the expiry of a lease). It is thus not a question of a broader discretional space to interpret the regulation.

This discretional space does however allow the national authorities to determine *when* and according *to who* the regulations could be re-read and compensation could be paid in future cases. The margin of discretion is notably directed to future agricultural officials encountering similar situations and therefore goes beyond the task facing the referring court.[354]

Because of the use of the compliance margin of discretion, the EU automatic transfer rule is not nullified. Even though the Court in paragraph 19 declared a rule with such a result a violation of fundamental rights. The Court instead defines the right to property in this way – the written consent rule is an infringement of the right to property and therefore nullified and

---

principle and fundamental rights upheld in Community law by decisions of the Court of Justice […] and, in that context, to rule whether or not any payment must be made in consideration of the reallocation."
The Court subsequently applies the proportionality test to the additional levy scheme and concludes that a definite reduction without compensation is not *per se* a measure disproportionate to the aim of reducing market surpluses and hence does not breach the right to property. To nullify the regulation altogether, on the ground that it breaches the right to property, is thus not an option. Instead the Member State is given a margin of discretion to ensure compliance between the two. See Case C-186/96, Stefan Demand v Hauptzollamt Trier ECR [1998] I-08529, para. 35 ff, (brackets added).

[353] AG Jacobs in para. 30 of his opinion: "It is of course for the national court to determine in the concrete case whether and to what extent account should be taken of the tenant' s interest in the quota. It is not in my view appropriate for this Court to seek to spell out in the framework of the present case the kinds of circumstances which the national courts will need to take into account; it must be sufficient for the Court to indicate in general terms the applicability of the principles of non-discrimination and of respect for the right to property in this context."

[354] However it is important to note that several milk farmers unsuccessfully tried to rely on *Wachauf* for compensation, See for instance, Case C-2/92, The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Dennis Clifford Bostock ECR [1994] I-00955; Case C-186/96, Stefan Demand v Hauptzollamt Trier ECR [1998] I-08529; Case C-63/93, Fintan Duff, Liam Finlay, Thomas Julian, James Lyons, Catherine Moloney, Michael McCarthy, Patrick McCarthy, James O'Regan, Patrick O'Donovan v Minister for Agriculture and Food and Attorney General ECR [1996] I-00569; Case C-275/05, Alois Kibler jun. v Land Baden-Württemberg, ECR [2006] I-10569 and Joined cases C-92/09 and C-93/09, Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen, ECR [2010] I-11063, para. 86-87.
Most notably, in *Bostock* the CJEU limits the potential implications of *Wachauf* in the dairy-farming sector: Dennis Clifford Bostock was a tenant farmer who *surrendered* his lease and subsequently sought compensation from the national authorities. He had invested in the dairy farm, albeit not built it up entirely as Hubert Wachauf. Regardless of these differences, the CJEU could have simply followed its own ruling in *Wachauf* and stated that the Member State has a "sufficiently wide margin of appreciation" to examine whether the lessee's contribution to the building up of the milk production justifies compensation. In any event the Court did not agree and said that the method used in *Wachauf* is not applicable simply because it concerned a surrender and not an expiry. The Court differentiated again in the same way *Kibler,* Alois Kibler voluntarily ended his lease.

the automatic transfer rule could not be applied to a dairy farmer such as Hubert Wachauf without giving him economic compensation, which is enabled through the use of a compliance margin of discretion.

Lastly, the Court concludes by affirming that the "submission that the rules in question conflict with the requirements of the protection of fundamental rights in the Community legal order must *therefore* be rejected." This *therefore* means that the CJEU has introduced a new way of making secondary EU law fundamental rights compliant though the operationalization of national discretion to reread EU sources in narrowly defined instances.[355]

This deconstruction of the different moves of the CJEU amplifies the implications of *Wachauf* beyond the classic reading focusing on judicial review of national provisions, and instead lays out a method for constructing a compliance margin of discretion.

7.4.3 The Parliament v Council Roadmap

Parliament v Council from 2006 on the right to family reunification is a great case study of how national discretion is operationalized to ensure fundamental rights compliance.[356]

The European Parliament issued an action for annulment of three paragraphs of the proposed Council Directive 2003/86 arguing that it violated the right to family reunification, derivable from the right to family life. In essence the contested provisions, all providing exceptions to the rule of reunification, held that children over the age of twelve who arrive independently of the rest of the family may have to verify that they meet certain conditions of integration provided for by existing legislation, that requests for reunification must be submitted before the age of fifteen in accordance with existing legislation and a provision containing time limits to family reunification, and in particular that Member States may provide for a waiting period of no more than three years.

The CJEU answers the Parliament's challenge unsympathetically by holding that the contested provisions *in themselves* correspond to ECHR-standard (1), and by constructing a roadmap for how the directive *can be applied* without breaching fundamental rights by using a national margin of discretion (2).[357]

[355] It should be noted that the "keyword" of the case is, *inter alia*, "Alternative offered to Member States."
[356] Council Directive 2003/86 on the right to family reunification for third country nationals residing lawfully in the territory of the Member State, [2003] OJ L 251.
[357] Case C-540/03, European Parliament v Council of the European Union, ECR [2006] Page I-05769.

The first analytical move relies on the following rationale: the discretion contained in the construction of the directive mirrors the standard provided for by the ECHR-system.[358] In other words, the ECtHR accommodates derogations from the right to family life by using its margin of appreciation-technique and the EU is merely doing the same by providing for derogations from the right to family reunification within the directive.

By noting how the ECtHR uses the margin of appreciation technique to accommodate derogations to Convention rights, the CJEU argues that the construction of the EU directive cannot be held to violate EU fundamental rights *a priori*. However, the *ex ante* review in *Parliament v Council* remains a review by the CJEU of EU law, as opposed to the ECtHR's scrutiny of national law. The notion of Member State discretion within the directive is used as an autonomous concept contained in a derogation clause, not, as with the ECtHR's margin of appreciation, a judge-created case-by-case evaluation of acceptable variations in human rights protection. This does not exclude that the standard of protection is in effect the same.

Thus the CJEU, purely *in abstracto,* concludes that *the construction* of the directive, and particularly the contested provisions are fundamental rights compliant.

In a second move the court holds that the directive *when applied will be* compliant with fundamental rights, because the Member State has a (*compliance) margin of discretion*. This second move is central to my analysis and is to be found in the vary last paragraphs:

> In the final analysis, while the Directive leaves the Member States a margin of appreciation, it is sufficiently wide to enable them to apply *the Directive's rules* in a manner consistent with the requirements flowing from the protection of fundamental rights (see, to this effect, Case 5/88 *Wachauf* [1989] ECR 2609, *paragraph 22*).
>
> It should be remembered that, /…/, the requirements flowing from /…/ fundamental rights, are also binding on Member States when they *implement* Community rules, and that *consequently* they are bound, as far as possible, to *apply* the rules in accordance with those requirements (see Case C-2/92 *Bostock* [1994] ECR I-955, paragraph 16; Case C-107/97 *Rombi and Arkopharma* [2000] ECR I-3367, paragraph 65; and, to this effect, *ERT*, paragraph 43).[359]

The CJEU dusts off the *Wachauf*-rationale – national discretion can *ultima ratio* make a piece of EU-legislation compliant with fundamental rights. Notably, this is the first fundamental

[358] For instance, in respect of the rule that Member States *can* require a certain level of integration in the host-state before accepting a request for family reunification if the applicant is over the age of twelve, it states, in para, 62, that: "In so doing, the final subparagraph of Article 4(1) of the Directive cannot be regarded as running counter to the right to respect for family life. In the context of a directive imposing precise positive obligations on the Member States, it preserves a limited margin of appreciation for those States which is no different from that accorded to them by the European Court of Human Rights, in its case-law relating to that right, for weighing, in each factual situation, the competing interests."

[359] *Parliament v Council*, para. 104.

rights case that *explicitly* reconnects with the compliance margin of discretion-technique used in 1989 in *Wachauf*.[360]

Yet *Parliament v Council* represents a challenge in terms of carving out how the CJEU operationalizes the margin of discretion-technique. Firstly, this challenge arises because of the reference to the ECtHR's margin of appreciation as a way of arguing that the Convention system accepts derogations to the right to family life. It is important to note how the CJEU references the margin of appreciation-technique as a way of constructing the ECHR-standard of protection, arguably as minimally as possible. It is only in the second move, when the CJEU had already disqualified the challenges to the three provisions that it activates the idea of a national margin of discretion to ensure fundamental rights compliance at the stage of application of the directive.

As a result of this roadmap for how fundamental rights based challenges will be understood by the CJEU, no rewriting of the directive is required, or indeed nullification.

Instead, every time the national immigration authorities apply the directive to a person seeking a resident permit on the ground of family reunification, beyond the specific derogations provided for in the directive, the competent national authorities have a latent margin of discretion to apply the directive's rules in a fundamental rights compliant manner.[361]

To sum up, the abstractness of *Parliament v Council* makes the CJEU *a priori* rule out the possibility of rights violation inherent in the construction of the directive itself. As to the *application*, the CJEU holds that the margin of discretion ultimately guarantees fundamental rights compliance. This is a significant discretional space and an acceptance of European variability (non-unitarity), in an area where children travelling alone or spouses separated for years may ultimately be reliant on the protection offered by this legislation. In other words, this reasoning stands at some remove from any narrative of the EU as an improver of European standards of fundamental rights protection.

In 2012, the roadmap constructed in *Parliament v Council* is applied to people.[362] In *O and S* the question is whether a person who is married to a lawfully residing third country

[360] In Case C-166/98, Société critouridienne de distribution (Socridis) v Receveur principal des douanes, ECR [1999] I-03791, the CJEU, in my opinion uses *Wachauf* inaccurately since the wide margin of appreciation was not used transpose the directive but to reread it: "Next, the Court has consistently held that directives do not infringe the Treaty if they leave the Member States a sufficiently wide margin of appreciation to enable them to transpose them into national law in a manner consistent with the requirements of the Treaty (see to that effect Case 5/88 Wachauf v Bundesamt für Ernährung und Forstwirtschaft [1989] ECR 2609, paragraph 22)."

[361] However, in fairness, the preliminary reference system is highlighted in that context. See para. 106.

[362] Joined cases C-356/11 and C-357/11, O. and S. v Maahanmuuttovirasto and Maahanmuuttovirasto v L, Published in the Electronic Reports of Cases.

national, who in turn has a child that is a Union citizen, is entitled to a residence permit on the grounds of family reunification? Essentially, what to do with the stepfather? Suffice to cite the CJEU's conclusion:

> It is true that Articles 7 and 24 of the Charter /…/ cannot be interpreted as depriving the Member States of their margin of appreciation when examining applications for family reunification (see, to that effect, *Parliament* v *Council*, paragraph 59).
>
> *However*, in the course of such an examination /…/ the provisions of that directive must be *interpreted* and *applied* in the light of Articles 7 and 24(2) and (3) of the Charter, /…/.
>
> It is for the competent national authorities, when *implementing* Directive 2003/86 and *examining applications* for family reunification, to make a balanced and reasonable assessment of all the interests in play, taking particular account of *the interests of the children concerned*.
> /…/
> It is for the referring court to ascertain *whether the decisions refusing residence permits* at issue in the main proceedings were taken in *compliance* with those requirements.[363]

In *O and S* the CJEU follows the roadmap formulated in *Parliament v Council*. The competent national immigration authorities have a margin of discretion to ensure that the directive is interpreted and applied in the light of the Charter and to make a balanced and reasonable assessment of the interests at play. Ultimately the national court is authorized to review the fundamental rights compatibility of the decisions taken by those authorities.

In addition to *O and S* and *Parliament v Council* and in line with the distinction between national and EU law which constantly resurfaces in the context of this typology of margin of discretion, there are important examples of how the CJEU nullifies *national* implementation law that it considers incompatible with the directive 2003/86 on family reunification.[364] Yet again, the Court nullifies national implementation law of a directive that in *itself,* following *Parliament v Council,* is fundamental rights compliant.

Similarly it should be noted that, in contrast to *Wachauf*, the *Parliament v Council*-line and the *Lindqvist*-line (which I will turn to next), the compliance margin of discretion does not encompass rereading of the secondary source but is instead given to *interpret* the legislation to secure fundamental rights compliance. Therefore the margins of discretion discussed here are wider and the outer limits of the discretional space are more intangible. Particularly since the intersection between the discretional space inherent in the construction of the directive

[363] *O and S*, para. 79 – 82. Emphasis added.
[364] Case C-578/08, Rhimou Chakroun v Minister van Buitenlandse Zaken, ECR [2010] I-1839, para. 64.

and the discretion to interpret the rules at the stage of application is more opaque, albeit distinguishable.

Again we see a collaborative mode of ensuring fundamental rights compliance, which arguably comes across as an elusive system of adjudication for a litigant seeking to engage in a fundamental rights-based challenge of EU legislation, while at the same time being profoundly functional in terms of avoiding nullification.

7.4.4 The Lindqvist Imperative

In a small parish in rural Sweden Bodil Lindqvist helped in the preparations for *confirmation,* which is a ceremony where at age fourteen, members of the church confirm their Christian belief. [365] In an attempt to reach out to these young people Bodil Lindqvist set up a webpage with humorously written short texts about the employees of the church, with personal information such as age, family circumstances, telephone number and, in one instance, health status.

As soon as Bodil Lindqvist realized that this initiative was not appreciated by all of her colleagues she removed the web page in question. By then, however, the Supervisory Authority for the Protection of Electronically Transmitted Data had been informed about the web page and its content. She was subsequently charged with breach of the *personuppgiftslagen*, which is the legislation implementing Directive 95/46/EC on data protection.[366]

The fundamental rights question referred to the CJEU is whether this hands-on application of the law implementing directive 95/46 is compatible with freedom of speech, enshrined *inter alia* in article 10 ECHR.

The Court answers this question by affirming that the directive itself includes rules with a large degree of flexibility and therefore the national legislator has a *margin of manoeuvre* in *implementing* the directive, and that nothing suggests that the directive's provisions in themselves violate fundamental rights.[367] Again, the same rationale as in the cases discussed earlier.

---

[365] Case C-101/01, Criminal proceedings against Bodil Lindqvist, ECR [2003] Page I-12971.
[366] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, [1995] OJ L 281.
[367] *Lindqvist*, paras. 83-84. For a more elaborate account of the discretionary powers contained in the directive itself, see Joined cases C-468/10 and C-469/10, Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF) and Federación de Comercio Electrónico y Marketing Directo (FECEMD) v Administración del Estado, ECR [2011] I-12181.

Accordingly, at the stage of *application,* the discretion accorded at the implementation stage would not be sufficient to avoid conflicts between the free movement of data, the protection of private life and the protection of freedom of speech. The CJEU concludes:

> Thus, it is, rather, at the stage of the *application* at national level of the legislation implementing Directive 95/46 in individual cases that a balance must be found between the rights and interests involved.
> /…/
> Consequently, it is for the *authorities* and *courts* of the Member States not only to interpret their national law in a manner consistent with Directive 95/46 *but also to make sure they do not rely on an interpretation of it which would be in conflict with the fundamental rights* protected by the Community legal order or with the other general principles of Community law, such as inter alia the principle of proportionality.[368]

This means that the CJEU makes a distinction between the principle of consistent interpretation and[369] the formula "*make sure they do not rely on an interpretation of it which would be in conflict with the fundamental rights,"* which I reconstruct as an example of a compliance margin of discretion.

Regardless of its negative phrasing, the formula contains two imperatives directed to the competent national authority or court.[370] The first imperative is - *You interpret!* The second imperative, however, limits the first – *The outcome must be fundamental rights compliance!*

While it is important to note the lack of direct and indirect margin of discretion-language, as defined earlier when I outlined the method for case law selection, I exceptionally include *Lindqvist* because the Court identifies a discretional space at the stage of application in which the Member State may elaborate the applicable standard of protection in a similar fashion to *Wachauf* and the *Parliament v Council*. Thus, in *Lindqvist* I argue the formula: *make sure they do not rely on an interpretation of it which would be in conflict with the fundamental rights,* is a description of a compliance margin of discretion. However, this formula does not automatically refer to an operational compliance margin of discretion. The use of this formula

[368] *Lindqvist*, paras. 85 and 87.
[369] The idea that if the wording of secondary EU law is open to more than one interpretation, preference should be given to the interpretation that renders the provision consistent rather than incompatible with the Treaties, is perennial. See Case C-218/82 Commission v Council, ECR [1983] 4063, para. 15 and Case C-135/93, Spain v Commission, ECR [1995] I-1651, para 37.
[370] For an interesting example of the formula being used as a rebuttable presumption, arguably operationalizing a very limited compliance margin of discretion, see Joined cases C-411/10 and C-493/10, N. S. v Secretary of State for the Home Department et M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, ECR [2011] I-13905. Essentially there is a presumption that the Member State applying the discretion accorded in art. 3(1) of regulation 343/2003, by which they may choose whether or not to return an asylum seeker to the responsible Member State, (i.e. the MS in which he or she first entered the EU), is acting in compliance with FR only as long as the MS cannot be unaware of systemic deficiencies in the FR protection in the responsible MS.

must be analysed in the context of judicial intervention in which it appears. Specifically, two criteria must be met. Firstly, it must be secondary EU law, not national law that is challenged on fundamental rights grounds, since this formula has also been used in cases declaring *national legislation or a national court decisions* incompatible with secondary EU law and/or fundamental rights. In such cases, however, the CJEU reviews national law and does not operationalize national discretion to solve the conflict.[371] The second criterion is that the CJEU remains silent in response to the fundamental rights challenge itself. In other words, if the CJEU declares that the piece of secondary law does *not* violate fundamental rights – there is no compliance margin of discretion in the case. Since there is no question to be answered at the national level, no compliance to obtain, the CJEU interprets by itself.[372]

This version of margin of discretion-technique, which is reliant on interpretation and interconnected to the discretional space inherent in directives,[373] represents the potentially broadest discretional space. Its outer limits are defined by the outcome of the interpretative act – fundamental rights compliance.[374] Indeed, the CJEU ultimately rules that:

> The provisions of Directive 95/46 *do not, in themselves,* bring about a restriction which conflicts with the general principles of freedom of expression or other freedoms and rights, /…/. It is for the national authorities and courts responsible for *applying* the national legislation implementing Directive 95/46 to ensure a fair balance between the rights and interests in question, including the fundamental rights protected by the Community legal order.[375]

This conclusion is an excellent illustration of how the CJEU, much like in *Wachauf* and *Parliament v Council,* makes the directive immune to nullification by drawing a distinction

[371] See Case C-403/09 PPU, Jasna Detiček v Maurizio Sgueglia, ECR [2009] I-12193 and Case C-461/10, Bonnier Audio AB and Others v Perfect Communication Sweden AB, Published in the Electronic Reports of Cases, para. 66.
[372] Case C-305/05, Ordre des barreaux francophones et germanophone and Others v Conseil des ministers, ECR [2007] I-05305 and Case C-400/10, PPU, J. McB. v L. E., ECR [2010] I-08965.
[373] To illustrate, article 1 of Directive 95/46 on data protection directive holds: "In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data." Article 5 is worded as follows: 'Member States shall, within the limits of the provisions of this Chapter, determine more precisely the conditions under which the processing of personal data is lawful.'
[374] Going forward, the formula, or a version of the formula, that the Member State has to "make sure they do not rely on an interpretation of it which would be in conflict with the fundamental rights" is reused in the area of data protection: Case C-73/07, Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy, ECR [2008] I-09831, para 54: "the object of Article 9 is to reconcile two fundamental rights: the protection of privacy and freedom of expression. The obligation to do so lies on the Member States;" Case C-403/09 PPU, Jasna Detiček v Maurizio Sgueglia, ECR [2009] I-12193, paras. 35 and 43; Joined cases C-468/10 and C-469/10, Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF) and Federación de Comercio Electrónico y Marketing Directo (FECEMD) v Administración del Estado, ECR [2011] I-12181.
[375] *Lindqvist*, para. 90. Emphasis added.

between the construction of the directive (EU) and its application (Member State) and attaches a margin of discretion to interpret at the latter stage.

However, the CJEU remains involved in the standard of fundamental rights protection, which will also be applied in future cases. The CJEU formulates general criteria for when the protection of private life constitute a proportionate limitation of freedom of speech.[376] These are thus the criteria that limit the discretional space because it does not leave the Member State the choice of completely autonomously elaborating on the standard of fundamental rights protection. Instead, these standards are sketched out, albeit broadly, by the CJEU.

In sum, just as in *Parliament v Council,* the compliance margin of discretion lies *ultima ratio* in its construction – beyond the discretional space inherent in the directive in terms of national implementating legislation, the competent national authority must interpret in accordance with fundamental rights protection.

7.5 Concluding Remarks: Entangling Compliance

This reconstruction of the compliance margin of discretion illustrates a division of labour between the CJEU and the competent national authorities. The technique has been traced from *Stauder*, through *Wachauf*, *Lindqvist* and *Parliament v Council,* up to very recent judgments. These cases have illustrated a distinctly functional use of the margin of discretion-technique in cases involving wide-ranging fundamental rights subject matters.

The compliance margin of discretion has thus emerged as *a third way* of dealing with fundamental rights challenges to EU secondary law, as opposed to either nullification on the grounds that the contested provision violates fundamental rights, or alternatively, dismissing the challenge. This finding shows that the supranational context, through the operationalization of national margins of discretion, may generate new methods for achieving fundamental rights compliance in the context of a classic judicial review scenario where legislation is challenged on fundamental rights grounds.

While the use of the compliance margin of discretion is functional, it also contains an important *tension*: it authorizes the national level to make important decisions on the application of EU law, yet it insulates EU law from fundamental rights challenges. Put differently, the use of the compliance margin of discretion empowers the competent national

[376] *Lindqvist*, para. 89.

authorities to handle EU law, but the outcome (fundamental right compliance), is prescribed by the CJEU. This method therefore interrupts the notion of unitary application of EU law and induces flexibility at the stage of application through the operationalization of national discretion.

The compliance margin of discretion therefore introduces a framework for thinking about the distinction between unitary application executed and guaranteed by the CJEU's interpretative authority, and an adjudicative method where an integrated system involving both national and EUropean actors guarantees a unitary outcome.

In this vein, this method interestingly contains a rule of law *problematique* by enabling the CJEU to surpass judicial review for predestined compliance while simultaneously revealing an adjudicative system built on trust between the CJEU and a series of competent national decisions-makers.

This method therefore unsettles the reliance of the dominant narratives on the euro-national dichotomy since it helps to make clear the patterns of euro-national interconnection in establishing the applicable standard of protection in yet another legal clash involving fundamental rights in the EU system.

In particular, this typology represents a margin of discretion whose structure contrasts with ideas about the CJEU's fundamental rights adjudication as either catering to the preservation of what is perceived as the uniquely national in constitutional protection, or alternatively, overriding national constitutional authority. Instead, discretional space is utilized by the Court to handle the compatibility between European legislative acts and fundamental rights protection, thus being utilized to share interpretative authority in relation to multiple common norm-commitments.

8. Exploring Interconnectedness: Concluding Remarks

*

My interest in this work has been to investigate the shape and effects of the CJEU's use of the margin of discretion-technique in cases involving fundamental rights. The three typologies of margin of discretion-use evince an elaboration of the applicable standard of fundamental rights protection that is interconnected.

Essentially, I have argued over the course of the last three chapters that rather than "simply" deferring to *the national*, the CJEU engages in a series of fairly complex interactions with the national decision-maker within the context of a given process of adjudication. This means that the three typologies of deviation, balance and compliance constitute a web of interconnectedness, and explaining this web has been one of the main purposes of this work.

This last section initiates the exploration of interconnectedness as a legal pattern within important strands of the CJEU's fundamental rights adjudication, but perhaps more importantly, it also serves to suggest strands of further inquiry, in relation to which I argue that the analysis conducted in this work constitutes a baseline.

In order to solidify this baseline I will begin by explaining the different *components of interconnectedness*. First, I will outline the structure of the sharing of interpretative authority within the process of adjudication, and secondly I will show how the process by which the *ex ante* separability along jurisdictional lines of standards of fundamental rights protection turns into interconnectedness *ex post* the process of adjudication.

After explaining these components of interconnectedness I will point to three layers of *representations of interconnectedness*. Rather than providing answers, this last section will direct the reader towards possible further inquiries. This final section is thus a forward-looking exercise that begins to explore the representations of the logics of the interconnectedness produced by the margin of discretion-technique when used in fundamental rights cases.

I will start from the bottom, and investigate how the legal patterns of interconnectedness destabilize the prescriptive morals underpinning the dominant narratives. The aim is one of illustrating how interconnectedness might represent a challenge to the values guiding these strands of discourse. Second, I will describe how interconnectedness is represented in the mechanics of fundamental rights adjudication. In other words, what the presence of interconnectedness does to the schema of the CJEU's fundamental rights adjudication. Lastly,

I will point to the potential negative implications for people seeking to engage with the CJEU's fundamental rights adjudication and finding themselves in front of an intricate interconnected adjudicative set-up.

8.1 Components of Interconnectedness

8.1.1 Sharing Interpretative Authority

The argument developed in this work holds that the margin of discretion, as used by the CJEU to adjudicate fundamental rights, is a method that enables the sharing of interpretative authority. The margin of discretion is not in the strict sense an interpretative method conducted by one interpreter only, but a method that opens the door to sharing that work. This means that within a given process of adjudication where the margin of discretion-technique is used to address a legal conflict involving fundamental rights the authority to interpret can reside with more than one actor.

The core claim of this argument contrasts with the respective rationales of the three dominant narratives formed around the logics of the CJEU's adjudication of fundamental rights. The narratives of improvement and intrusion presume the singularity of interpretative authority, which resides with the CJEU. The narrative of diversity, on the other hand, relies on the notion that interpretative authority may shift from one jurisdiction to the other. Importantly however, this shift from one jurisdiction to the other is clearly distinguishable from the idea of sharing, which in contrast presumes more than one interpreter within a given moment of adjudication.

In terms of the mechanics of sharing, the EU treaties establish a hierarchy between the decision-makers discussed in this work. As pointed out in chapter 2.2.1, the CJEU is above the national courts, the national legislators, and various national administrative bodies when it comes to the power to interpret the EU's fundamental rights material. As a result, the CJEU has the power to initiate the operationalization of margins of discretion and the shared decision-making that this entails. This starting-point is one of the baseline commonalities of the three margin of discretion-enterprises, which I have outlined and categorized.

Following the CJEU's initiative in operationalizing the technique, the detailed mechanics of this sharing look different within the structure of the three typologies. When the CJEU signals its intent to identify a moment of national decision-making and incorporate it into its

process of adjudicating the applicable standard of fundamental rights protection, the shape and content of this moment of national interpretation varies.

These variables in the sharing of interpretative authority could fruitfully be thought of as the temporal aspects (1), as the questions of content (2) and the methods of constraint (3). Ultimately these variables help answer the question of what is internalized in the CJEU's process of adjudication through the use of the margin of discretion-technique. In other words, how the sharing of interpretative authority happens.

The temporal aspects (1) I refer to are essentially embodied in the question of whether the margin of discretion identifies a future decision or a decision that has already taken place. Here the CJEU varies the reach of its sharing of interpretative authority. If, as in the main uses of the balance margin of discretion and the deviation margin of discretion, the CJEU identifies decisions and formulations of subject matters or policy areas existing at the time of adjudication, the interpretative authority is shared *ex post facto* with the national decision-makers. This means that the margin of discretion is accredited after – perhaps even years after – the decision was taken. This could also be framed as the CJEU opening up part of the adjudicative process and filling it with the output of national decision-making that has already taken place. Ultimately, this national reading becomes part of what constitutes the standard of protection pertaining to the EU legal material.

The compliance margin of discretion and a few examples of the balance margin of discretion are instead constructed as authorizing future decision-making relatable to identified national or EU-sourced legal provisions. Again, the CJEU opens up discretionary space this time only in future instances of decision-making where national decision-makers perform interpretative work, which ultimately becomes the applicable standard of fundamental rights protection.

The questions of content (2) concern the work of interpretation or formulation requested, or when moments of decision-making are incorporated *ex post facto*, "sequestrated" by the CJEU. The questions of content address what type of activity is ultimately embraced by the margin of discretion.

Within the use of the balance margin of discretion it is typically administrative decision-making, frequently of a strikingly local character that is retroactively understood to have been a moment in which the national enjoyed interpretive authority.

In the deviation margin of discretion-scenario the CJEU instead identifies a space in which the national decision-maker, often the legislator, can formulate acceptable deviations from EU-sourced norms. The question of content here is more open-ended. These formulations are

much broader in scope, especially when compared to the balance margin of discretion, and they may concern more comprehensive sets of ideas about the character of violence, of what constitutes the connection between a mother and her child, or how a budget should be managed. These formulations are then fitted into the CJEU's interpretation of the EU fundamental rights source.

In the compliance margin of discretion-scenario in contrast, the CJEU identifies a moment of application of EU legislation in which the national decision-maker is free to formulate how that piece of legislation can be applied in a fundamental rights compliant way. The content of the moment of decision-making that the compliance margin of discretion is embracing is by far the most indeterminate, especially from the CJEU's vantage point. Indeterminacy arises since it embraces a moment of interpretation that is controlled only in terms of its predestined outcome of compliance, and not what constitutes compliance in a specific case. However this last point leads me to the third variable, concerning differentiation in the means of constraining the sharing of interpretative authority.

The method for constraining the space opened for national interpretative participation may be constrained in a second move of legal reasoning (3). I have shown how, with varying intensity, the CJEU has performed proportionality reviews of measures constructed as residing within a margin of discretion. Indeed this is the most important method for constraining the interpretative space opened by the margin of discretion.

In addition however, there are also more subtle methods by which the CJEU might constrain or reduce the discretional space. In the balance margin of discretion-scenario the CJEU identifies a national decision as residing within a discretional space but subsequently formulates the rationales, particularly the EU law considerations, which the decision-making body was understood to have pondered before reaching the decision. The CJEU thus reins in the interpretative and elaborative act from within, by inserting a set of decision-making motifs.

In the compliance margin of discretion-scenario the constraining feature is present at the outset, and indeed is the main characteristic of the typology, namely that the outcome of the interpretative act allowed within the margin of discretion is "compliance."

Ultimately, the constraining feature in the deviation margin of discretion-scenario is of a different character and perhaps more of a modelling exercise than an actual constraint. Here, the CJEU ties the national level's deviations to the structure and wording of the EU fundamental rights source.

The CJEU identifies moments in which it shares interpretative authority and these moments may have different characteristics, as outlined above. The common core of this sharing act however, is that it creates dynamism on both sides, which sends impulses to what ultimately becomes the construction of the applicable standard of fundamental rights protection.[377]

Depending on the structure of the margin of discretion and the character of the moment of national decision-making it has defined, the national decision-makers and the CJEU may be said to perform different filling-in functions.[378] In the balance-scenario the CJEU might fill-in the rationales of the decision-making to various degrees, albeit preserving the decision and accepting its effects. In the compliance-scenario the CJEU sets the outcome of the act of interpretation and the national administrative body perform the act of filling in what constitutes fundamental rights compliance in the case at hand. In the deviation-scenario the national decision-maker instead, generally the legislator, fills-in what constitutes the acceptable deviations from and constraints of EU-sourced fundamental rights. This is a helpful way to think about the sharing using a different terminology.

Furthermore, the interconnectedness that I aim to illustrate, and the component of this which I have referred to as "shared interpretative authority" in the specific context of the forms of interaction that the CJEU's use of the margin of discretion techniques enables, finds different parallels in literature.

Harding, using mostly Canada and the US and their respective uses of foreign law, has written about "shared responsibility of constitutional interpretation," by which she is thinking about how more than one court could develop interpretations of the same constitutional right.[379]

Furthermore, with the CJEU in mind, Azoulai writes about "interpretative decentralisation" as a way of thinking about the margin of discretion-technique.[380] However, Azoulai links (with scepticism) this rise in decentralization to an increase in the

[377] For a kindred point see Post and Siegel's concept of "polycentric interpretation:" "We use the term "polycentric" instead to refer to the distribution of constitutional interpretation in our legal system across multiple institutions, many of which are political in character." Post, RC and Siegel, RB 2003, Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act, *Yale Law Journal* 112 (8), p. 2022.

[378] See further on this idea, Sabel, CF and Simon WH 2012, *Contextualizing Regimes: Institutionalization as a Response to the Limits of Interpretation and Policy Engineering*, Columbia Law School Public Law & Legal Theory Working Paper Group, Paper Number 12-302, p. 40.

[379] Harding, S 2003, Comparative Reasoning and Constitutional Review, *Yale Journal of International Law* 28, p. 457.

[380] Azoulai, L 2013, The European Court of Justice and the Duty to Respect Sensitive National Interests, in De Witte, B, Dawson, M and Muir, E (eds.), *Judicial Activism at the European Court of Justice*, Edward Elgar Publishing, Cheltenham, p. 181.

operationalization of morals and values pertaining to the national legal locus (along the lines of the views promoted by diversity narrators).

Both "shared responsibility of constitutional interpretation" and "interpretative decentralisation" are valuable and conceptually neighbour "shared interpretative authority." Still, I aim to illustrate a type of sharing that happens within one adjudicative process, and therefore differently from the shared responsibility of constitutional interpretation between different superior courts, which Harding is describing in a transnational, non-EU setting. Moreover, I am trying to describe a process that is always at the very least momentaneously interconnected within a given instance of adjudication, whereas decentralization points away from the participation of the CJEU.

In terms of sharp contrast to the explanation of shared interpretative authority developed in this work, an often used notion to describe interaction between decision-makers, especially courts, is that of *judicial dialogue*. I will draw a distinction between the rationale of this concept, vague as it is, and what I am trying to capture by using the terminology of shared interpretative authority.[381]

Paralleling this desire to frame and discard the concept of judicial dialogue, Jackson understands the discourse on judicial dialogue as implying "felt obligations of reciprocity," by which she essentially means the expectation of response.[382] This is an important and clarifying framing of dialogue, which helps, by way of contrast, to clarify the patterns of interconnectedness established by the CJEU's use of margins of discretion.

The uses of margins of discretion are not question and answer-exercises but more of an opening of space within an adjudicative process for the participation of several interpreters. As I have already outlined above, on the one hand the CJEU shares interpretative authority by singling out moments of decision-making that have already taken place and where for temporal reasons there is no expectation of response. On the other hand, in terms of using the margin of discretion technique to single out moments of decision-making that will take place in the future, the CJEU prescribes the answer to the legal question, which is then to be elaborated within a margin of discretion. Specifically, I refer to the legal answer of *balance* between fundamental freedoms and fundamental rights and the legal answer of fundamental rights *compliance.* The notion of dialogue does not capture this dynamic.

---

[381]For instance, on critical discussions of the concept of "transnational judicial conversations" see McCrudden, C 2000, Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights, *Oxford journal of legal studies* 20 (4), pp. 499-532 and on "transjudicial dialogue" see Slaughter, A-M 1999, Judicial Globalization, *Virginia Journal of International Law* 40, pp. 1103-1124.

[382] Jackson 2010, supra note 15 at 72.

Beyond the specific temporal aspects, which make dialogue inapt to describing the processes triggered by the use of margins of discretion, the mere state of being interconnected is different from the back-and-forth presumed by dialogue, which ultimately relies on separate entities throughout the conversation.

In sum, the sharing of interpretative authority is a central component of the CJEU's operationalization of margins of discretion in the adjudication of fundamental rights. This sharing enables the CJEU to interconnect a set of moments of interpretative activity and this act of joining them together, to which I will now turn, ultimately creates the applicable standard of fundamental rights protection.

X. Elaborating the Standard of Fundamental Rights Protection: From Ex Ante Separability to Ex Post Interconnectedness

Interconnectedness in this work refers to the blurring of the boundary between what pertains to the national legal *locus* and what pertains to the *EUropean* legal *locus* in terms of the applicable standard of fundamental rights protection. Interconnectedness thus refers to the euro-national rather than *EUropean* or national status of the applicable standard of fundamental rights protection. I argue that to various degrees this interconnectedness appears and destabilizes the possibility of separation of legal spheres in cases where the CJEU operationalizes a margin of discretion to adjudicate fundamental rights.

The identification, as outlined above, of shared interpretative authority in the process of adjudicating cases involving EU fundamental rights material creates the infrastructure necessary to argue that the margin of discretion ultimately enables an interconnected elaboration of the applicable standard of protection.

The sharing is thus capable of enabling a move from an instance in which it is possible to identify and carve out the distinctly national or *EUropean* standard of fundamental rights protection to another instance, *ex post* the process of adjudication, in which this binary characterization of the standard of protection is no longer apt. Illustrating this move to an *ex post* condition where the jurisdictional divide is no longer reflected in the applicable standard of protection is one of the main insights produces by the three typologies. I will now examine this dynamic in more detail.

In the deviation margin of discretion-scenario, in the opinion of the litigant, the challenged national measure violates the *EUropean* standard of protection. The national measure, *ex ante* the process of adjudication, thus embodies a potentially lower standard of fundamental rights protection. However after the operationalization of the margin of discretion, enabling a

sharing of interpretative authority, the CJEU incorporates the deviating national standard and attaches it to the EU-sourced fundamental right. The interconnectedness therefore lies in how the national deviation ties into and gives meaning to the EU-sourced right, an act that ultimately formulates the applicable standard of protection.

In the balance margin of discretion-scenario we find a national measure (an administrative decision or legislative provision) engaging or enforcing a fundamental right protected at the national level and mirrored, the CJEU holds, in the EU fundamental rights material. This measure, in the opinion of the litigant, triggers a clash with internal market law. The CJEU inserts EU law considerations into the original national decision-making and understands it as having achieved balance between an internal market fundamental freedom and a fundamental right. The applicable standard of protection in the case at hand ultimately lies at a juncture between the requirements of the fundamental freedom and the original national reading of a fundamental right, which the CJEU accepts as being mirrored in the EU law material. In contrast then, the balance margin of discretion does not enable the separation between on the one hand internal market fundamental freedoms, and on the other hand national decision-making embodying fundamental rights in some form. Instead it uses the margin of discretion to formulate a standard of protection that allegedly balances both sets of norms.

In the compliance margin of discretion-scenario a piece of EU legislation, in the opinion of the litigant, violates a fundamental right. Differing from the other two typologies due to the compliance margin of discretion's future-orientation, the CJEU opens up a space within the moment of application of EU law in which the national decision-maker plays a dominant role in elaborating the content of the standard of protection. The CJEU has already qualified the contested legislation as being fundamental rights compliant. The interconnectedness of the applicable standard of protection thus manifests itself in the fact that the sharing of interpretative authority allocates the definition of the outcome to the CJEU, and the elaboration of the precise content constituting that outcome to the national decision-maker.

Importantly, the CJEU does not want to distinguish and isolate the circumstances, measures and decisions discussed in this work as wholly national concerns alien to the EU system. Rather, the CJEU engages these interpretations on the part of national decisions-makers so as to formulate the applicable standard of protection. It is thus not only a question of allowing for lesser protection through deference, or giving a fundamental rights protection-discount to the national legal *loci*.[383] It is more of an exercise in merging different readings.

[383] On the notion of discount see Resnik 2014, supra note 3.

At this point it may be useful to contrast the traditionally intricate relationship between the Member States' systems of fundamental rights protection and the EU's fundamental rights material. Indeed, within the European Union, the notion that fundamental rights protection is understood in relation to national legal sources is not novel. It is traceable to the idea that the CJEU (more explicitly in the early days), adjudicates on fundamental rights derived from the "common constitutional traditions of the Member States." The CJEU's source searching within the national legal milieu to find its own legal material signals a recurrent and intricate relationship between the *EUropean* and the national in this area. Kumm described this as a rationalist rather than legalist approach to fundamental rights.[384] In connection with this observation Kumm points towards the need for a better understanding of the intricate origins of the fundamental rights sources used by the CJEU.

However, as distinct from this classic CJEU method of mirroring fundamental rights sources using the "common constitutional traditions" line, the margin of discretion interconnects the very elaboration of the applicable standard of protection. Thus, this method engages the national reading of fundamental rights in particular cases in a more robust manner, rather than simply acknowledging that the EU also protects the same rights as a particular national constitution.

This interconnectedness established in the context of the use of the margin of discretion-technique to adjudicate fundamental rights destabilizes the notion that individuals simply "have a choice of which source to plead, and judges have a choice of which right to enforce,"[385] or that inquiry can satisfactorily separate "the pluralism of human rights themselves" and "the pluralism of human rights' interpretations."[386]

In sum, the interconnectedness produced *ex post* the use of margins of discretion in cases involving fundamental rights is a rejection of the *problematique* relating to the higher/lower standards as mapped onto jurisdictional lines and goes beyond the mere observation of interacting legal regimes.

---

[384] Kumm 2010, supra note 34 at 108.

[385] See Stone Sweet 2012, supra note 40 at 60: "In many national legal systems, three such sources – national constitutional rights, EU rights, and the ECHR – overlap. Individuals have a choice of which source to plead, and judges have a choice of which right to enforce. These choices have consequences, as when national judges prefer to apply European rights, rather than their own constitution law, as a means of raising standards of protection."

[386] Besson 2014, supra note 73 at 181: "I will make two sets of points here: one pertaining to the pluralism of human rights themselves and the other to the pluralism of human rights' interpretations."

8.2 Representations of Interconnectedness

*

I argue that the CJEU's use of the margin of discretion-technique produces an interconnected form of elaboration of the applicable standard of protection. I have outlined the mechanics of the foundational components of interconnectedness – the sharing of interpretative authority, which enables a common elaboration of the applicable standard of protection.

This final section will identify the representations of this interconnectedness. This will be a way of illustrating the repercussions of interconnectedness and, to borrow from Jackson, *the postures* of interconnectedness.[387]

These representations of interconnectedness have the distinct characteristic of not taking sides. The representations of interconnectedness are therefore reproductions of the non-one-sided legal condition, especially as these sides pertain to jurisdictional divides. Interconnectedness operates within a set of overlapping jurisdictions that are open to the possibility of both harmony or dissonance of national and European self-understandings of the EU fundamental rights material.[388]

Investigating these echoes of interconnectedness, as opposed to cementing the constant separability of jurisdictional divides is, I argue, a choice that opens up new ways of thinking about important strands of the CJEU's fundamental rights adjudication. These are new ways of thinking about empirical understandings of what the CJEU does when it operationalizes the margin of discretion-technique, but also about what is overlooked by commentary that focuses too one-sidedly on the euro-national binary in its various forms.

In this last section I will formulate starting-points for further inquiry based on the detection of interconnectedness. These starting-points are three distinct representations of interconnectedness, concerning different aspects of the totality of the CJEU's fundamental rights adjudication. I will examine what the legal pattern of interconnectedness does to the values guiding discourse, and especially the three dominant narratives about the CJEU's adjudication (1). Then I will consider the representation of interconnectedness within the structure of the CJEU's fundamental rights adjudication (2). Lastly I will pose a set of questions for further inquiry along the lines of how a person's legal orientation changes when faced with interconnectedness, and how people may use their knowledge of that condition to possibly formulate viable projects of social change (3).

---

[387] Jackson 2010, supra note 15 at 17.
[388] See further along these lines Jackson 2010, supra note 15 at 9.

8.2.1 Countering the Value of Improvement, the Value of Non-Intrusion and the Value of Diversity

The exercise of showing how the margin of discretion-technique opens up spaces for an interconnected elaboration of the fundamental rights standard challenges the binary opposition relied on, and reproduced by the narratives of improvement, intrusion and diversity. This is a point I have argued throughout this work. Indeed, throughout the chapters outlining the different typologies I have interwoven points of contrast between this elaboration and the three dominant narratives.

In this last section, reaching beyond the more empirical point that the dominant narratives do not describe the operation of the margins of discretion, I would like to highlight how the interconnectedness that this technique produces destabilizes the quest for realization of the underlying values upon which the narratives rest. It destabilizes, in other words, the prescription of certain moral standpoints favoured by the narratives. This follows Cover's writing on how: "Every prescription is insistent in its demand to be located in discourse – to be supplied with history and destiny, beginning and end, explanation and purpose. And every narrative is insistent in its demand for its prescriptive point, its moral."[389]

The question becomes how these morals, which celebrate the binary and hold improvement, non-intrusion and diversity as values, are affected by the legal pattern of interconnectedness. While this inquiry first and foremost seeks to counter the moral prescriptions of the dominant narratives, it is also a way of better understanding the implications of the interconnectedness produced by the CJEU's use of the margin of discretion-technique in cases involving fundamental rights. As such, this is a preliminary investigation, which ultimately suggests the usefulness, beyond a critical study of the dominant narratives, of further critical investigation into the value of interconnectedness in the world of EU fundamental rights adjudication.[390] For the time being however, I will relate

[389] Cover, R 1983, Foreword: Nomos and Narrative, *Harvard Law Review* 97, p. 5.

[390] The value of interconnectedness has been examined in important strands of feminist scholarship in legal and constitutional theory. It is held to promote connections prior to separations, and emphasises the empiricism of interconnection, especially as a better description of the human condition and people's interaction between each other and in society. See West's classic feminist critique of masculine assumptions in liberal jurisprudence: West 1988, supra note 6. The suspicion that emphasis on separability between entities is not value-neutral is also recurrent in MacKinnon's critique of what she calls the difference approach, namely the idea that there is a significant difference between the sexes: MacKinnon, CA 1987 *Feminism Unmodified: Discourses on Life and Law*, Harvard University Press, 1987, p. 34. Resnik summarizes: "A touchstone of feminism is connection; over and over again, feminist theories speak about our interrelatedness, our inter-dependencies, ourselves and others as impossible of comprehension in isolation." Resnik, J 1987, On the Bias: Feminist Reconsiderations of the

the legal patterns of interconnectedness to the value of improvement, the value of non-intrusion, and the value of diversity.

The narrative of improvement, which promotes the importance of, and potential for the European and supranational in improving people's lives is perhaps the narrative which is most attuned to interconnectedness. Akin to the narrative of improvement, interconnectedness takes collaboration between overlapping jurisdictions seriously and appreciates that the national and *EUropean* develop techniques of mediation to that end. There is thus a commonality between the improvement narrative's reliance on the potential constructiveness of the supranational in enforcing fundamental rights through adjudication, and the constant involvement of the supranational in arranging the mediation between overlapping jurisdictions (interconnectedness).

Still, the blurring of jurisdictional boundaries through the incorporation of national decision-making that was contested by the litigant in the first place (in the balance margin of discretion-scenario, but especially in the deviation margin of discretion-scenario), hampers the momentum, which the improvement narrators very often rely on.

The deliberative capacity of interconnectedness to engage multiple interpretative acts within one given process of adjudication is more complicated then the unilateral rights enforcement-capacity imagined by improvement narrators.

In sum, interconnectedness suggests inclusion of national desires as communicated in interpretative acts potentially to the extent that forward movement in terms of fundamental rights enforcement is very limited (the deviation margin of discretion provides important examples). What I mean here is that improvement narrators imagine a more straightforward striking down of the national measure where instead interconnectedness, to varying degrees, incorporates the reading of fundamental rights that is implied in the measure which the litigant originally challenged.

It should be pointed out that improvement through *EUropean* involvement may look different, may be slower and more composite than the binary version held out as an ideal by improvement narrators. This latter point suggests that interconnectedness does not preclude improvement but that the supranational court's interpretative activity in fundamental rights

---

Aspirations for Our Judges, *Southern California Law Review* 61 (6), p. 1921. However for critique of, *inter alia,* the difference approach, see: Fraser, N and Nicholson, LJ 1990, Social Criticism without Philosophy: An Encounter between Feminism and Postmodernism, in Fraser, N and Nicholson, LJ, (eds.) *Feminism/Postmodernism,* Routledge, New York and Grant, J 1993, *Fundamental Feminism. Contesting the Core Concepts of Feminist Theory,* Routledge, New York.

enforcement takes a different shape. Thus the prescriptive moral force of the EU as a unilateral improver, which guides improvement narrators, is destabilized.

The narrative of intrusion and the cherishing of European non-intrusion into the national milieu of fundamental rights protection represents the sharpest contrast with legal patterns of interconnectedness. The narrative of intrusion relies heavily on the boundaries between the overlapping jurisdictions and understands the national apparatus as the better guarantor of fundamental rights protection.

This appreciation of the national appears to lead the narrative of intrusion towards jurisdictional conflict-driven modes of analysis of EU fundamental rights. By this I mean to think about conflicts as organized alongside jurisdictional lines, and importantly, to assume that these remain separable after the process of adjudication. In contrast, the margin of discretion-typologies in this work mediate legal conflicts involving, in different ways, the EU fundamental rights material, not merely the type of legal conflict that strictly organizes itself alongside jurisdictional lines.

There is a pacifist stroke in interconnectedness, which downplays the (at times highly-strung) rhetoric of intrusion narratives, especially when intrusive narratives consider undue intrusion to be emblematic of the operation of fundamental rights adjudication rather than the exception, however troubling.

In sum, I argue that the legal patterns of interconnectedness represent a form of normality within the CJEU's fundamental rights adjudication, which in turn challenges the intrusion narrative to reconsider its characterization of intrusion as the most emblematic form of the ordinary operation of the CJEU's fundamental rights adjudication. Or at the very least, the legal pattern of interconnectedness within the core operation of the CJEU's fundamental rights adjudication pushes the intrusion narrative towards other areas where the value of non-intrusion might be worth consideration, albeit structured differently compared to the core areas which is discussed in this work. Such difference in structure could for instance be a more composite idea of who the intruders are, rather than merely the CJEU. Fundamental rights violations in the context of the measures taken as a response to the economic crisis in the Eurozone may be, as has been intimated earlier, a potentially fruitful area for investigation into the evolution of the value of non-intrusion within EU fundamental rights protection.

The higher moral of organizing and understanding diversity alongside the borders of each Member State provides the most interesting comparison with the legal pattern of interconnectedness. This is so since techniques of coordination of overlapping jurisdictions, such as the margin of discretion, are often associated with ideas of variation and difference.

There is thus a *prima facie* association between the diversity narrative and the margin of discretion-technique, which may lead to the conclusion that techniques such as the margin of discretion may be a tool for the prescriptive moral of diversity narrators.

In contrast, the detection of the legal pattern of interconnectedness as produced by the CJEU's use of margins of discretion to adjudicate fundamental rights constitutes an important challenge to the diversity narrators. The legal pattern of interconnectedness illustrates how the mechanics of fundamental rights adjudication may be elaborated with very little interest in borders.

More importantly, interconnectedness creates variations in the reading of fundamental rights that stem from both the *EUropean* and the national legal environment. This point is crucial. The interconnectedness in the CJEU's elaborations of fundamental rights standards produces variations but these variations are not derivable from the bounded context of a particular Member State. Instead, these variations are composite and collaborative. Hence, while the CJEU's use of margins of discretion may produce variations, these variations are not simply national.

In sum, the legal pattern of interconnectedness highlights the entanglement of a variety of diversities derivable from the structure of the legal conflict and legal sources in modes of fundamental rights protection, but also of different fundamental rights readings. This should be contrasted with the notion of legally operationable diversity that follows the territorial borders of Member States, and thus relies on nationalist rationales.[391]

In the same vein, interconnectedness also points to a practical problem with the prescriptive morals of non-intrusion and diversity, namely that they limit constructive and inclusive thinking on the breadth and depth of social problems that could be transferred to fundamental rights language. In other words, the underlying favouritism of the national guided by the value of non-intrusion and diversity distracts from important social problems that do not necessarily express themselves along EU/national-lines. Fundamental rights grievances increasingly connect and engage people living in multiple jurisdictions, and as such are transnational in character, since it seems to be the case that inequalities know no

[391] Benhabib describes the nationalist version of sovereignty in the following way: "The nationalist variant traces law's legitimacy to the self-determination of a discrete, clearly bounded people, considered to be a homogeneous entity – an ethnos – whose law express and binds its collective will alone." Benhabib, S 2009, Claiming Rights Across Borders: International Human Rights and Democratic Sovereignty, *American Political Science Review* 103 (4), p. 693.

jurisdictional bounds.[392] The prescriptive moral underpinning non-intrusion and diversity, as distinct from the improvement narrative, does not address this dynamic. This ultimately risks narrowing the thinking of potential avenues for social change, where instead the factor of interconnectedness should be included.

Interconnectedness constitutes the foundation for a critical line of inquiry in relation to national identity that undermines the solidity of the connection between the specificity of national identity and the distinctness of the fundamental rights protection. This quality of interconnectedness directs us towards possible routes of further critical inquiry into the problems with the diversity narrative's reliance on territorially bounded logics.

To sum up, all of this suggests that the representation of interconnectedness does something to each of these prescriptive morals. In the case of the narrative of improvement interconnectedness stimulates the improvement narrator to think differently about how improvement may happen. It may be slowing it down, due to the less momentous pace and deliberative style of interconnectedness, and from this perspective interconnectedness could prompt reformulations of the method of improvement. Simultaneously however, if improvement is continuously defined as the European legal regime unilaterally improving the national standard of fundamental rights protection then interconnectedness will represent a parallel story. Yet, and here like the improvement narrators I align myself with the fundamental appreciation of the supranational, I would argue that in order to avoid prematurely excluding any avenue of social change, interconnectedness is better understood as an integral part of possible methods of improvement.

In contrast then, the dichotomy between interconnectedness and intrusion is strong and straightforward. Interconnectedness provides a challenge to the euro-national, conflict-driven rationales of intrusion. Moreover, interconnectedness destabilizes the often-presumed victimization of the national legal *locus* and introduces the notion of national interpretative agency.

Finally, interconnectedness undermines the diversity narrative's prescriptive moral of preservation of the legalistic expressions of the presumed nationally unique. I argue that the most valuable contribution of the detection of the legal pattern of interconnectedness is that it can be used to target the morals of nationalism embedded in the diversity narrative's reconstruction of the CJEU's fundamental rights adjudication.

[392] Indeed, the idea that certain societal problem, evils even, lie not in an outside body threatening national unity and uniqueness but inside that assumed unity and uniqueness, goes back to Arendt's writing about the origins of totalitarianism. Arendt 1958, supra note 93.

8.2.2 Moving Between Court-Centred and Non-Court-Centred Legal Realities: Notes on Jurisgenerativity and Iterations

In this section I would like to highlight how interconnectedness represents movement between different legal realities of fundamental rights protection, and especially between those that are court-centred and non-court-centred.

This circulating movement of one fundamental rights norm between different qualified interpreters in a given adjudicative process is the distinct feature of the influence of interconnectedness on the mechanics of fundamental rights protection. Thinking about the legal pattern of interconnectedness as moving a fundamental right between different venues where it is read and interpreted is an attempt to describe the dynamic created by shared interpretative authority.

In other words, movement between differently shaped legal *loci* is a quality which interconnectedness infuses into the adjudicative process. This movement between court-centred and non-court-centred legal realities within one adjudicative process ultimately muddles and shapes the standard of fundamental rights protection.

In contrast, fundamental rights protection is commonly associated with more strict court-centred logics. In the three dominant narratives of improvement, intrusion and diversity, EU fundamental rights protection is very much centred around the CJEU, albeit the disagreement on the desirability of that condition.

Instead, and to repeat, the representation of interconnectedness, as identified in the operation of the three margin of discretion-typologies, entails a reading of the fundamental rights triggered in a given case that circulates between administrative bodies, national courts, national legislators, and the CJEU. By this I mean that the reading of the same fundamental right will move between court-centred and non-court-centred legal realities within the process of establishing the applicable standard of fundamental rights protection.

This movement, which interconnectedness represents, means that the latitude, the manoeuvring, the space, the variations of norms, do not solely concern and capture interpretative output from the national sub-unit, but instead involve all decision-makers who are sharing interpretative authority. Hence, the manoeuvring of fundamental rights norms engages all jurisdictions sharing that norm-commitment.

This is, as was also noted in relation to the prescriptive moral underlying the narrative of diversity, an important point about how the variations of fundamental rights norms enabled by

the operationalization of margins of discretion, does not map onto euro-national jurisdictional divides.

There are parallels to this way of thinking. For instance, there are several sets of concepts stemming from scholarly inquiries into transnationalism and more dialectical understandings of federalism, which try to capture the same type of movement and dynamism in the circulation of norms between actors entrusted with their interpretation. I find the ideas of *jurisgenerativity* and *iterations* particularly useful. I will briefly highlight how these concepts provide support for the detection of interconnectedness specifically as it presents itself in the mechanics of adjudication. This in turn, I argue, thickens the solidity of that identification.

Jurisgenerativity was first used by Cover to explain the process through which legal meaning is created, hence law's capacity to create normative meaning without formal law making.[393] This way of understanding the capacity of law to generate meaning in ways not immediately expected (to frame it simplistically) supports the identification of legal patterns of interconnectedness. This is especially the case since the concept of jurisgenerativity understands processes such as the circulation of one fundamental right between court-centred and non-court-centred legal realities within a given process of adjudication (as enabled by the margin of discretion) as a logical outflow of law's versatile capacities. This movement, while not strictly speaking foreseen in the treaties or the Charter, still created normative meaning.

In sum, a jurisgenerative analysis embraces the idea that law in itself produces both meaning and connections. The interconnectedness detected within the apparatus of EU fundamental rights protection can thus be understood as the output of a jurisgenerative process.

The concept of iterations is also valuable since, when applied in the context of supranational fundamental rights, it understands the search for a minimum core of a given fundamental right as a fallacy, and instead understands circulation and hence reinterpretation of norms as virtues. While not specifically discussing courts, Benhabib's thinking about the democratic iterations of human rights is instructive here. She lays out how formal decision-makers are just one part of a much broader democratic participatory process of "local contextualization, interpretation and vernacularization" of human rights. Benhabib, again thinking outside the courtroom, states that: "Every act of iteration involves making sense of an authoritative original in a new and different context through interpretation."[394] She

[393] Cover 1983, supra note 389, at 19. See also Benhabib, S 1986, *Critique, Norm and Utopia: A Study of the Foundations of Critical Theory*, Columbia University Press, New York, p. 272.
[394] Benhabib 2009, supra note 391 at 692.

continues that actors, still not courts, "must reinterpret and reappropriate human rights principles such as to give them shape as constitutional rights, and, if and when necessary, suffuse constitutional rights with new content."[395]

Paralleling this argument, the representation of interconnectedness as produced by margins of discretion point to the possibility of similarly shaped movement, albeit between courts, administrative bodies and legislators within a given process of adjudication. I believe it is useful to relate interconnectedness to the idea of iterations because both seek to capture and account for how multiple readings of rights may relate to each other within a given context of fundamental rights protection.

In sum, the idea that interconnectedness enables movement between court-centred and non-court-centred contexts of fundamental rights protection is relatable to a set of analytical concepts such as jurisgenerativity and iterations, which seek to open up legal categories traditionally perceived as closed. Therefore, one way of thinking about the representation of interconnectedness is to think about how the elaboration of the same fundamental right is being circulated amongst interpreters within the overlapping jurisdictions. The margin of discretion-technique opens up a route in which a standard of protection can be formulated using interpretative input with different geographical locations and accepts both court-centred and non court-centred compositions.

8.2.3 Engaging with Interconnectedness

What is it like for people interested in engaging with their EU fundamental rights protection to encounter a process of adjudication that has operationalized a margin of discretion? How does it affect their thinking about the machinery of the CJEU's fundamental rights adjudication, especially as a venue for social change?

This is a perspective that has not been explicitly explored in this work, mainly because it requires a different set of analytical tools. Nonetheless I believe the analysis conducted in this work, which aims to thoroughly understand the CJEU's use of the technique, may serve as a point of references for future inquires into its effect on citizenship. As Walker states: "Conceptual analysis and empirical inquiry alone can never solve normative problems. Yet they can help us to understand these problems more clearly, and provide a better route map through the moral and political maze."[396]

[395] Benhabib, S 2012, *The Future of Democratic Sovereignty and Transnational law: On Legal Utopianism and Democratic Scepticism*, Strauss Working Paper 03/12, NYU School of Law, New York, p. 35.
[396] Walker, N 2015, *Intimations of Global Law*, Cambridge University Press, Cambridge, p. 1.

What flows from my reading of the CJEU's use of the margin of discretion-technique is that the utility of the question of "who has the last word," is diminished. Interconnectedness means that no one actor alone is empowered to pronounce the last word unilaterally. Framed differently, seeking to understand who has the last word will not answer the question of how the fundamental rights standard was elaborated. This may mean that instances where margins of discretion are operationalized by the CJEU to formulate the standard of protection are likely to be perceived as considerably more complex and harder to foresee, since the power to define fundamental rights does not reside straightforwardly in one or the other legal system.

Interconnectedness therefore represents a version of transnationalism, which may complicate orientation for people seeking to engage with it, since the old maps of sources and decision-makers might not provide the necessary guidance.[397]

Indeed, interconnectedness illustrates that the answer to the question of *who is enforcing what on whom* does not necessarily map onto old jurisdictional lines in the area of fundamental rights. Interconnectedness may therefore require a reformulation of people's ideas about how fundamental rights are enforced. One of the questions I would pose is therefore, how people seeking to litigate their fundamental rights experience a fundamental rights protection that is not enforced by one actor striking down the measure of another actor, and where the interpretative output of these actors does not map onto jurisdictional lines? What is the message imparted by fundamental rights enforcement characterized by interconnectedness and blurred jurisdictional divides?

In sum, given the roadmap laid out in this work in relation to the enforcement of fundamental rights when margins of discretion are used, an initial set of questions may address how that infrastructure of elaboration of the applicable standard of fundamental rights protection affects citizens seeking to engage with it, i.e. does that protection appear more remote and incomprehensible or is there a discernible sense of euro-national collaboration, albeit intricate, that may be appealing? How does the strand of euro-national interconnectedness identified within the EU's fundamental rights protections present itself to people seeking to engage with it? The idea that the supranational last word either merely

[397] These sets of questions are derivable from discussions on the changing relationship between transnational constitutionalism and democracy. Walker, to take one example, has written about how the incompleteness of democracy in terms of its ability to regulate an increasingly transnational world may alter the function and shape of constitutionalism. "But it does underline the point that neither the democratic principle itself nor the preferences of those agents who claim to be empowered by the democratic principle can supply the whole answer to the question of the appropriate forms and conditions in terms of which democracy is constituted, distributed, and interconnected." Walker, N 2008, Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders, *International Journal of Constitutional Law* 6 (3-4), p. 394.

enforces rights on the national level or accords discounts from a supranational norm to the national level will be an important starting point for such inquiry.

A second set of questions concerns the legal condition of euro-national interconnectedness when thinking about how the living conditions in Europe might or might not change through law. The argument implicit in this work is that the detection of methods of adjudication that produce interconnectedness thickens our understanding of the way in which fundamental rights standards of protection are created within the EU. This in turn facilitates the formulation of projects of social change as these pertain to that which may be addressed using a language of fundamental rights.

As I already alluded when discussing the possible development of the improvement narrative, one starting point for further inquiry would be to try to structure what interconnectedness does to such projects of social change. What does interconnectedness, as it manifests itself in shared interpretative authority between different actors, courts, administrative bodies, and legislators, do to the determination of the better method of social change, as articulated in law and specifically in fundamental rights language?

This second set of questions essentially comes down to asking how should interconnectedness influence thinking about social change through law in Europe? At the very least this entails formulating projects of change within the European Union, which do not focus on one actor only or depend on thinking about adjudication as preserving one or the other jurisdiction's standard of fundamental rights protection. These are all important questions for future engagement with the apparatus of EU fundamental rights protection, and euro-national interconnectedness is the starting point for such inquiry.

BIBLIOGRAPHY

BOOKS

Arendt, H 1958, *The Origins of Totalitarianism*, Meridian Books, New York.

Aziz, M 2004, *The Impact Of European Rights on National Legal Cultures*, Hart Publishing, Oxford; Portland.

Bell, L, Schaefer, AJN and Peleg, I (eds.) 2001, *Negotiating Culture and Human Rights*, Columbia University Press, New York.

Benhabib, S 1986, *Critique, Norm and Utopia: A Study of the Foundations of Critical Theory*, Columbia University Press, New York.

Busstra, MJ 2011, *The Implications of the Racial Equality Directive for Minority Protection Within the European Union*, Eleven International Publishing, The Hague.

Cappelletti, M 1971, *Judicial Review in the Contemporary World*, Bobbs-Merrill, Indianapolis.

Cappelletti, M 1989, *The Judicial Process in Comparative Perspective*, Clarendon Press, Oxford.

Cappelletti, M and Garth, BG 1978, *Access To Justice: The Worldwide Movement To Make Rights Effective: A General Report*, AW Sijthoff, Leiden.

Cartabia, M 1995, *Principi inviolabili e integrazione europea*, Giuffrè, Milano.

Claes, M 2005, *The National Courts' Mandate in the European Constitution,* Hart Publishing, Portland.

Craig, P 2010, *The Lisbon Treaty: Law, Politics, and Treaty Reform*. Oxford University Press, Oxford.

Craig, P and de Búrca, G 2011, *EU Law: Text, Cases, and Materials*, 5th edition, Oxford University Press, Oxford.

Davies, B 2012, *Resisting the European Court of Justice: West Germany's Confrontation with European law, 1949- 1979*, Cambridge University Press, Cambridge.

Davis, KC 1969, *Discretionary Justice: A Preliminary Inquiry*, Louisiana State University Press, Baton Rouge.

Delmas-Marty, M 2009, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World*, Bloomsbury Publishing, Oxford.

Di Sarcina, F 2010, *L'Europa delle donne: la politica di pari opportunità nella storia dell'integrazione europea, 1957-2007*, Il Mulino, Bologna.

Ellis, E 1999, *The Principle of Proportionality in the Laws of Europe*, Hart Publishing, Oxford.

Eskridge, WN and Ferejohn, JA 2010, *A Republic Of Statutes: The New American Constitution*, Yale University Press, New Haven.

Esping-Andersen, G 1990, *The Three Worlds of Welfare Capitalism*, Princeton University Press, Princeton.

Fabbrini, F 2014, *Fundamental Rights in Europe: Challenges and Transformations of a Multilevel System In Comparative Perspective*, Oxford University Press, Oxford.

Grant, J 1993, *Fundamental Feminism. Contesting the Core Concepts of Feminist Theory,* Routledge, New York.

Guibernau, M 2007, *The Identity of Nations*, Polity, Cambridge.

Hansen, L and Wæver, O 2003, *European Integration and National Identity: The Challenge of the Nordic States*, Routledge, London; New York.
Hart, HLA 1961, *The Concept of Law*, Oxford University Press, Oxford.
Hemerijck, A 2012, *Changing Welfare States*, Oxford University Press, Oxford.
Jackson, V 2010, *Constitutional Engagement in a Transnational Era*, Oxford University Press, Oxford.
Ignatieff, M 2001, *Human Rights as Politics and Idolatry*, Princeton University Press, Princeton.
Kadish, MR and Kadish, SH 1973, *Discretion to Disobey: A Study of Lawful Departures from Legal Rules*, Stanford University Press, Stanford.
Legg, A 2012, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality*, Oxford University Press, Oxford.
Lyotard, J-F 1984, *The Postmodern Condition: A Report On Knowledge*, Manchester University Press, Manchester.
MacKinnon, AS 1987, *Feminism Unmodified: Discourses On Life And Law*, Harvard University Press, Boston.
Milward, A 1992, *The European Rescue of the Nation State*, Routledge, London.
Morton, V 2014, *European Union Human Rights Law*, Edward Edgar Publishing, Cheltenham.
Rachels, J 1993, *The Challenge of Cultural Relativism, The Elements of Moral Philosophy,* McGraw-Hill, New York.
Ricœur, P 1984, *Time and Narrative, Vol.1*, University of Chicago Press, Chicago.
Smith, AD 1998, *Nationalism and Modernism: A Critical Survey of Recent Theories of Nation and Nationalism,* Routledge, New York; London.
Somek, A 2011, *Engineering Equality: An Essay on European Anti-Discrimination Law*, Oxford University Press, Oxford.
Spade, D 2011, *Normal Life: Administrative Violence, Critical Trans Politics, and The Limits of Law,* South End Press, Brooklyn New York.
Tatham, AF 2013, *Central European Constitutional Courts in the Face of EU Membership: The Influence of the German Model in Hungary and Poland*, Martinus Nijhoff Publishers, Leiden.
Torres Pérez, A 2009, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication*, Oxford University Press, Oxford.
Tushnet, M 2000, *Taking the Constitution Away From the Courts*, Princeton University Press, Princeton.
Vincent, A 2002, *Nationalism and Particularity*, Cambridge University Press, Cambridge.
Walker, N 2015, *Intimations of Global Law*, Cambridge University Press, Cambridge.
Young, KG 2012, *Constituting Economic and Social Rights*, Oxford University Press, Oxford.

CHAPTERS IN EDITED BOOKS

Alter, K 1998, Explaining National Court Acceptance Of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration, in Slaughter, AM, Stone Sweet, A and Weiler, JHH (eds.), *The European Court and National Courts-Doctrine And Jurisprudence: Legal Change in its Social Context*, Hart Publishing, Oxford.

Alston, P and de Schutter O 2005, Introduction: Addressing the Challenges Confronting the EU Fundamental Rights Agency, in Alston, P and de Schutter, O (eds.), *Monitoring Fundamental Rights in the EU, The Contribution of the Fundamental Rights Agency*, Hart Publishing, Oxford.

Arnull, A 2013, Judicial Activism and the European Court Of Justice: How Should Academics Respond?, in De Witte, B, Dawson, M and Muir, E (eds.), *Judicial Activism at the European Court of Justice,* Edward Elgar Publishing, Cheltenham.

Azoulai, L 2012, The Case of Fundamental Rights: a State of Ambivalence, in Micklitz, H-W and De Witte, B (eds.), *The European Court of Justice and the Autonomy of the Member States*, Intersentia, Cambridge.

Azoulai, L 2013, The European Court Of Justice and the Duty to Respect Sensitive National Interests, in De Witte, B, Dawson, M and Muir, E (eds.), *Judicial Activism at the European Court of Justice*, Edward Elgar Publishing, Cheltenham.

Barak, A 2012, Proportionality (2), in Rosenfeld, M and Sajó, A (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, Oxford.

Beaumont, P 2002, Human Rights: Some Recent Developments and Their Impact on Convergence and Divergence of Law in Europe, in Beaumont, P, Lyons C and Walker, N (eds.), *Convergence and Divergence in European Public Law*, Hart Publishing, Oxford.

Bengoetxea, J 2014, Rethinking EU Law in the Light of Pluralism and Practical Reason, in Maduro, M, Tuori, K and Sankari, S (eds.), *Transnational Law: Rethinking European Law and Legal Thinking*, Cambridge University Press, Cambridge

Benhabib, S 2006, Another Cosmopolitanism, in Post, R (ed.), *Another Cosmopolitanism,* Oxford University Press, Oxford.

Besson, S 2014, European Human Rights Pluralism, in Maduro, M, Tuori, K and Sankari, S (eds.), *Transnational Law: Rethinking European Law and Legal Thinking*, Cambridge University Press, Cambridge; New York.

Bryde, BO 2010, The ECJ's Fundamental Rights Jurisprudence - A Milestone in Transnational Constitutionalism, in Maduro, M and Azoulai, L (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Hart Publishing, Oxford; Portland.

Cannizzaro, E and Bonafè, B 2014, Beyond the Archetypes of Modern Legal Thought: Appraising New and Old Forms of Interaction Between Legal Orders, in Maduro, M, Tuori, K and Sankari, S (eds.), *Transnational Law: Rethinking European Law and Legal Thinking*, Cambridge University Press, Cambridge; New York.

Cappelletti, M, Seccombe, M and Weiler, JHH 1986, General Introduction, in Cappelletti, M, Seccombe, M and Weiler, JHH (eds.), *Integration Through Law: Europe and the American Federal Experience*, Vol. 1, Walter de Gruyter, Berlin.

Claes, M 2013, National Identity: Trump Card or Up for Negotiation?, in Saiz Amaiz, A and Alcoberro Llivina, C (eds.), *National Constitutional Identity And European Integration*, Intersentia, Cambridge.

Cruz Villalón, P 2010, 'All the guidance', ERT and Wachauf, in Maduro, M and Azoulai, L (eds.), *The Past And Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Hart Publishing, Oxford; Portland.

de Búrca, G 2013, Europe's Raison D'être, in Kochenov, D and Amtenbrink, F (eds.), *The European Union's Shaping of the International Legal Order,* Cambridge University Press, Cambridge.

Delmas-Marty, M 1992, The Richness of Underlying Legal Reasoning, in Delmas-Marty M (ed), *The European Convention for the Protection of Human Rights*, Nijhoff Publishing, Dordrecht; Boston.

de Vries, S, Bernitz, U and Weatherill, S 2013, Introduction, in de Vries, S, Bernitz, U and Weatherill, S (eds.), *The Protection Of Fundamental Rights In The EU After Lisbon*, Hart Publishing, Oxford; Portland.

Dubout, E 2014, The Protection of Fundamental Rights and the Allocation of Competences in the EU: A Clash of Constitutional Logics, in Azoulai, L (ed.), *The Question of Competence In the European Union*, Oxford University Press, Oxford.

Dougan, M 2012, Judicial Activism or Constitutional Interaction? Policymaking by the ECJ in the Field of Union Citizenship*,* in Micklitz, H-W and De Witte, B (eds.), *The European Court of Justice and the Autonomy of the Member States*, Intersentia, Cambridge.

Fraser, N and Nicholson, LJ 1990, Social Criticism without Philosophy: An Encounter between Feminism and Postmodernism, in Fraser, N and Nicholson, LJ, (eds.), *Feminism/Postmodernism*, Routledge, New York.

Frowein, JA, Schulhofer, S and Shapiro, M 1986, The Protection of Fundamental Human Rights as a Vehicle Of Integration, in Cappelletti, M, Seccombe, M and Weiler, JHH (eds.), *Integration through law: Europe and the American federal experience*. Vol. 1. Walter de Gruyter, Berlin.

Glenn, HP 2014, Transnational Legal Thought, Plato, Europe and Beyond, in Maduro, M, Tuori, K and Sankari, S (eds.), *Transnational Law: Rethinking European Law and Legal Thinking*, Cambridge University Press, Cambridge; New York.

Grabenwarter, C 2010, National Constitutional Law Relating to the European Union, in von Bogdandy, A and Bast, J (eds.), *Principles of European constitutional law*, 2nd ed., Hart Publishing, Oxford; Portland.

Groppi T, Spigno I and Vizioli N 2013, The Constitutional Consequences of the Financial Crisis in Italy, in Contiades, X (ed.), *Constitutions in the Global Financial Crisis. A Comparative Analysis*, Ashgate, Burlington.

Jacobs, FG 2010, Wachauf and the Protection of Fundamental Rights in EC Law, in Maduro, M and Azoulai, L (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Hart Publishing, Oxford; Portland.

Kaila, H 2012, The Scope of Application of the Charter of Fundamental Rights of the European Union in the Member States, in Cardonnel, P, Rosas, A and Wahl, N (eds.), *Constitutionalising the EU Judicial System, Essays in Honour of Pernilla Lindh*, Hart Publishing, Oxford; Portland.

Kilpatrick, C 2002, Emancipation through Law or the Emasculation of Law: The Nation State, the EU, and Gender Equality at Work, in Conaghan, J, Fischl, RM and Klare, K (eds.), *Labour Law in an Era of Globalization,* Oxford University Press, Oxford.

Komárek, J 2012 Institutional Dimensions of Constitutional Pluralism, in Avbelj, M and Komárek, J (eds.), *Constitutional Pluralism in the European Union and Beyond*, Hart Publishing, Oxford.

Kumm, M 2010, Internationale Handelsgesellschaft, Nold and the New Human Rights Paradigm, in Maduro, M and Azoulai, L (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Hart Publishing, Oxford; Portland.

Küling, J 2006, Fundamental Rights, in von Bogdandy, A and Bast, J (eds.), *Principles of European Constitutional Law*. Vol. 8. Hart Publishing, Oxford.

Kühn, Z 2010, Wachauf and ERT: On the Road from the Centralised to the Decentralised System of Judicial Review, in Maduro, M and Azoulai, L (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Hart Publishing, Oxford; Portland.

Macdonald, RSJ 1993, The Margin of Appreciation, in Macdonald, RSJ, Matscher, F and Petzold, H (eds.), *The European System for the Protection of Human Rights*, M. Nijhoff, Leiden; Boston.

Maduro, M 1999, Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU, in *The EU and Human Rights*, Alston, P, Bustelo M and Heenan J (eds.), Oxford University Press, Oxford.

Maduro, M 2003, Contrapunctual Law: Europe's Constitutional Pluralism in Action, in Walker, N (ed.), *Sovreignity in Transistion*, Hart Publishing, Oxford.

Maduro, M 2009, Courts and Pluralism. Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism, in Dunoff, JL and Trachtman, JP (eds.), *Ruling the world?: Constitutionalism, International Law, and Global Governance*, Cambridge University Press, Cambridge.

Maduro, M 2012, Three Claims of Constitutional Pluralism, in Avbelj, M and Komárek, J (eds.), *Constitutional Pluralism in the European Union and Beyond*, Hart Publishing, Oxford.

Martinico, G 2010, Preliminary Refernce and Constitutional Courts. Are you in the Mood for Dialogue?*,* in Fontanelli, F, Martinico, G and Carrozza, P (eds.), *Shaping Rule of Law Through Dialogue : International and Supranational Experiences*, Europa Law Publishing, Groningen.

Mayer, F 2010, *Multilevel Constitutional Jurisdiction*, in von Bogdandy, A and Bast, J (eds.), *Principles of European Constitutional Law*, 2nd ed., Hart Publishing, Oxford; Portland.

Millet, XF 2014, The Respect for National Constitutional Identity in the European Legal Space: An Approach to Federalism as Constitutionalism, in Azoulai, L (ed.), *The Question of Competence in the European Union*, Oxford University Press, Oxford.

More, G 1999, The Principle of Equal Treatment: From Market Unifier to Fundamental Right?, in Craig, P and de Búrca, G (eds.), *The Evolution of EU Law*, Oxford University Press, Oxford.

Muir, E 2013, The Court of Justice: A Fundmantal Rights Institution Among Others, in De Witte, B, Dawson, M and Muir, E (eds.), *Judicial Activism at the European Court of Justice*, Edward Elgar Publishing, Cheltenham.

Nollkaemper, A and Nijman, JE 2007, Introduction, in Nollkaemper, A and Nijman, JE (eds.), *New Perspectives on the Divide Between National and International Law*, Oxford University Press, Oxford

Oskarson, M 1996, Väljarnas vågskålar, in Gilljam, M and Holmberg, S (eds.), *Ett knappt ja till EU: Väljarna och folkomröstningen 1994*, Nordsteds Juridik, Stockholm.

Pernice, I, Griller, S and Ziller, J 2008, The Treaty of Lisbon and Fundamental Rights, in Griller, S and Ziller, J (eds.), *The Lisbon Treaty, EU Constitutionalism without a Constitutional Treaty,* Springer, New York.

Resnik, J 2014, Federalism(s)'s Forms and Norms: Contesting Rights, De-Essentializing Jurisdictional Divides, and Temporizing Accommodations, in Fleming, JE and Levy, JT (eds.) *Federalism and Subsidiarity: Nomos Lv*, NYU Press, New York.

Rorty, R 1993, Human Rights, Rationality, and Sentimentality, in Shute, S and Hurley, S (eds.), *On Human Rights,* Basic Books, New York.

Saiz Amaiz, A and Alcoberro Llivina, C 2013, Introduction, in Saiz Amaiz, A and Alcoberro Llivina, C (eds.), *National Constitutional Identity and European Integration*, Intersentia, Cambridge.

Sciarra, S 2002, Market Freedoms and Fundamental Social Rights, in Hepple, BA (ed.), *Social and Labour Rights in a Global Context: International and Comparative Perspectives*, Cambridge University Press, Cambridge.

Spaventa, E 2009, Federalisation Versus Centralisation: Tensions in Fundamental Rights Discourse in the EU, in Dougan, M and Currie, S (eds.), *50 years of the European Treaties : Looking Back and Thinking Forward*, Hart Publishing Oxford; Portland

Tizzano, A 2008, The Role of the ECJ in the Protection of Fundamental Rights, in Arnull, A, Eeckhout, P and Tridimas, T (eds.), *Continuity and Change in EU law: Essays in Honour of Sir Francis Jacobs*, Oxford University Press, Oxford

Torres Pérez, A 2012, The Dual System of Rights Protection in the European Union, in Cloots, E, De Baere, G and Sottiaux, S (eds.), *Federalism in the European Union*, Hart Publishing, Oxford; Portland.

Tridimas, T 2010, Primacy, Fundamental Rights and the Search for Legitimacy, in Maduro, M and Azoulai, L (eds.), *The past and future of EU law: the classics of EU law revisited on the 50th anniversary of the Rome Treaty*, Hart Publishing, Oxford.

Tuori, K 2010, The Many Constitutions of Europe, in Tuori, K and Sankari, S (eds.), *The Many Constitutions of Europe,* Ashgate, Burlington.

Tuori, K 2014, Transnational Law: On Legal Hybrids and Perspectivism, in Maduro, M, Tuori, K and Sankari, S (eds.), *Transnational Law: Rethinking European Law and Legal Thinking*, Cambridge University Press, Cambridge; New York.

Walker, N 2012, Constitutionalism and Pluralism in Global Context, in Avbelj, M and Komárek, J, *Constitutional pluralism in the European Union and beyond*, Hart Publishing, Oxford.

Weatherill, S 2013, From Economic Rights to Fundamental Rights, in de Vries, S, Bernitz, U and Weatherill, S (eds.), *The Protection of Fundamental Rights in the EU After Lisbon*, Hart Publishing, Oxford.

Weiler, JHH 1999, Fundamental Rights and Fundamental Boundaries: on the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space, in Weiler, JHH (ed.), *The Constitution of Europe: "do the clothes have an emperor?" and Other Essays on European Integration*, Cambridge University Press, Cambridge.

Weiler, JHH 2011, Prologue: Global and Pluralist Constitutionalism—Some Doubts, in de Búrca, G and Weiler, JHH (eds.), *The Worlds of European Constitutionalism*, Cambridge University Press, Cambridge.

ARTICLES IN PEER REVIEWED JOURNALS

Albi, A 2007, Supremacy of EC law in the New Member States, *European Constitutional Law Review* 3 (1), pp. 25-67.

Algotsson, K-G 2011, De svenska partierna och Lavaldomen, *Statsvetenskaplig tidskrift* 113 (4), pp. 403-42.

Anagnostou, D and Millns, S 2013, Gender Equality, Legal Mobilization, and Feminism in a Multilevel European System, *Canadian Journal of Law and Society/Revue Canadienne Droit et Société* 28 (2), pp. 115-131.

Aroney, N 2007, Subsidiarity, Federalism and the Best Constitution: Thomas Aquinas on City, Province and Empire, *Law and Philosophy* 26 (2), pp. 161-228.

Barnard, C and Hepple, B 1999, Indirect Discrimination: Interpreting Seymour-Smith, *The Cambridge Law Journal* 58 (2), pp. 399-412.

Baquero Cruz, J 2008, The Legacy of the Maastricht-Urteil and the Pluralist Movement, *European Law Journal* 14 (4), pp. 389-422.

Ball, CA 1996, The Making of a Transnational Capitalist Society: The Court of Justice, Social Policy, and Individual Rights under the European Community's Legal Order, *Harvard International law Journal* 37, pp. 307-388.

Benhabib, S 2009, Claiming Rights Across Borders: International Human Rights and Democratic Sovereignty, *American Political Science Review* 103 (4), pp. 691-704.

Bercusson B 1990, The European Community's Charter of Fundamental Social Rights of Workers, *The Modern Law Review* 53 (5), pp. 624-642.

Besselink, LFM 1998, Entrapped by the maximum standard: on fundamental rights, pluralism and subsidiarity in the European Union, *Common Market Law Review* 35 (3), pp. 629-680.

Besselink, LFM 2010, National and Constitutional Identity Before and After Lisbon, *Utrecht Law Review* 44 (6), pp. 36-51.

Besson, S 2006, The European Union and Human Rights: Towards A Post-National Human Rights Institution? *Human Rights Law Review* 6 (2), pp. 323-360.

Benvenisti, E 1998, Margin of appreciation, consensus, and universal standards, *NYU Journal of International Law and Politics* 31, pp. 843 – 854.

Berman Schiff, P 2006, Global legal pluralism, *Southern California Law Review* 80, pp. 1155-95.

Biondi, A 2004, Free Trade, a Mountain Road and the Right to Protest: European Economic Freedoms and Fundamental Individual Rights, *European Human Rights Law Review*, pp.51-61.

Bulterman, MK and Kranenborg, HR 2006, What if rules on free movement and human rights collide? About laser games and human dignity: the Omega case, *European Law Review* 1, p.93-101.

Burrows, N 1980, The Promotion of Women's Rights by the European Economic Community, *Common Market Law Review* 17 (2), pp. 191-209.

Cappelletti, M 1979, The "Mighty Problem" of Judicial Review and the Contribution of Comparative Analysis, *The Southern California Law Review* 53, pp. 409-445.

Carozza, PG 2003, Subsidiarity as a Structural Principle of International Human Rights Law, *American Journal of International Law* 97 (1), pp.38-79.

Chu, G 2006, 'Playing at Killing' Freedom of Movement, Case C-36/02, Omega Spielhallen und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, *Legal Issues of Economic Integration* 33 (1), pp. 85-94.

Cichowski, RA 2004, Women's Rights, the European Court, and Supranational Constitutionalism, *Law & Society Review* 38 (3), pp. 489-512.
Coppel, J and O'Neill, A 1992, The European Court of Justice: Taking Rights Seriously, *Common Market Law Review* 12 (2), pp. 227-239.
Cover, R 1981, The Use of Jurisdictional Redundancy: Interest, Ideology and Innovation, *William & Mary Law Review* 22, pp. 639-682.
Cover, R 1983, Foreword: Nomos and narrative, *Harvard Law Review* 97, pp. 4-68.
Cover, R and Aleinikoff, AT 1977, Dialectical federalism: habeas corpus and the court, *Yale Law Journal* 86 (6), pp. 1035-1102.
Cummings, SL and Trubek LG 2008, Globalizing public interest law, *UCLA Journal of International Law & Foreign Affairs* 13, pp. 1-53.
Davies, ACL 2008, One step forward, two steps back? The Viking and Laval cases in the ECJ, *Industrial Law Journal* 37 (2), pp. 146-148.
Dawson, M and de Witte, F 2013, Constitutional Balance in the EU after the Euro-Crisis, *The Modern Law Review* 76, pp. 817–844.
de Búrca, G 1993, The principle of proportionality and its application in EC law, *Yearbook of European Law* 13 (1), pp. 105-150.
de Búrca, G 2011, The Road Not Taken: The European Union as a Global Human Rights Actor, *American Journal of international law* 105 (4), pp. 649-693.
de Búrca, G 2012, The Trajectories of European and American Antidiscrimination Law, *American Journal of Comparative Law* 60 (1), pp. 1-22.
de Búrca, G and Gerstenberg, O 2006, The Denationalization of Constitutional Law, *Harvard International Law Journal* 47, pp. 243- 262.
de Vries, SA 2013. Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice, *Utrecht Law Review* 9 (1), pp. 169-192.
de Waele, H. and van der Vleuten, A 2010, Judicial Activism in the European Court of Justice-The Case of LGBT Rights, *Michigan State University College of Law Journal of International Law* 19, pp. 639 -652.
Donnarumma, MA 2010, Il processo di "costituzionalizzazione" dell'Unione Europea e la tensione dialettica tra la giurisprudenza della corte di giustizia e le giurisprudenze delle corti costituzionali, *Rivista Italiana di Diritto Pubblico Comunitario* 2, pp. 407-450.
Donnelly, J 2007, The relative universality of human rights, *Human Rights Quarterly* 29 (2), pp. 281-306.
Dølvik, JE and Visser J 2009, Free movement, equal treatment and workers' rights: can the European Union solve its trilemma of fundamental principles?, *Industrial Relations Journal* 40 (6), pp. 491-509.
Dworkin, R 1963, Judicial Discretion, *Journal of Philosophy* 60 (21), pp. 624–638.
Dworkin, R 1967, The model of rules, *The University of Chicago Law Review* 35 (1), pp. 14-46.
Dworkin, R 1982, Law as interpretation, *Critical Inquiry* 9 (1), pp.179-200.
Eeckhout, P 2002, The EU Charter of Fundamental Rights and the federal question, *Common Market Law Review* 39 (5), pp. 945-994.
Fichera, M and Herlin-Karnell, E 2013, The Margin of Appreciation Test and Balancing in the Area of Freedom Security and Justice: A Proportionate Answer for a Europe of Rights?, *European Public Law* 19 (4), pp. 759–788.
Fontanelli, F 2013, Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog: Court of Justice of the European Union: Judgment of 26 February 2013, Case C-617/10 Åklagaren v. Hans Åkerberg Fransson, *European Constitutional Law Review* 9 (2), pp. 315-334.

Fraser, N 1995, From redistribution to recognition? Dilemmas of justice in a 'post-socialist' age, *New Left Review* 212, p. 68-93.
Fredman, S 1992, European Community discrimination law: a critique, *Industrial Law Journal* 21 (2), pp. 119-134.
Fudge, J 2015, Constitutionalizing Labour Rights in Canada and Europe: Freedom of Association, Collective Bargaining, and Strikes, *Current Legal Problems*, first published online June 23, 2015.
Gerards, J 2011, Pluralism, Deference and the Margin of Appreciation Doctrine*, European Law Journal* 17 (1), pp. 80-120.
Giubboni, S 2010, Social Rights and Market Freedom in the European Constitution: A Re-Appraisal, *European Labor Law Journal* 1 (2), pp. 161-184.
Goldston, JA 2010, The struggle for Roma rights: arguments that have worked, *Human Rights Quarterly* 32 (2), pp. 311-325.
Goodwin, M 2006, DH and Others v. Czech Republic: a major set-back for the development of non-discrimination norms in Europe, *German Law Journal* 7 (4), pp. 421-432.
Guastaferro, B 2012, Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause, *Yearbook of European Law* 31 (1), pp. 263–318.
Habermas, J 1996, The European Nation State. Its Achievements and Its Limitations. On the Past and Future of Sovereignty and Citizenship, *Ratio Juris* 9, pp. 125–137.
Halberstam, D and Mollers, C 2009, German Constitutional Court says Ja Zu Deutschland, *German Law Journal* 10 (8), pp. 1241- 1258
Harding, S 2003, Comparative reasoning and constitutional review, *Yale Journal of International Law* 28, pp. 409-467.
Heide, I 1999, Supranational action against sex discrimination: Equal pay and equal treatment in the European Union, *International Labour Review* 138 (4), pp. 381-410.
Held, D 2002 Law of states, law of peoples, *Legal Theory* 8 (2), pp. 1-44.
Helfer, LR and Voeten, E 2014, International courts as agents of legal change: evidence from LGBT rights in Europe, *International Organization* 68 (1), pp. 77-110.
Hilson, C 2002, New social movements: the role of legal opportunity, *Journal of European Public Policy* 9 (2), pp. 238-255.
Hinarejos, A 2008, Laval and Viking: The right to collective action versus EU fundamental freedoms, *Human Rights Law Review* 8 (4), pp. 714-729.
Horsley, T 2013, Reflections on the role of the Court of Justice as the "motor" of European integration: Legal limits to judicial law-making, *Common Market Law Review* 50 (4), pp. 931-964.
Hutchinson, MR 1999, The Margin of Appreciation Doctrine in the European Court of Human Rights, *International and Comparative Law Quarterly* 48 (3), pp. 638-650.
Itzcovich, G 2013, One, None and One Hundred Thousand Margins of Appreciations: The Lautsi Case, *Human Rights Law Review* 13 (2), pp. 287-308.
Jacquot, S and Vitale, T 2014, Law as a weapon of the weak? A comparative analysis of legal mobilization by Roma and women's groups at the European level, *Journal of European Public Policy* 21 (4), pp. 587-604.
Joerges, C and Rödl, F 2009, Informal politics, formalised law and the 'Social Deficit' of European integration: reflections after the judgments of the ECJ in Viking and Laval, *European Law Journal* 15 (1), pp. 1-19.
Kilpatrick, C 2014, Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?, *European Constitutional Law Review* 10 (3), pp. 393-421.

Kilpatrick, C 2015, On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts, *Oxford Journal of Legal Studies* 35 (2), pp. 325-353.
Komárek, J 2014, National constitutional courts in the European constitutional democracy, *International Journal of Constitutional Law* 12 (3), pp. 525-544.
Konstadinidies, T 2010, Constitutional Identity as a Shield and as a Sword: The European Legal Order within the framework of National Constitutional Settlement, *Cambridge Yearbook of European Legal Studies* 13 (1), pp. 195-218.
Kumm, M 1999, Who is the final arbiter of constitutionality in Europe?: three conceptions of the relationship between the German Federal Constitutional Court and the European Court of Justice, *Common Market Law Review* 36 (2), pp. 351-386.
Kumm, M 2005, The jurisprudence of Constitutional conflict: constitutional Supremacy in Europe before and After the Constitutional Treaty, *European Law Journal* 11 (3), pp. 262-307.
Kumm, M and Ferreres Comella, V 2005, The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union, *International Journal of Constitutional Law* 3, pp. 473-492.
Lacroix, J 2002, For a European Constitutional Patriotism, *Political Studies* 50 (5), pp. 944-958.
Landau, D 2012, The Reality of Social Rights Enforcement, *Harvard International Law Journal* 53 (1), pp. 402-458.
Lenaerts, K 2000, Fundamental Rights in the European Union, *European Law Review* 2 5 (6), pp. 575-600.
Lenaerts, K and De Smijter, E 2001, A "bill of rights" for the European Union, *Common Market Law Review* 38 (2), pp. 273-300.
Lanier, ER 1988, Solange, Farewell: The Federal German Constitutional Court and the Recognition of the Court of Justice of the European Communities as Lawful Judge, *Boston College International and Comparative Law Review* 11 (1), pp. 1-28.
Lester, A 1998, Universality versus Subsidiarity: A Reply, *European Human Rights Law Review* 73 (1), pp. 75-76.
Lo Faro, A 2008, Social rights and economic freedom in the internal market: some brief notes on" Laval" and" Viking," *Lavoro e diritto* 22 (1), pp. 63-96.
MacCormick, N 1993, Beyond the Sovereign State, *The Modern Law Review* 56 (1), p. 1-18.
MacCormick, N 1995, The Maastricht‐Urteil: Sovereignty Now, *European Law Journal* 1 (3), pp. 259-266.
MacCormick, N 1995, Sovereignty: myth and reality, *Scottish Affairs* 11, pp. 1-13.
MacCormick, N 1996, Liberalism, nationalism and the post-sovereign state, *Political Studies* 44 (3), pp.553-567.
MacKinnon, CA 1991, Reflections on sex equality under law, *Yale Law Journal*, pp. 1281-1328.
Mahoney, P 1998, Marvellous Richness of Diversity or Invidious Cultural Relativism, *Human Rights Law Review* 19, pp. 1 -5.
Malmberg J and Sigeman T 2008, Industrial actions and EU economic freedoms: the autonomous collective bargaining model curtailed by the European Court of Justice, *Common Market Law Review* 45 (4), pp. 1115-1146.
Mancini, GF 1989, The making of a constitution for Europe, *Common Market Law Review* 26(4), pp. 595-614.

Mazey, S 1998, The European Union and women's rights: from the Europeanization of national agendas to the nationalization of a European agenda?, *Journal of European Public Policy* 5 (1), pp. 131-152.
McCrudden, C 2000, Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights, *Oxford journal of legal studies* 20 (4), pp. 499-532.
Morijn, J 2006, Balancing fundamental rights and common market freedoms in union law: Schmidberger and Omega in the light of the European Constitution, *European Law Journal* 12 (1), pp. 15-40.
Nic Shuibhne, N 2009, Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law, *European Law Review* 34 (2), pp. 230-256.
Nielson, R 2010, Free Movement and Fundamental Rights, *European Labour Law Journal* 1 (1), pp. 19-32.
Olsen, F 1984, Statutory rape: A feminist critique of Rights Analysis, *Texas Law Review* 63, pp. 387-432.
Payandeh, M 2011, Constitutional review of EU law after Honeywell: Contextualizing the relationship between the German Constitutional Court and the EU Court of Justice, *Common Market Law Review* 48 (1), pp. 9-38.
Pescatore, P 1970, Fundamental Rights and Freedoms in the System of the European Communities, *American Journal of Comparative Law* 18, pp. 343-351.
Post, RC and Siegel, RB 2003, Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act, *Yale Law Journal* 112 (8), pp. 1943-2059.
Prechal, S 2004, Equality of treatment, non-discrimination and social policy: achievements in three themes, *Common Market Law Review* 41 (2), pp. 533-551.
Raz, J 1972, Legal principles and the limits of law, *Yale Law Journal* 81 (5), pp. 823-854.
Reich, N 1996, Judge-made Europe a la carte: Some Remarks on Recent Conflicts between European and German Constitutional Law Provoked by the Banana Litigation, *European Journal of International Law* 7 (1), pp. 103-111.
Reich, N 2008, Free Movement v. Social Rights in an Enlarged Union: The Laval and Viking Cases Before the European Court of Justice, *German Law Journal* 9, pp. 125-143.
Renteln, AD 1988, Relativism and the search for human rights, *American Anthropologist* 90 (1), pp. 56-72.
Resnik, J 1987, On the bias: feminist reconsiderations of the aspirations for our judges, *Southern California Law Review* 61 (6), pp. 1877-1944.
Resnik, J 2001, Categorical federalism: Jurisdiction, gender, and the globe, *Yale Law Journal* 111(3), pp. 619-680.
Sadurski, W 2008, 'Solange, chapter 3': Constitutional Courts in Central Europe Democracy—European Union, *European Law Journal* 14 (1), pp. 1-35.
Sarmiento, D 2013, Who's afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe, *Common Market Law Review* 50 (5), pp. 1267-1304.
Scharpf, FW 2010, The asymmetry of European integration, or why the EU cannot be a 'social market economy', *Socio-economic Review* 8 (2), pp. 211-250
Scheuerman, WE 2014, Cosmopolitanism and the world state, *Review of International Studies* 40 (3), pp. 426-427.
Scott, J and Sturm, S 2006, Courts as Catalysts: Re-Thinking the Judicial Role in New Governance, *Columbia Journal of European Law* 13, pp. 565-594.
Shany, Y 2005, Toward a general margin of appreciation doctrine in international law?, *European Journal of International Law* 16 (5), pp. 907-940.

Slaughter, A-M 1999, Judicial globalization, *Virginia Journal of International Law* 40, pp. 1103-1124.
Spielmann, D 2014, Whither the Margin of Appreciation? *Current Legal Problems* 67(1), pp. 49-65.
Stone Sweet, A 2012, A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe, *Global Constitutionalism* 1 (1), pp. 53-90.
Stoodard, TB 1997, Bleeding Heart: Reflections on Using the Law to Make Social Change, *NYU Law Review* 72 (5), pp. 967-983.
Sweeney, J 2007, A 'Margin of Appreciation' in the Internal Market: Lessons from the European Court of Human Rights, *Legal Issues of Economic Integration* 34 (1), pp. 27-52.
Syrpis, P and Novitz, T 2008, Economic and social rights in conflict: political and judicial approaches to their reconsiliation, *European Law Journal* 33 (3), pp. 411-427.
Toggenburg, GN 2005, Who is managing ethnic and cultural diversity in the European condominium? The moments of entry, integration and preservation, *JCMS: Journal of Common Market Studies* 43 (4), pp. 717-738.
Tridimas, T 1996, The Court of Justice and Judicial Activism, *European Law Review* 21 (3), pp. 199-210.
Tridimas, T 2011, Constitutional Review of Member State Action: The virtues and vices of an incomplete jurisdiction, *International Journal of Constitutional Law* 9 (3–4), pp. 737–756.
van der Schyff, G 2012, The Constitutional Relationship Between the European Union and its Member States: The Role of National Identity in Article 4 (2) TEU, *European Law Review* 37 (5), pp. 563-583.
von Bogdandy, A and Schill, S 2011, Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty, *Common Market Law Review* 48 (5), pp. 1417-1453.
Waldock, H 1980, The Effectiveness of the System set up by the European Convention on Human Rights, *Human Rights Law Journal* 1 (1), pp. 1-12.
Walker, N 2002, The idea of constitutional pluralism *The Modern Law Review* 65 (3), pp. 317-359.
Walker, N 2008, Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders, *International Journal of Constitutional Law* 6 (3-4), pp. 373-396.
Weiler, JHH 1986, Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities, *Washington Law Review* 61, pp. 1103-1142.
Weiler, JHH 2011, 60 Years since the First European Community: Reflections on Messianism, *European Journal of International Law* 22 (2), pp. 303-311.
Weiss, A 2007, Federalism and the gay family: free movement of same-sex couples in the United States and the European Union, *Columbia Journal of law and Social Problems* 81, pp. 81 -122
West, R 1988, Jurisprudence and gender, *The University of Chicago Law Review* 55 (1), pp. 1-72.
Woolfson, C, Thörnqvist, C and Sommers, J 2010, The Swedish model and the future of labour standards after Laval, *Industrial Relations Journal* 41 (4), pp. 333-350.

WORKING PAPERS

Benhabib, S 2012, The Future of Democratic Sovereignty and Transnational law: On Legal Utopianism and Democratic Scepticism, Strauss Working Paper 03/12, NYU School of Law.

de Búrca, G 2013, Europe's raison d'être, NYU Public Law & Legal Theory Research Paper Series, WP NO. 13-19.

Gehrke, H 1993, *The implementation of the EC milk quota regulations in British, French and German law*, EUI WP LAW NO. 93/8.

Höpner, M and Schäfer, A 2010, *Polanyi in Brussels? Embeddedness and the three dimensions of European economic integration*, No. 10/8 MPIfG Discussion Paper.

Kilpatrick, C 2009, British Jobs for British Workers? UK Industrial Action and Free Movement of Services in EU Law, LSE Law, Society and Economy Working Papers 16/2009, LSE, Law Department.

Kilpatrick, C and De Witte, B (eds.) 2014, *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges,* EUI Working Paper LAW 2014/05.

Kilpatrick, C 2015, *Constitutions, social rights and sovereign debt states in Europe: a challenging new area of constitutional inquiry*, EUI WP LAW 2015/34.

Sabel, CF and Simon WH 2012, *Contextualizing Regimes: Institutionalization as a Response to the Limits of Interpretation and Policy Engineering*, Columbia Law School Public Law & Legal Theory Working Paper Group, Paper Number 12-302.

Shapiro, SJ 2007, *The "Hart-Dworkin" debate: A short guide for the perplexed*, Public Law and Legal Theory Working Paper Series, WP No. 77, March 2007.

Walker, N 2010 *Constitutionalism as the Incompleteness of Democracy: An Iterative Relationship*, Edinburgh School of Law WP NO 2010/25.

TABLE OF CASES AND LEGISLATION

CASES AND OPINIONS FROM THE CJEU

Case 26/62, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, ECR [1963] I-209
Case 29/69, Erich Stauder v City of Ulm – Sozialamt, ECR [1969] 00419
Case 11/70, Internationale Handelsgesellschaft v Einfuhr-und Vorratsstelle für Getreide und Futtermittel, ECR [1970] 01125
Case 4/73, Nold, Kohlen- und Baustoffgrobhandlung v European Commission, ECR [1974] 00491
Case 43/75, Defrenne II, ECR [1976] I-455
Case 96/80, J.P. Jenkins v Kingsgate ECR [1981] 00
Case 163/82, Commission v Italy, ECR [1983] 3273
Case 165/82, Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland, ECR [1983] 03431
Case C-218/82, Commission v Council, ECR [1983] 4063
Case 184/83, Ulrich Hofmann v Barmer Ersatzkasse, ECR [1984] 03047
Case 248/83, Commission v Germany, ECR [1985] 01459
Joined cases C-60/84 and C-61/84, Cinéthèque and others v Fédération nationale des cinemas française, ECR [1985] 2605
Case 170/84, Bilka - Kaufhaus GmbH v Karin Weber von Hartz, ECR [1986] 01607
Case 222/84, Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary, ECR [1988] 01651
Case 314/85, Foto-Frost v Hauptzollamt Lübeck-Ost, ECR [1987] 4199
Case 302/86, Commission of the European Communities v Kingdom of Denmark, ECR [1988] 04607
Case 318/86, Commission of the European Communities v French Republic ECR [1988] I-03559
Case 5/88, Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft ECR [1989] 02609
Case 171/88, Ingrid Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co. KG ECR [1989] 02743
Case C-179/88, Handels- og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening, ECR [1990] I-03979
Case C-229/89, Commission of the European Communities v Kingdom of Belgium ECR [1991] I-02205
Case C-159/90, The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others ECR [1991] I-04685
Case C- 148/91, Vereniging Veronica Omroep Organisatie v Commissariaat voor de Media ECR [1993] I-00487
Joined Cases C-159/91 and C-160/91, Poucet and Pistre v Assurances Générales de France and Others [1993] ECR I-637
Case C-226/91, Jan Molenbroek v Bestuur van de Sociale Verzekeringsbank, ECR [1992] I-05943
Case C-2/92, The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Dennis Clifford Bostock ECR [1994] I-00955
Case C-275/92, Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler, ECR [1994] I-01039

Case C-63/93, Fintan Duff, Liam Finlay, Thomas Julian, James Lyons, Catherine Moloney, Michael McCarthy, Patrick McCarthy, James O'Regan, Patrick O'Donovan v Minister for Agriculture and Food and Attorney General ECR [1996] I-00569
Case C−135/93, Spain v Commission, ECR [1995] I−1651
Case C-317/93, Inge Nolte v Landesversicherungsanstalt Hannover, ECR [1995] I-04625
Case C-444/93, Ursula Megner and Hildegard Scheffel v Innungskrankenkasse Vorderpfalz, ECR [1995] I-04741
Case C-244/94, Fédération Française des Sociétés d' Assurance [1995] ECR I-4013
Case C-280/94, Y. M. Posthuma-van Damme v Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen and N. Oztürk v Bestuur van de Nieuwe Algemene Bedrijfsvereniging, ECR [1996] I-00179
Case C-1/95, Hellen Gerster v Freistaat Bayern, ECR [1997] I-05253
Case, C-265/95, Commission of the European Communities v French Republic (Spanish Strawberries), ECR [1997] I-06959
Case C-368/95, Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag ECR [1997] I-03689
Case C-55/96, Job Centre [1997] ECR I-7119
Case C-186/96, Stefan Demand v Hauptzollamt Trier ECR [1998] I-08529
Case C-249/96, Lisa Jacqueline Grant v South-West Trains Ltd, ECR [1998] I-00621
Case C-411/96, Margaret Boyle and Others v Equal Opportunities Commission ECR [1998] I-06401
Case C-167/97, Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez, ECR [1999] I-00623
Case C-273/97, Sirdar v Army Bd, ECR [1999] 7403
Case C-281/97, Andrea Krüger v Kreiskrankenhaus Ebersberg ECR [1999] I-05127
Case C-166/98, Société critouridienne de distribution (Socridis) v Receveur principal des douanes, ECR [1999] I-03791
Joined Cases C-180/98 and C-184/98, Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten ECR [2000] I-06451
Case C-222/98, Hendrik Van der Woude v Stichting Beatrixoord ECR [2000] I-7111
Case C-226/98, Birgitte Jørgensen v Foreningen af Speciallæger and Sygesikringens Forhandlingsudvalg, ECR [2000] I-02447
Case C-285/98, Tanja Kreil v Bundesrepublik Deutschland, ECR [2000] I-00069
Case C-322/98, Bärbel Kachelmann v Bankhaus Hermann Lampe KG, ECR [2000] I-07505
Case C-268/99, Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie, ECR [2001] I-08615
Case C-313/99, Gerard Mulligan and Others v Minister for Agriculture and Food, Ireland and Attorney General, ECR [2002] I-5719
Joined Cases C-20/00 and C-64/00, Booker Aquaculture Ltd, trading as Marine Harvest McConnel and Hydro Seafood GSP Ltd v The Scottish Ministers ECR [2003] I−7411
Case C- 60/00, Mary Carpenter v Secretary of State for the Home Department ECR [2002] I-06279
Case C-112/00, Eugen Schmidberger Internationale Transporte v Republik Österreich ECR [2003] I-05659
Case C-187/00, Helga Kutz-Bauer v Freie und Hansestadt Hamburg ECR [2003] I-02741
Joined Cases C-213/00 and C-451/00 Cooperativa Lattepiù and Others v Azienda di Stato per gli interventi nel mercato agricolo, ECR [2004] I-2869
Case C-101/01, Criminal proceedings against Bodil Lindqvist, ECR [2003] I-12971

Case C-109/01, Secretary of State for the Home Department v Hacene Akrich ECR [2003] I-09607
Case C-186/01, Alexander Dory v Bundesrepublik Deutschland, ECR [2003] I-02479
Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn ECR [2004] I-09609
Case C-71/02, Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH ECR [2004] I-03025
Case C-77/02, Erika Steinicke v Bundesanstalt für Arbeit, ECR [2003] I-09027
Case C-147/02, Michelle K. Alabaster v Woolwich plc and Secretary of State for Social Security, ECR [2004] I-03101
Case C-540/03, European Parliament v Council of the European Union, ECR [2006] I-05769
Case C-496/04, J. Slob v Productschap Zuivel, ECR [2006] I-8257
Case C-275/05, Alois Kibler jun. v Land Baden-Württemberg, ECR [2006] I-10569
Case C-305/05, Ordre des barreaux francophones et germanophone and Others v Conseil des ministers, ECR [2007] I-05305
Case C-341/05, Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, ECR [2007] I-11767
Case C-432/05, Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern ECR [2007] I-02271
Case C-438/05, International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eest ECR [2007] I-10779
Case C-250/06, United Pan-Europe Communications Belgium SA and Others v Belgian State, ECR [2007] I-11135
Case C-244/06, Dynamic Medien Vertriebs GmbH v Avides Media AG ECR [2008] I-00505
Case C-458/06, Skatteverket v Gourmet Classic Ltd, ECR [2008] I-04207
Case C-275/06, Productores de Música de España (Promusicae) v Telefónica de España SAU, ECR [2008] I-00271
Case C-73/07, Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy, ECR [2008] I-09831
Case C-213/07, Michaniki AE v Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias, ECR [2008] I-09999
Joined cases C-570/07 and C-571/07, José Manuel Blanco Pérez and María del Pilar Chao Gómez v Consejería de Salud y Servicios Sanitarios and Principado de Asturias, ECR [2010] 2010 I-04629
Case C-12/08, Mono Car Styling SA, in liquidation v Dervis Odemis and Others ECR [2009] I-06653
Case C-194/08, Susanne Gassmayr v Bundesminister für Wissenschaft und Forschung ECR [2010] I-06281
Case C-271/08, European Commission v Federal Republic of Germany, ECR [2010] I-07091
Case C-471/08, Sanna Maria Parviainen v Finnair Oyj, ECR [2010] I-06533
Case C-578/08, Rhimou Chakroun v Minister van Buitenlandse Zaken, ECR [2010] I-1839
Case C-28/09, European Commission v Republic of Austria, ECR [2011] I-13525
Joined cases C-92/09 and C-93/09, Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen, ECR [2010] I-11063
Case C-208/09 Sayn-Wittgenstein v. Landeshauptmann von Wien, ECR [2010] I-13693
Case C-391/09, Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others, ECR [2011] I-03787
Case C-403/09 PPU, Jasna Detiček v Maurizio Sgueglia, ECR [2009] I-12193
Case C-123/10, Waltraud Brachner v Pensionsversicherungsanstalt, ECR [2011] I-10003

Case C-145/10, Eva-Maria Painer v Standard VerlagsGmbH and Others, ECR [2011] I-12533
Case C-149/10, Zoi Chatzi v Ypourgos Oikonomikon, ECR [2010] I-08489
Case C−389/10P, KME Germany AG, KME France SAS and KME Italy SpA v European Commission ECR [2011] I-13125
Case C-400/10, PPU, J. McB. v L. E., ECR [2010] I-089
Case C-461/10, Bonnier Audio AB and Others v Perfect Communication Sweden AB, Published in the Electronic Reports of Cases
Joined cases C-468/10 and C-469/10, Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF) and Federación de Comercio Electrónico y Marketing Directo (FECEMD) v Administración del Estado, ECR [2011] I-12181
Case C-617/10, Åklagaren v Hans Åkerberg Fransson, Published in the Electronic Reports of Cases
Joined cases C-356/11 and C-357/11, O. and S. v Maahanmuuttovirasto and Maahanmuuttovirasto v L, Published in the Electronic Reports of Cases
Case C-399/11, Stefano Melloni v Ministerio Fiscal, Published in the Electronic Reports of Cases
Case C-5/12, Marc Betriu Montull v Instituto Nacional de la Seguridad Social (INSS) ECR [2013] nyr
Case C-595/12, Loredana Napoli v Ministero della Giustizia, ECR [2014] nyr
Case C-173/13, Maurice Leone and Blandine Leone v Garde des Sceaux, ECR [2014] nyr

*

Opinion of the Court (Full Court) 2/13 delivered on 18 December 2014

*

Opinion of AG Roemer delivered on 29 October 1969 in Case 29/69, Erich Stauder v City of Ulm – Sozialamt
Opinion of AG Jacobs delivered on 27 April 1989 in Case 5/88, Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft
Opinion of AG La Pergola delivered on 26 October 1999 in Case C-285/98, Tanja Kreil v Bundesrepublik Deutschland
Opinion of AG Jacobs delivered on 11 July 2002 in Case C-112/00, Eugen Schmidberger Internationale Transporte v Republik Österreich
Opinion of AG Bot delivered on 2 September 2010 in Case C-232/09, Dita Danosa v LKB Līzings SIA
Opinion of AG Maduro delivered on 20 September 2005 in Case C-53/04 Cristiano Marrosu and Gianluca Sardino v Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate
Opinion of AG Maduro delivered on 8 October 2008 in Case C-213/07, Michaniki AE v Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias
Opinion of AG Cruz Villalón delivered on 1 June 2010 in Case C-570/08 Symvoulio Apochetefseon Lefkosias v Anatheoritiki Archi Prosforon
Opinion of AG Trstenjak delivered on 8 September 2011 in Case C-282/10, Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre

Opinion of AG Trstenjak delivered on 22 September 2011 in Joined cases C-411/10 and C 493/10, N. S. v Secretary of State for the Home Department et M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform

Opinion of AG Cruz Villalón delivered on 14 January 2015 in Case C-62/14, Gauweiler and others v Deutscher Bundestag

EUROPEAN UNION SECONDARY LEGISLATION

Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organisation of the market in milk and milk products, [1975] OJ L 148

Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, [1975] OJ L 45

Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies, [1975] OJ L 48

Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, [1975] OJ L 39

Council Directive 77/187/EEC of 14 February 1977 relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, [1977] OJ L 61

Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, [1979] OJ L 6

Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, [1977] OJ L 283

Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector, [1984] OJ L 90

Commission Regulation (EEC) No 1371/84 of 16 May 1984 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68, [1984] OJ L 132

Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, [1992] OJ L 348

Council Directive 93/104/EC of 23 November 1993, concerning certain aspects of the organisation of working time, [1993] OJ L 307

Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, [1994] OJ L 368

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, [1995] OJ L 281

Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, [1996] OJ L 145

Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, [1998] OJ L 225
Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, [2001] OJ L 82
Council Directive 2003/86 on the right to family reunification for third country nationals residing lawfully in the territory of the Member State, [2003] OJ L 251.
Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [2004] OJ L 158
Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, [2004] OJ L 373
Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, [2005] OJ L 326
Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), [1996] OJ L 204
Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, [2008] OJ L 348
Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, [2010] OJ L 68
Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, [2010] OJ L 180
Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, [2013] OJ L 294

CASES AND MATERIAL FROM THE COUNCIL OF EUROPE AND THE ECTHR

Judgement of 7 December 1976, Handyside v United Kingdom, application no 5493/72
Judgement of 26 September 1996, Buckley versus United Kingdom, application no 20348/92
Judgement of 13 July 2012, Mouvement Raëlien Suisse v Switzerland, application no 16354/06

*

Explanatory report on Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, (CETS No. 213)